Constitutional Law with a Twist: Less Is More

Second Edition

ALISA KLEIN

Wilmington University Farnan School of Law

CALI® eLangdell® Press

Constitutional Law with a Twist: Less Is More

Second Edition

Alisa Klein
Associate Professor
Wilmington University Farnan School of Law

Second Edition
CALI eLangdell® Press 2026

Constitutional Law with a Twist: Less Is More

Second Edition

Alisa Klein

Associate Professor

Wilmington University Farnan School of Law

Second Edition

CALI eLangdell® Press 2026

ISBN: 979-8-89904-055-9

About the Author

Alisa Klein is an Associate Professor of Law at Wilmington University Farnan School of Law, which was founded in 2022 with a mission to increase access to affordable legal education. Before joining the faculty, Alisa spent 28 years working as an appellate attorney and supervisor in the Civil Division of the U.S. Department of Justice. There, she litigated many constitutional law cases, including many of the modern cases in this book. While working at DOJ, Alisa also regularly taught a constitutional law seminar as an adjunct professor at Georgetown Law School and, more recently, as a visiting professor at Haverford College. Before starting at DOJ, she clerked for Justice Ruth Bader Ginsburg on the U.S. Supreme Court and for Judge Louis H. Pollak on the U.S. District Court for the Eastern District of Pennsylvania. She holds a B.A. from Princeton University's School of Public and International Affairs and a J.D. from Harvard Law School. Since joining the Farnan School of Law, Alisa has written some law review articles and short pieces, and she is now working on a First Amendment casebook for CALI. Alisa especially enjoys mentoring students.

Notices

This is the second edition of this casebook, released July 2026. Visit http://elangdell.cali.org for the latest version and for revision history.

This work by Alisa Klein is licensed and published by CALI eLangdell Press under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0). CALI and CALI eLangdell Press reserve under copyright all rights not expressly granted by this Creative Commons license. CALI and CALI eLangdell Press do not assert copyright in US Government works or other public domain material included herein. Permissions beyond the scope of this license may be available through feedback@cali.org.

In brief, the terms of that license are that you may copy, distribute, and display this work, or make derivative works, so long as

- you give CALI eLangdell Press and the author credit;
- you do not use this work for commercial purposes; and
- you distribute any works derived from this one under the same licensing terms as this.

Suggested attribution format for the original work:

Alisa Klein, *Constitutional Law with a Twist: Less Is More, Second Edition* (2026). Published by CALI eLangdell Press. Available under a Creative Commons BY-NC-SA 4.0 License.

CALI® and eLangdell® are United States federally registered trademarks owned by The Center for Computer-Assisted Legal Instruction. The cover art design is a copyrighted work of CALI, all rights reserved. The cover may be used when otherwise using this material under the terms of its Creative Commons license. The CALI graphical logo is a trademark and may not be used outside of its permitted use on the original cover without permission.

This material does not contain nor is intended to be legal advice. Users seeking legal advice should consult with a licensed attorney in their jurisdiction. The editors have endeavored to provide complete and accurate information in this book. However,

CALI does not warrant that the information provided is complete and accurate. CALI disclaims all liability to any person for any loss caused by errors or omissions in this collection of information.

About CALI eLangdell Press

The Center for Computer-Assisted Legal Instruction (CALI®) is: a nonprofit organization with over 200 member U.S. law schools, an innovative force pushing legal education toward change for the better. There are benefits to CALI membership for your school, firm, or organization. ELangdell® is our electronic press with a mission to publish more open books for legal education.

How do we define “open?”

- Compatibility with devices like smartphones, tablets, and e-readers; as well as print.
- The right for educators to remix the materials through more lenient copyright policies.
- The ability for educators and students to adopt the materials for free.

Find available and upcoming eLangdell titles at The eLangdell Bookstore. Show support for CALI by telling your friends and colleagues where you received your free book.

Table of Contents

ABOUT THE AUTHOR ..... **I**

NOTICES ..... **II**

ABOUT CALI ELANGDELL PRESS ..... **IV**

TABLE OF CONTENTS ..... **V**

PREFACE. WHY IS THIS CASEBOOK SO SHORT? ..... **XIII**

OVERVIEW OF THIS CASEBOOK ..... **XVI**

PART ONE: THE POWERS OF GOVERNMENT **1**

CHAPTER 1. POWERS OF THE JUDICIAL BRANCH **1**

A. INTRODUCTION 1
B. STANDING 3
C. RIPENESS 14
D. MOOTNESS 14
E. POLITICAL QUESTION DOCTRINE 21
F. THE POWER OF JUDICIAL REVIEW 28

CHAPTER 2. FEDERALISM **31**

A. POWERS OF THE LEGISLATIVE BRANCH (CONGRESS) 31
B. THE VALUES THAT UNDERLIE FEDERALISM 32
C. SPECIFIC POWERS OF CONGRESS 42
1. Introduction *42*
2. Congress's commerce power *42*
3. Congress's power under the Necessary & Proper Clause *82*
4. Congress's taxing power *89*
5. Congress's spending power *97*
D. FEDERALISM-BASED LIMITS ON STATE POWER 106
1. Introduction *106*
2. Preemption by federal statute *110*
3. The Privileges & Immunities Clause of Article IV *120*
4. The Dormant Commerce Clause *125*
5. Federal immunity from state regulation (intergovernmental immunity) *145*
E. TENTH AMENDMENT AND ELEVENTH AMENDMENT PROTECTIONS FOR STATES 151
1. Introduction *151*
2. No state immunity from federal regulation (Tenth Amendment) *154*
3. State immunity from federal commandeering (Tenth Amendment) *158*
4. State sovereign immunity (Eleventh Amendment) *166*
F. TRANSLATING FEDERALISM 169

CHAPTER 3. SEPARATION OF POWERS **171**

A. INTRODUCTION 171
B. PROCEDURAL CONSTRAINTS ON LAWMAKING 172

C. THE DIVISION OF LAWMAKING AND EXECUTIVE POWER 179
1. Introduction 179
2. The nondelegation doctrine 182
3. Delegations from Congress to the Executive Branch 187
4. Congress's power of the purse 199
5. The President's duty and discretion to enforce federal laws 203
6. The related question of impoundment 206
D. THE PRESIDENT'S POWERS TO APPOINT AND REMOVE FEDERAL OFFICERS 207
1. Introduction 207
2. The power to appoint federal officers 208
3. The power to remove federal officers 221
E. EXECUTIVE PRIVILEGE 232
F. THE PRESIDENT'S IMMUNITIES FROM CIVIL SUIT AND CRIMINAL PROSECUTION 235
G. IMPEACHMENT AND CONGRESSIONAL OVERSIGHT 241

CHAPTER 4. FOREIGN AFFAIRS 243

A. INTRODUCTION 243
1. Congress's foreign affairs powers 243
2. The President's foreign affairs powers 244
3. The difference between federal statutes, treaties, and executive agreements 244
B. FOREIGN AFFAIRS: FEDERALISM ISSUES 245
1. Introduction 245
2. State intrusions on federal foreign affairs powers 246
3. Federal preemption of state immigration regulation 255
4. State surrender of sovereign immunity in the war powers context 263
C. FOREIGN AFFAIRS: SEPARATION OF POWERS ISSUES 266
1. Congress's delegations of foreign powers to the Executive Branch 266
2. The allocation of war powers between Congress and the President 276
3. The allocation of diplomatic powers between Congress and the President 278

PART TWO: INDIVIDUAL RIGHTS 286

CHAPTER 5. THE INCORPORATION DOCTRINE AND THE STATE ACTION REQUIREMENT .. 286

A. INTRODUCTION TO INDIVIDUAL RIGHTS 286
B. THE INCORPORATION DOCTRINE 287
1. The Fourteenth Amendment's incorporation of the Bill of Rights 287
2. The Fifth Amendment's reverse incorporation of the Equal Protection Clause 291
C. THE STATE ACTION REQUIREMENT 291
1. Significant state involvement in private action 293
2. Public officials who are acting in a private capacity 295

CHAPTER 6. PROCEDURAL DUE PROCESS AND EQUAL PROTECTION 301

A. INTRODUCTION 301
B. PROCEDURAL DUE PROCESS 301
1. Overview 301
2. What counts as a protected property interest? 303
3. The right to an unbiased decisionmaker 305
4. The right to a meaningful opportunity to object to the government's action 308
C. EQUAL PROTECTION 319

1. Overview *319*
2. Rational basis review *321*
3. Strict scrutiny *325*
4. Intermediate scrutiny *348*
5. Classifications involving transgender individuals *366*

CHAPTER 7. FUNDAMENTAL RIGHTS AND THE RIGHT TO TRAVEL 383

A. FUNDAMENTAL RIGHTS 383
1. Overview *383*
2. Unenumerated economic rights (the Lochner era) *385*
3. Unenumerated personal rights *391*
B. THE RIGHT TO TRAVEL 419
C. BIRTHRIGHT CITIZENSHIP 426

CHAPTER 8. GUN RIGHTS AND PROPERTY RIGHTS 428

A. INTRODUCTION 428
B. SECOND AMENDMENT GUN RIGHTS 430
C. FIFTH AMENDMENT TAKINGS CLAIMS 450
D. THE CONTRACTS CLAUSE 463

CHAPTER 9. CONGRESS'S POWER TO PROTECT INDIVIDUAL CONSTITUTIONAL RIGHTS. 465

A. INTRODUCTION 465
B. THE THIRTEENTH AMENDMENT 466
C. THE FOURTEENTH AMENDMENT 471
D. THE FIFTEENTH AMENDMENT 482

Detailed Table of Contents

About the Author I
Notices II
About CALI eLangdell Press IV
Table of Contents V
Detailed Table of Contents VIII
Preface. Why is this casebook so short? XIII
Anne-Marie Slaughter, On Thinking Like a Lawyer, Harv. L. Today, 2002 xiv
Overview of this casebook XVI

PART ONE: THE POWERS OF GOVERNMENT 1

CHAPTER 1. POWERS OF THE JUDICIAL BRANCH 1
A. INTRODUCTION 1
B. STANDING 3
FDA v. Alliance for Hippocratic Medicine, 602 U.S. 367 (2024) (9-0 vote) 3
Bost v. Illinois State Bd. of Elections, 146 S. Ct. 513 (2026) 11
First Choice Women's Resource Centers v. Davenport, 146 S. Ct. 1114 (2026) (9-0 vote) 12
C. RIPENESS 14
D. MOOTNESS 14
FBI v. Fikre, 144 S. Ct. 771 (2024) (9-0 vote) 15
Health Freedom Defense Fund v. Biden, 71 F.4th 888 (11th Cir. 2024) (3-0 vote) 17
E. POLITICAL QUESTION DOCTRINE 21
Rucho v. Common Cause, 588 U.S. 684 (2019) (5-4 vote) 22
F. THE POWER OF JUDICIAL REVIEW 28
CHAPTER 2. FEDERALISM 31
A. POWERS OF THE LEGISLATIVE BRANCH (CONGRESS) 31
B. THE VALUES THAT UNDERLIE FEDERALISM 32
NFIB v. Sebelius, 567 U.S. 519 (2012) (excerpt about federalism) 32
Edward L. Rubin and Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903 (1994) 34
Seth Kreimer, Federalism and Freedom, Annals of the American Academy of Political & Social Science, March 2001 38
Heather K. Gerken, Distinguished Scholar in Residence Lecture: A User's Guide to Progressive Federalism, 45 Hofstra L. Rev. 1087 (2017) 39
C. SPECIFIC POWERS OF CONGRESS 42
1. Introduction 42
2. Congress's commerce power 42
United States v. Lopez, 514 U.S. 549 (1995) (historical excerpt) 44
Wickard v. Filburn, 317 U.S. 111 (1942) 47
Jim Chen, Filburn's Legacy, 52 Emory L.J. 1719 (2003) 50
Katzenbach v. McClung, 379 U.S. 294 (1964) 52
Perez v. United States, 402 U.S. 146 (1971) 56
United States v. Lopez, 514 U.S. 549 (1995) (5-4 vote) 59
United States v. Morrison, 529 U.S. 598 (2000) 67

Gonzales v. Raich, 545 U.S. 1 (2005) 72
NFIB v. Sebelius, 567 U.S. 519 (2012) (5-4 vote on the commerce power ruling) 78
3. Congress's power under the Necessary & Proper Clause 82
McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819) 82
Gonzales v. Raich, 545 U.S. 1 (2005) 87
4. Congress's taxing power 89
Bailey v. Drexel Furniture, 259 U.S. 20 (1922) 90
NFIB v. Sebelius, 567 U.S. 519 (2012) 92
5. Congress's spending power 97
South Dakota v. Dole, 483 U.S. 203 (1987) 98
NFIB v. Sebelius, 567 U.S. 519 (2012) 103
D. FEDERALISM-BASED LIMITS ON STATE POWER 106
1. Introduction 106
2. Preemption by federal statute 110
Wyeth v. Levine, 555 U.S. 555 (2009) 111
PLIVA, Inc. v. Mensing, 564 U.S. 604 (2013) 114
Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) 116
3. The Privileges & Immunities Clause of Article IV 120
Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) 121
4. The Dormant Commerce Clause 125
Granholm v. Healy, 544 U.S. 460 (2005) 125
Maine v. Taylor, 477 U.S. 131 (1986) 129
Kassel v. Consol. Freightways Corp. of Delaware, 450 U.S. 662 (1981) 132
National Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023) (splintered vote) 136
5. Federal immunity from state regulation (intergovernmental immunity) 145
McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819) 145
U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 147
Trump v. Anderson, 601 U.S. 100 (2024) 149
E. TENTH AMENDMENT AND ELEVENTH AMENDMENT PROTECTIONS FOR STATES 151
1. Introduction 151
2. No state immunity from federal regulation (Tenth Amendment) 154
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 154
3. State immunity from federal commandeering (Tenth Amendment) 158
Printz v. United States, 521 U.S. 898 (1997) 159
Reno v. Condon, 528 U.S. 141 (2000) 164
4. State sovereign immunity (Eleventh Amendment) 166
Alden v. Maine, 527 U.S. 706 (1999) 167
F. TRANSLATING FEDERALISM 169
CHAPTER 3. SEPARATION OF POWERS 171
A. INTRODUCTION 171
B. PROCEDURAL CONSTRAINTS ON LAWMAKING 172
INS v. Chadha, 462 U.S. 919 (1983) 172
Clinton v. New York, 524 U.S. 417 (1998) 176
C. THE DIVISION OF LAWMAKING AND EXECUTIVE POWER 179
1. Introduction 179
2. The nondelegation doctrine 182
Gundy v. United States, 588 U.S. 128 (2019) 182
FCC v. Consumers' Research, 145 S. Ct. 2482 (2025) 184
3. Delegations from Congress to the Executive Branch 187
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 188

Alabama Association of Realtors v. HHS, 141 S. Ct. 2485 (2021) 190
Job Creators Network v. Department of Labor, 142 S. Ct. 661 (2022) 192
Biden v. Missouri, 142 S. Ct. 647 (2022) 195
West Virginia v. EPA, 142 S. Ct. 2587 (2022) 197
4. Congress's power of the purse 199
Biden v. Nebraska, 143 S. Ct. 2355 (2023) 200
CFPB v. Community Financial Services Ass'n, 601 U.S. 416 (2024) 202
5. The President's duty and discretion to enforce federal laws 203
United States v. Texas, 599 U.S. 670 (2023) 203
6. The related question of impoundment 206
D. THE PRESIDENT'S POWERS TO APPOINT AND REMOVE FEDERAL OFFICERS 207
1. Introduction 207
2. The power to appoint federal officers 208
United States v. Arthrex, Inc., 594 U.S. 1 (2021) 210
Kennedy v. Braidwood Management, Inc., 145 S. Ct. 2427 (2025) 212
Lucia v. SEC, 585 U.S. 237 (2018) 218
3. The power to remove federal officers 221
Trump v. Slaughter, 146 S. Ct. __ (2026) 222
Trump v. Cook, 146 S. Ct. __ (2026) 229
E. EXECUTIVE PRIVILEGE 232
Trump v. Vance, 591 U.S. 786 (2020) 233
F. THE PRESIDENT'S IMMUNITIES FROM CIVIL SUIT AND CRIMINAL PROSECUTION 235
Trump v. United States, 144 S. Ct. 2312 (2024) 236
G. IMPEACHMENT AND CONGRESSIONAL OVERSIGHT 241
CHAPTER 4. FOREIGN AFFAIRS 243
A. INTRODUCTION 243
1. Congress's foreign affairs powers 243
2. The President's foreign affairs powers 244
3. The difference between federal statutes, treaties, and executive agreements 244
B. FOREIGN AFFAIRS: FEDERALISM ISSUES 245
1. Introduction 245
2. State intrusions on federal foreign affairs powers 246
Zschernig v. Miller, 389 U.S. 429 (1968) 246
Hencely v. Fluor Corp., 146 S. Ct. 1086 (2026) 248
Excerpt from the federal government's Supreme Court amicus brief in Crosby 252
3. Federal preemption of state immigration regulation 255
Arizona v. United States, 567 U.S. 387 (2012) (5-3 vote, with Justice Kagan recused) 256
4. State surrender of sovereign immunity in the war powers context 263
Torres v. Texas Department of Public Safety, 597 U.S. 580 (2022) 264
C. FOREIGN AFFAIRS: SEPARATION OF POWERS ISSUES 266
1. Congress's delegations of foreign powers to the Executive Branch 266
Trump v. Hawaii, 585 U.S. 667 (2018) 266
Learning Resources, Inc. v. Trump, 146 S. Ct. 628 269
2. The allocation of war powers between Congress and the President 276
3. The allocation of diplomatic powers between Congress and the President 278
Zivotofsky v. Kerry, 576 U.S. 1 (2015) 278
PART TWO: INDIVIDUAL RIGHTS 286
CHAPTER 5. THE INCORPORATION DOCTRINE AND THE STATE ACTION REQUIREMENT . 286

A. INTRODUCTION TO INDIVIDUAL RIGHTS *286*
B. THE INCORPORATION DOCTRINE *287*
1. The Fourteenth Amendment's incorporation of the Bill of Rights 287
McDonald v. City of Chicago, 561 U.S. 742 (2010) 288
2. The Fifth Amendment's reverse incorporation of the Equal Protection Clause 291
C. THE STATE ACTION REQUIREMENT *291*
1. Significant state involvement in private action 293
Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) 293
2. Public officials who are acting in a private capacity 295
Lindke v. Freed, 144 S. Ct. 756 (2024) 295
CHAPTER 6. PROCEDURAL DUE PROCESS AND EQUAL PROTECTION 301
A. INTRODUCTION *301*
B. PROCEDURAL DUE PROCESS *301*
1. Overview 301
2. What counts as a protected property interest? 303
AstraZeneca Pharmaceuticals v. Secretary of HHS, 137 F.4th 116 (3d Cir. 2025) 303
3. The right to an unbiased decisionmaker 305
Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) 306
4. The right to a meaningful opportunity to object to the government's action 308
Mathews v. Eldridge, 424 U.S. 319 (1976) 309
Nelson v. Colorado, 581 U.S. 128 (2017) 317
C. EQUAL PROTECTION *319*
1. Overview 319
2. Rational basis review 321
Olson v. California, 104 F.4th 66 (9th Cir. 2024) (en banc) 321
3. Strict scrutiny 325
Brown v. Board of Education, 347 U.S. 483 (1954) 326
Loving v. Virginia, 388 U.S. 1 (1967) 330
Palmore v. Sidoti, 466 U.S. 429 (1984) 332
Washington v. Davis, 426 U.S. 229 (1976) 334
Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (6-3 vote) 337
4. Intermediate scrutiny 348
Weinberger v. Stephen Wiesenfeld, 420 U.S. 636 (1975) 350
Craig v. Boren, 429 U.S. 190 (1976) 351
Mississippi University for Women v. Joe Hogan, 458 U.S. 718 (1982) 353
United States v. Virginia, 518 U.S. 515 (1996) 356
Single-Gender Public Schools in 5 Charts, EDUCATION WEEK (Nov. 2, 2017) 364
5. Classifications involving transgender individuals 366
United States v. Skrmetti, 145 S. Ct. 1816 (2025) 366
Adam B. Kushner, A losing bet, N.Y. TIMES, June 19, 2025 375
West Virginia v. B.P.J., 145 S. Ct. ___ (2026) 378
CHAPTER 7. FUNDAMENTAL RIGHTS AND THE RIGHT TO TRAVEL 383
A. FUNDAMENTAL RIGHTS *383*
1. Overview 383
2. Unenumerated economic rights (the *Lochner* era) 385
Lochner v. New York, 198 U.S. 45 (1905) 385
Adkins v. Children's Hospital of the District of Columbia, 261 U.S. 525 (1923) 387
West Coast Hotel v. Parrish, 300 U.S. 379 (1937) 389
3. Unenumerated personal rights 391
Griswold v. Connecticut, 381 U.S. 479 (1965) 392

Washington v. Glucksberg, 521 U.S. 702 (1997) 395
Obergefell v. Hodges, 576 U.S. 644 (2015) 399
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022) 404
B. THE RIGHT TO TRAVEL *419*
Saenz v. Roe, 526 U.S. 489 (1999) 421
C. BIRTHRIGHT CITIZENSHIP *426*
CHAPTER 8. GUN RIGHTS AND PROPERTY RIGHTS 428
A. INTRODUCTION *428*
B. SECOND AMENDMENT GUN RIGHTS *430*
New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) 432
United States v. Rahimi, 144 S. Ct. 1889 (2024) 437
C. FIFTH AMENDMENT TAKINGS CLAIMS *450*
Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021) 452
Tyler v. Hennepin County, Minnesota, 598 U.S. 631 (2023) 456
Sheetz v. County of El Dorado, California, 601 U.S. 267 (2024) 459
D. THE CONTRACTS CLAUSE *463*
Sveen v. Melin, 584 U.S. 811 (2018) 463
CHAPTER 9. CONGRESS'S POWER TO PROTECT INDIVIDUAL CONSTITUTIONAL RIGHTS 465
A. INTRODUCTION *465*
B. THE THIRTEENTH AMENDMENT *466*
Jones v. Alfred H. Mayer Co., 392 U.S. 440 (1968) 467
Runyon v. McCrary, 427 U.S. 160 (1976) 470
C. THE FOURTEENTH AMENDMENT *471*
City of Boerne v. Flores, 521 U.S. 507 (1997) 473
Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003) 476
D. THE FIFTEENTH AMENDMENT *482*
Shelby County, Alabama v. Holder, 570 U.S. 529 (2013) 484

Preface. Why is this casebook so short?

Hello, students, and welcome to constitutional law! This casebook covers the content of a typical 4-credit con law course: the structure of the U.S. government and many individual rights (excluding First Amendment rights and rights unique to criminal law). There are many con law casebooks out there, so I will start by explaining how this one is different and why. In short, this casebook is short—much shorter than other con law casebooks. It reflects the "less is more" approach that I gradually adopted in teaching con law over a couple decades. In my experience, students get more joy, more depth, and more growth from con law when there is less reading and more of everything else.

For three main reasons, I have always created my own con law reading materials. First, con law is a sprawling subject that changes rapidly. That is because the rules of con law are announced in decisions of the Supreme Court, which frequently issues new decisions that build upon, refine, and sometimes overrule its earlier decisions. To keep my reading materials up to date, I revise them often. This second edition of the book includes cases that the Supreme Court decided as recently as June 2026, which was the end of its 2025-2026 Term. To keep the reading materials short, I focus on recent cases that describe the evolution of an area of law, and I am more selective about including the earlier cases. I edit long opinions down to digestible size. Because history is crucial to learning con law, I weave history into my written commentary.

Second, my overall goal is to facilitate student growth. Some students start out a con law course with a lot of knowledge of U.S. government and history; others do not. To level the playing field, I write introductions for each new topic that lay out foundational concepts. I use a chatty tone to make the materials accessible and interesting to a diverse group of students. I repeat points and circle back to concepts, because con law principles can be difficult to understand at a first pass.

Third, I supplement the readings with additional materials that I make available for other faculty to use (as they see fit) along with this book. For example, at the start of nearly every class, I give an online quiz with a single multiple-choice question on topics that we studied recently. We then go over the quiz immediately as a class, discussing not only why the right answer is right but also why the wrong answers are

wrong. That process helps students to see quickly why they are making mistakes and to adjust their study habits accordingly. I also give an essay-style midterm test and a second midterm test with 15 multiple-choice questions, as well as a three-hour final exam. Early on, I assign a practice essay and give out a model answer. Periodically, I assign exercises in which students write their own essay prompts and then lead class discussions of their prompts (with my help).

Students, you may have guessed by now that less reading does not mean less work! To succeed, you must read every case closely and more than once. You must write case outlines that identify the rules that the Supreme Court sets out, but identifying those rules is not enough. Your notes also must describe how the Court applied the rules to the facts—not only in the assigned case, but also in earlier cases that the assigned case describes. You must read every opinion both critically and charitably. And you must take all assignments seriously.

My students assure me that this effort is worthwhile. The concepts that I teach and test are just as sophisticated as the ones that I taught to upper-level Georgetown law students, who already had taken their introductory con law course. If you put in the effort, you will emerge equipped to discuss and debate the cutting-edge legal issues with law school students around the country. Perhaps more important, you will be able to help your nonlawyer friends and family members understand that news accounts of government actions and court decisions are often oversimplifications that omit the strongest arguments on the other side. As the piece below explains, that is the essence of thinking like a lawyer.

Anne-Marie Slaughter, On Thinking Like a Lawyer, HARV. L. TODAY, 2002

Thinking like a lawyer means, in the first instance, thinking with care and precision, reading and speaking with attention to nuance and detail.

Thinking like a lawyer also means that you can make arguments on any side of any question. You may resist that teaching, thinking that we are stripping you of your personal principles and convictions, transforming you into a hired gun. On the contrary, learning how to *make* arguments on different sides of a question is learning that there *are* arguments on both sides, and learning how to *hear* them. That is the core of the liberal value of tolerance, but also the precondition for order in a society that chooses to engage in conflict with words rather than guns. It is our best hope for rational deliberation, for solving problems together not based on eradicating conflict, but for channeling it productively and cooperating where possible.

Thinking like a lawyer also means exercising judgment, distinguishing among those arguments, sifting good from bad. Just as you will come to understand that there are arguments made in good faith on opposing sides, you must also learn to reject some arguments, or at least to choose among them. Arguments may be bad because they are illogical, because they do not fit the facts or the law, because they are silly or inconsequential. They may also be bad because they promote bad policies, or because they reflect values that we condemn: racism, degradation of human dignity, greed—you fill in the blanks. Learning to think like a lawyer means learning to reject some arguments and to embrace others, and to know and be able to articulate why.

Thinking like a lawyer means combining realism with idealism. It means believing in the possibility and the desirability of both order and justice, and in the capacity of the law to help us achieve them. But it also means knowing the full range of human conduct, and understanding that grand principles will remain paper principles unless they are implemented with an eye to human incentives. Nevertheless, in the end the idea of law, and the ideals that it stands for, is what lawyers represent. It is much harder to be an idealist when you have all the reasons to be a cynic. Thinking like a lawyer is thinking like a human being, a human being who is tolerant, sophisticated, pragmatic, critical, and engaged. It means combining passion and principle, reason and judgment. You are on your way to thinking like lawyers. It’s both a pleasure and a privilege to help get you there.

Overview of this casebook

The central question of constitutional law is: Who decides? Think about some hot-button policy questions. For example, during a pandemic, should the federal government have the power to make people wear masks on airplanes, buses, and trains? Or should each state get to decide whether and when to impose a masking requirement for its residents? Or perhaps you think that *no* government—federal or state—should have that power, in which case you might argue that individuals have a constitutional right to be free of government mask mandates. Do your answers to such questions change when you think about the power to ban abortion? To ban machine guns? To require employers to pay a minimum wage? To prohibit discrimination on the basis of race, sex, or other characteristics?

Now let's add some vocabulary to these concepts. Part One of this book focuses on the **powers of government**. It asks which government—or which subpart of the federal government—has a particular power. **Federalism** refers to the allocation of power between the federal government and the state governments. **Separation of powers** refers to the allocation of power among the three branches of the federal government: the Legislative Branch (Congress), the Executive Branch (the President and the vast federal bureaucracy), and the Judicial Branch (the Supreme Court, the federal courts of appeals, and the federal district courts).

Part Two of this book focuses on **individual rights**. It asks whether and to what extent specific constitutional amendments give individuals the right to be free from various forms of government action, such as race discrimination or deprivations of liberty or property.

Because this book is about *federal* constitutional law, nearly all the cases in it are decisions of the U.S. Supreme Court. (By contrast, casebooks on subjects like torts and contracts are filled with opinions of state supreme courts, which have primary responsibility for developing the law in those areas.) Throughout the book, we will ask how the U.S. Supreme Court develops the rules of constitutional law. Do the Justices rely on the Constitution's text? On history? On the Court's own precedents? On the Justices' evolving views of which powers and rights are important? We also will ask which sources the Court *should* use, bearing in mind that Justices are unelected and unaccountable to the people of the United States. Our approach to these questions will build in complexity as we progress through the book.

Note: I have taken many editorial liberties in this book to keep the readings short and to minimize clutter. The cases that I include are illustrative—rather than exhaustive—of the topics covered. I do not include ellipses when I cut material from quoted sources, nor do I add brackets when I make edits to quoted sources for purposes of clarity or flow. Passages that start with terms such as “Introduction,” “Background,” “Commentary,” “Questions,” “Note,” or “Important note” are my own writing. I put various key terms and important cases in bold, so that you pay particular attention to them. In sum, this book is meant to be used as a resource for teaching and learning. For any real-world work, you will need to do legal research and use the original, unedited sources.

PART ONE: THE POWERS OF GOVERNMENT

CHAPTER 1. POWERS OF THE JUDICIAL BRANCH

A. INTRODUCTION

The cases in this chapter address the powers of the federal **Judicial Branch** (aka the **Judiciary**). The Judicial Branch has three levels: the **Supreme Court**; the 13 federal **courts of appeals**; and the 94 federal **district courts** that collectively have hundreds of judges. A case typically begins with a single district court judge. On appeal, it is typically decided by a majority vote of a panel of three judges. If a party then seeks Supreme Court review and the Supreme Court chooses to hear the case, it is decided by a majority vote of the nine Justices.

What are the core powers of the Judiciary? A federal judge does not get to opine on issues simply because the judge has an interesting idea. That would be an impermissible **advisory opinion**. Under Article III of the Constitution, the judicial power is limited to resolving certain "**cases**" and "**controversies**," terms that are essentially interchangeable. As you will see in the decisions below, the Supreme Court has established rules for deciding whether a suit meets the "case or controversy" requirement.

If a federal court concludes that a case does not satisfy the "case or controversy" requirement, the court must dismiss the case (toss it out) without deciding the merits of the plaintiff's claim. The case is deemed **nonjusticiable**, meaning that the court lacks the power to hear it. For example, in the *FDA v. Alliance for Hippocratic Medicine* (2024) case that is excerpted below, the doctor plaintiffs claimed that the Food and Drug Administration acted unlawfully when FDA made it easier for pregnant women to get the abortion-inducing drug mifepristone. The Supreme Court did not reach the merits of that claim—in other words, the Court did not decide whether FDA's actions were unlawful—because the Court concluded that the

plaintiffs lacked standing, which is a threshold requirement for a case to be justiciable.

The most important doctrines of justiciability are **standing**, **ripeness**, and **mootness**.

The opinion in *FDA v. Alliance for Hippocratic Medicine* (2024) describes the rules for determining if the plaintiff had **standing** to sue. The opinion explains that to demonstrate standing, the plaintiff must have (1) a **concrete injury** that was or soon will be (2) **caused by the defendant's conduct** and that is (3) **redressable** by the court. These requirements must be satisfied on the day that the plaintiff filed the suit. In *Alliance*, the Supreme Court concluded that the plaintiffs did not have standing. By contrast, in the other two cases excerpted below—*Bost v. Illinois State Board of Elections* (2026) and *First Choice Women's Resource Centers, Inc. v. Davenport* (2026)—the Supreme Court held that the plaintiffs did have standing to sue.

In addition to demonstrating standing, the plaintiff must show that the suit was not brought **too early**—which could prompt a court to dismiss it as **unripe**—or **too late**, which could prompt a court to dismiss it as **moot**.

I have not included a case involving **ripeness**, but here is a way to think about the difference between ripeness and standing. Usually, standing is about **who** can sue and ripeness is about **when** someone can sue. If a court dismisses a case on standing grounds, typically the court concludes that the plaintiff will never have a justiciable claim. By contrast, if a court dismisses a case as unripe, it often thinks the plaintiff may eventually have a justiciable claim but does not have one yet.

The opinion in *FBI v. Fikre* (2024) is a recent Supreme Court decision that illustrates how **mootness** works. The opinion in *Health Freedom Defense Fund v. Biden* (11th Cir. 2024) also illustrates mootness. That opinion was written by a court of appeals, but it does a nice job laying out and applying the mootness rules that the Supreme Court has established.

There is one more type of justiciability issue that you should know about even though it does not come up often. Sometimes—but rarely—the Supreme Court will say that a particular dispute involves a nonjusticiable **political question**, meaning that it cannot be resolved by a federal court even though the plaintiff has standing and the case is not unripe or moot. *Rucho v. Common Cause* (2019) is one such case. But the outcome of *Rucho* is quite unusual; the argument that a case involves a nonjusticiable political question almost always fails.

The justiciability doctrines described above are *limits* on the judicial power. After you read about those limits on the judicial power, you will read about a very important *component* of the judicial power that is known as the **power of judicial review**. Assuming that a case is justiciable, the power of judicial review means that the Supreme Court gets to decide whether actions taken by other parts of the government—including Congress and the President—are constitutional, and the Supreme Court gets the final word on that question.

The power of judicial review is not explicit in the Constitution. The Supreme Court first announced the power of judicial review in *Marbury v. Madison* (1803). That case, which was written by Chief Justice John Marshall, is widely regarded as the most important in the Supreme Court's history, and it is often cited in modern cases. Many justiciable cases do not involve the power of judicial review: for example, if a person sues a company and claims that the company violated the person's patent, that suit does not challenge a government action. But the most important Supreme Court cases often involve challenges to government actions, which is why the power of judicial review is so important.

B. STANDING

A plaintiff who brings a suit in federal court must have Article III **standing**. This requirement is designed to ensure that federal courts only decide an actual "case or controversy," as the text of Article III demands. As you will see in the excerpt below from *Alliance for Hippocratic Medicine* (2024), the Supreme Court has developed rules for determining whether a plaintiff has standing. The basic rules are that the plaintiff must have an (1) **injury in fact** that was (2) **caused** by the defendant's conduct and that (3) the court can **redress** (fix). As you read the opinion, pay close attention to how the Court further explains and applies these rules. What types of injuries count as an injury in fact? How do we know whether the defendant caused the plaintiff's injury? Why did the Court conclude that these plaintiffs lacked standing? And why did the Court reach the opposite conclusion in the two cases that are excerpted after this one?

FDA v. Alliance for Hippocratic Medicine, 602 U.S. 367 (2024) (9-0 vote)

*[**Background:** The plaintiffs claimed that the Food and Drug Administration (FDA) acted unlawfully when FDA made it easier for doctors to prescribe the abortion-*

inducing drug mifepristone for pregnant women. The lower courts agreed and declared FDA's actions invalid. The Supreme Court reversed without deciding whether the FDA had acted unlawfully because the Court concluded that the plaintiffs did not have standing. Justice Brett Kavanaugh wrote the opinion for the unanimous Supreme Court.]

Justice Brett KAVANAUGH wrote the opinion for the unanimous Court:

In 2016 and 2021, the Food and Drug Administration relaxed its regulatory requirements for mifepristone, an abortion drug. Those changes made it easier for doctors to prescribe and pregnant women to obtain mifepristone. Several pro-life doctors and associations sued FDA, arguing that FDA's actions violated the Administrative Procedure Act. But the plaintiffs do not prescribe or use mifepristone. And FDA is not requiring them to do or refrain from doing anything. Rather, the plaintiffs want FDA to make mifepristone more difficult for other doctors to prescribe and for pregnant women to obtain. Under Article III of the Constitution, a plaintiff's desire to make a drug less available *for others* does not establish standing to sue. Nor do the plaintiffs' other standing theories suffice. Therefore, the plaintiffs lack standing to challenge FDA's actions.

Article III standing is a bedrock constitutional requirement that this Court has applied to all manner of important disputes. Standing is built on a single basic idea—the idea of separation of powers. Importantly, separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787. Therefore, we begin as always with the precise text of the Constitution.

Article III of the Constitution confines the jurisdiction of federal courts to "Cases" and "Controversies." The case or controversy requirement limits the role of the Federal Judiciary in our system of separated powers. As this Court explained to President George Washington in 1793 in response to his request for a legal opinion, federal courts do not issue advisory opinions about the law. Nor do federal courts operate as an open forum for citizens to press general complaints about the way in which government goes about its business.

As Justice Scalia memorably said, Article III requires a plaintiff to first answer a basic question: "'What's it to you?'" A. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983). For a plaintiff to get in the federal courthouse door and obtain a judicial determination of what the governing law is, the plaintiff cannot be a mere bystander, but instead must

have a personal stake in the dispute. The requirement that the plaintiff possess a personal stake helps ensure that courts decide litigants' legal rights in specific cases, as Article III requires, and that courts do not opine on legal issues in response to citizens who might roam the country in search of governmental wrongdoing. Standing also tends to assure that the legal questions presented to the court will be resolved in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. Moreover, the standing doctrine serves to protect the autonomy of those who are most directly affected so that they can decide whether and how to challenge the defendant's action.

By limiting who can sue, the standing requirement implements the Framers' concept of the proper—and properly limited—role of the courts in a democratic society. In particular, the standing requirement means that the federal courts decide some contested legal questions later rather than sooner, thereby allowing issues to percolate and potentially be resolved by the political branches in the democratic process. And the standing requirement means that the federal courts may never need to decide some contested legal questions: Our system of government leaves many crucial decisions to the political processes, where democratic debate can occur and a wide variety of interests and views can be weighed.

A.

The fundamentals of standing are well-known and firmly rooted in American constitutional law. To establish standing, as this Court has often stated, a plaintiff must demonstrate (i) that she has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief. See *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992). Those specific standing requirements constitute an essential and unchanging part of the case-or-controversy requirement of Article III.

The second and third standing requirements—causation and redressability—are often flip sides of the same coin. If a defendant's action causes an injury, enjoining the action or awarding damages for the action will typically redress that injury. So the two key questions in most standing disputes are injury in fact and causation.

First is injury in fact. An injury in fact must be concrete, meaning that it must be real and not abstract. The injury also must be particularized; the injury must affect the plaintiff in a personal and individual way and not be a generalized grievance. An injury in fact can be a physical injury, a monetary injury, an injury to one's property, or

an injury to one's constitutional rights, to take just a few common examples. Moreover, the injury must be actual or imminent, not speculative—meaning that the injury must have already occurred or be likely to occur soon. And when a plaintiff seeks prospective relief such as an injunction, the plaintiff must establish a sufficient likelihood of future injury.

By requiring the plaintiff to show an injury in fact, Article III standing screens out plaintiffs who might have only a general legal, moral, ideological, or policy objection to a particular government action. For example, a citizen does not have standing to challenge a government regulation simply because the plaintiff believes that the government is acting illegally. A citizen may not sue based only on an asserted right to have the Government act in accordance with law. Nor may citizens sue merely because their legal objection is accompanied by a strong moral, ideological, or policy objection to a government action. The injury in fact requirement prevents the federal courts from becoming a vehicle for the vindication of the value interests of concerned bystanders.

Second is causation. The plaintiff must also establish that the plaintiff 's injury likely was caused or likely will be caused by the defendant's conduct.

Government regulations that require or forbid some action *by the plaintiff* almost invariably satisfy both the injury in fact and causation requirements. So in those cases, standing is usually easy to establish.

By contrast, when (as here) a plaintiff challenges the government's unlawful regulation (or lack of regulation) of *someone else*, standing is not precluded, but it is ordinarily substantially more difficult to establish. That is often because unregulated parties may have more difficulty establishing causation—that is, linking their asserted injuries to the government's regulation (or lack of regulation) of someone else.

When the plaintiff is an unregulated party, causation ordinarily hinges on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. Yet the Court has said that plaintiffs attempting to show causation generally cannot rely on speculation about the unfettered choices made by independent actors not before the courts. Therefore, to thread the causation needle in those circumstances, the plaintiff must show that the third parties will likely react in predictable ways that in turn will likely injure the plaintiffs.

As this Court has explained, the line of causation between the illegal conduct and injury—the links in the chain of causation—must not be too speculative or too attenuated. The causation requirement precludes speculative links—that is, where it is not sufficiently predictable how third parties would react to government action or cause downstream injury to plaintiffs. The causation requirement also rules out attenuated links—that is, where the government action is so far removed from its distant (even if predictable) ripple effects that the plaintiffs cannot establish Article III standing.

The causation requirement is central to Article III standing. Like the injury in fact requirement, the causation requirement screens out plaintiffs who were not injured by the defendant's action. Without the causation requirement, courts would be virtually continuing monitors of the wisdom and soundness of government action.

Determining causation in cases involving suits by unregulated parties against the government is admittedly not a mechanical exercise. That is because the causation inquiry can be heavily fact-dependent and a question of degree. Unfortunately, applying the law of standing cannot be made easy, and that is particularly true for causation. Just as causation in tort law can pose line-drawing difficulties, so too can causation in standing law when determining whether an unregulated party has standing.

That said, the absence of precise definitions has not left courts entirely at sea in applying the law of standing. Like most legal notions, the standing concepts have gained considerable definition from developing case law. The Court has identified a variety of familiar circumstances where government regulation of a third-party individual or business may be likely to cause injury in fact to an unregulated plaintiff. For example, when the government regulates (or under-regulates) a business, the regulation (or lack thereof) may cause downstream or upstream economic injuries to others in the chain, such as certain manufacturers, retailers, suppliers, competitors, or customers. When the government regulates parks, national forests, or bodies of water, for example, the regulation may cause harm to individual users. When the government regulates one property, it may reduce the value of adjacent property. The list goes on.

As those cases illustrate, to establish causation, the plaintiff must show a predictable chain of events leading from the government action to the asserted injury—in other words, that the government action has caused or likely will cause injury in fact to the plaintiff.

B.

Here, the plaintiff doctors and medical associations are unregulated parties who seek to challenge FDA's regulation of others. Specifically, FDA's regulations apply to doctors prescribing mifepristone and to pregnant women taking mifepristone. But the plaintiff doctors and medical associations do not prescribe or use mifepristone. And FDA has not required the plaintiffs to do anything or to refrain from doing anything. To try to establish standing, the plaintiffs advance several complicated causation theories to connect FDA's actions to their alleged injuries in fact.

1.

We first address the plaintiffs' claim that FDA's relaxed regulation of mifepristone causes conscience injuries to the doctors.

The doctors contend that FDA's 2016 and 2021 actions will cause more pregnant women to suffer complications from mifepristone, and those women in turn will need more emergency abortions by doctors. The plaintiff doctors say that they therefore may be required—against their consciences—to render emergency treatment completing the abortions or providing other abortion-related treatment.

The Government correctly acknowledges that a conscience injury of that kind constitutes a concrete injury in fact for purposes of Article III. So doctors would have standing to challenge a government action that likely would cause them to provide medical treatment against their consciences.

But in this case—even assuming for the sake of argument that FDA's 2016 and 2021 changes to mifepristone's conditions of use cause more pregnant women to require emergency abortions and that some women would likely seek treatment from these plaintiff doctors—the plaintiff doctors have not shown that they could be forced to participate in an abortion or provide abortion-related medical treatment over their conscience objections. That is because, as the Government explains, federal conscience laws definitively protect doctors from being required to perform abortions or to provide other treatment that violates their consciences.

2.

In addition to alleging conscience injuries, the doctors cite various monetary and related injuries that they allegedly will suffer as a result of FDA's actions—in particular, diverting resources and time from other patients to treat patients with mifepristone complications; increasing risk of liability suits from treating those patients; and potentially increasing insurance costs.

Those standing allegations suffer from the same problem—a lack of causation. The causal link between FDA's regulatory actions and those alleged injuries is too speculative or otherwise too attenuated to establish standing.

To begin, the claim that the doctors will incur those injuries as a result of FDA's 2016 and 2021 relaxed regulations lacks record support and is highly speculative. The doctors have not offered evidence tending to suggest that FDA's deregulatory actions have both caused an increase in the number of pregnant women seeking treatment from the plaintiff doctors and caused a resulting diversion of the doctors' time and resources from other patients. Moreover, the doctors have not identified any instances in the past where they have been sued or required to pay higher insurance costs because they have treated pregnant women suffering mifepristone complications. Nor have the plaintiffs offered any persuasive evidence or reason to believe that the future will be different.

In any event, and perhaps more to the point, the law has never permitted doctors to challenge the government's loosening of general public safety requirements simply because more individuals might then show up at emergency rooms or in doctors' offices with follow-on injuries. Stated otherwise, there is no Article III doctrine of "doctor standing" that allows doctors to challenge general government safety regulations. Nor will this Court now create such a novel standing doctrine out of whole cloth.

Consider some examples. EPA rolls back emissions standards for power plants—does a doctor have standing to sue because she may need to spend more time treating asthma patients? A local school district starts a middle school football league—does a pediatrician have standing to challenge its constitutionality because she might need to spend more time treating concussions? A federal agency increases a speed limit from 65 to 80 miles per hour—does an emergency room doctor have standing to sue because he may have to treat more car accident victims? The government repeals certain restrictions on guns—does a surgeon have standing to sue because he might have to operate on more gunshot victims?

The answer is no: The chain of causation is simply too attenuated. Allowing doctors or other healthcare providers to challenge general safety regulations as unlawfully lax would be an unprecedented and limitless approach and would allow doctors to sue in federal court to challenge almost any policy affecting public health.

And if we were now to invent a new doctrine of doctor standing, there would be no principled way to cabin such a sweeping doctrinal change to doctors or other

healthcare providers. Firefighters could sue to object to relaxed building codes that increase fire risks. Police officers could sue to challenge a government decision to legalize certain activities that are associated with increased crime. Teachers in border states could sue to challenge allegedly lax immigration policies that lead to overcrowded classrooms.

We decline to start the Federal Judiciary down that uncharted path. That path would seemingly not end until virtually every citizen had standing to challenge virtually every government action that they do not like—an approach to standing that this Court has consistently rejected as flatly inconsistent with Article III.

We recognize that many citizens, including the plaintiff doctors here, have sincere concerns about and objections to others using mifepristone and obtaining abortions. But citizens and doctors do not have standing to sue simply because others are allowed to engage in certain activities—at least without the plaintiffs demonstrating how they would be injured by the government's alleged under-regulation of others. Citizens and doctors who object to what the law allows others to do may always take their concerns to the Executive and Legislative Branches and seek greater regulatory or legislative restrictions on certain activities.

It has been suggested that the plaintiffs here must have standing because if these plaintiffs do not have standing, then it may be that no one would have standing to challenge FDA's 2016 and 2021 actions. For starters, it is not clear that no one else would have standing to challenge FDA's relaxed regulation of mifepristone. But even if no one would have standing, this Court has long rejected that kind of "if not us, who?" argument as a basis for standing. The assumption that if these plaintiffs lack standing to sue, no one would have standing, is not a reason to find standing. Rather, some issues may be left to the political and democratic processes: The Framers of the Constitution did not set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts.

The plaintiffs have sincere legal, moral, ideological, and policy objections to elective abortion and to FDA's relaxed regulation of mifepristone. But under Article III of the Constitution, those kinds of objections alone do not establish a justiciable case or controversy in federal court. Here, the plaintiffs have failed to demonstrate that FDA's relaxed regulatory requirements likely would cause them to suffer an injury in fact. For that reason, the federal courts are the wrong forum for addressing the plaintiffs' concerns about FDA's actions. The plaintiffs may present their concerns and objections to the President and FDA in the regulatory process, or to Congress and

the President in the legislative process. And they may also express their views about abortion and mifepristone to fellow citizens, including in the political and electoral processes.

No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. We reverse the judgment of the U. S. Court of Appeals for the Fifth Circuit and remand the case for further proceedings consistent with this opinion.

Commentary: The principles set out in *Alliance* are important, but the outcome was unusual in holding that the plaintiffs lacked standing. Typically, people and entities don't go through the expense and hassle of filing a lawsuit unless they have a personal stake in the matter. In the two cases excerpted below—*Bost* (2026) and *First Choice Women's Resource Centers* (2026)—the Court held that the plaintiffs did have standing.

Bost v. Illinois State Bd. of Elections, 146 S. Ct. 513 (2026)
(7-2 vote on the bottom line)

*[**Background:** Congressman Michael Bost was a candidate running for reelection in Illinois to the U.S. House of Representatives. He claimed that Illinois's procedure for counting mail-in ballots received after election day violated federal law. The Supreme Court held that he had standing to sue. Chief Justice John Roberts wrote the opinion for the Court, which Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh joined. Justice Amy Coney Barrett, joined by Justice Elena Kagan, concurred in the judgment, which meant that they agreed with the Court's bottom line but not its reasoning. Justice Ketanji Brown Jackson dissented, joined by Justice Sonia Sotomayor.]*

Chief Justice John ROBERTS wrote the opinion for the Court:

Three political candidates challenged Illinois's procedure for counting mail-in ballots received after election day. We consider whether the candidates have standing to maintain their suit. Under Article III of the Constitution, plaintiffs must have a personal

stake in a case to have standing to sue. *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 379 (2024). They must, in other words, be able to answer a basic question: "'What's it to you?'" A. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983). Congressman Bost has an obvious answer: He is a candidate for office. And a candidate has a personal stake in the rules that govern the counting of votes in his election.

Candidates have an interest in a fair process. Win or lose, candidates suffer when the process departs from the law. Thus, the long-shot and shoo-in alike would suffer harm if a State chose to conduct its election by, say, flipping a coin. The result of such an election would not reflect the will of the people, and the candidates would lose the opportunity to compete for the people's support.

Such harm to candidates is in no sense common to all members of the public. Voters, to be sure, also have a general interest in an accurate vote tally. But a candidate's interest differs in kind. An unfair and inaccurate election plainly affects those who compete for the support of the people in a different way than it affects the people who lend their support.

Candidates, in short, are not mere bystanders in their own elections. They have an obvious personal stake in how the result is determined and regarded. Departures from the preordained rules cause them particularized and concrete harm. The same is true of competitors in other contests. Each runner in a 100-meter dash, for example, would suffer if the race were unexpectedly extended to 105 meters. Whether a particular runner expects to finish strong or fall off the pace in the final five meters, all would be deprived of the chance to compete for the prize that the rules define. The fastest to run 105 meters has not won the 100-meter dash. And in much the same way, an unlawful extension of vote counting deprives candidates of the opportunity to compete for election under the Constitution and laws of the United States.

First Choice Women's Resource Centers v. Davenport, 146 S. Ct. 1114 (2026) (9-0 vote)

*[**Background:** First Choice Women's Resource Centers is a nonprofit religious organization that provides counseling and resources to pregnant women in New Jersey. New Jersey's Attorney General accused groups like First Choice of*

discouraging abortion by providing false or misleading information about it. As part of the investigation, the New Jersey Attorney General served a subpoena on First Choice, commanding the group to produce documents reflecting the names, phone numbers, addresses, and places of employment of all individuals who had made donations to First Choice by any means other than through one specific webpage. First Choice filed this suit, alleging that the subpoena violated its First Amendment freedom of association. The Supreme Court held that First Choice had standing to sue. Justice Neil Gorsuch wrote the opinion for the unanimous Court.]

Justice Neil GORSUCH wrote the opinion for the unanimous Court:

This case presents a narrow question. We are not asked to decide the merits of First Choice's federal lawsuit, only whether it may proceed. Article III of the Constitution vests federal courts with the "judicial Power" to decide "Cases" and "Controversies." § 2, cl. 1. Inherent in that assignment is a "standing" requirement consisting of three elements: injury in fact, causation, and redressability. Together, these elements help us distinguish cases and controversies fit for judicial resolution from questions of public policy reserved to the elected branches or abstract disputes better left to the debating hall.

As this case comes to us, it centers on the injury-in-fact element. To satisfy that element, a case must involve an injury that is concrete, particularized, and actual or imminent. First Choice submits that the Attorney General's subpoena—and specifically its demand for donor information—has caused it to suffer an actual and ongoing injury to its First Amendment rights by deterring donors from associating with it.

First Choice has established a present injury to its First Amendment associational rights. An injury in fact does not arise only when a defendant causes a tangible harm to a plaintiff, like a physical injury or monetary loss. It can also arise when a defendant burdens a plaintiff's constitutional rights. And our cases have long recognized that demands for a charity's private member or donor information have just that effect. They discourage people from associating with groups engaged in protected First Amendment advocacy.

C. RIPENESS

Let's contrast standing and ripeness. Standing is about **who** can sue: Is this plaintiff the right person or entity to sue? If a court finds no standing, often it thinks the plaintiff will never be able to bring the case. Ripeness is about **when** someone can sue. If the court finds a case unripe, often the court thinks that the plaintiff eventually might be able to sue, but not yet because it's uncertain whether the plaintiff will be injured. To decide if a case is ripe, a court asks: "Did the plaintiff sue **too soon**?"

I have not included an excerpt from a ripeness case because, in the real world, it's somewhat unusual for a court to dismiss a case on Article III ripeness grounds. The standing rules themselves require that a plaintiff's injury be "actual or imminent" to qualify as an injury in fact. So, if a court believes that it is speculative whether the plaintiff will be injured in the future, the court can dismiss the case on standing grounds rather than ripeness grounds. That choice between standing and ripeness does not have much real-world impact because both types of dismissal are "without prejudice," meaning that the plaintiff can bring a new suit if the facts change in ways that establish a concrete case or controversy.

D. MOOTNESS

Now let's contrast standing and mootness. To decide whether the plaintiff has standing, a federal court looks at the facts *at the time the plaintiff filed the complaint*. But sometimes, facts change over time in ways that end the case or controversy that existed when the complaint was filed. To decide if a case is moot, a court asks: "Has this dispute been **overtaken by events**?"

For example, imagine a plaintiff who brought a suit to challenge a state's restrictions on ads that can be placed in the windows of liquor stores. If the plaintiff owned a liquor store when he filed the suit, he had standing. But imagine that plaintiff sold his store to someone else while the suit was pending. That sale makes the plaintiff's case moot, because he no longer has a personal interest in the outcome of the challenge to the state law.

In that hypothetical, the case became moot because of the *plaintiff's conduct* (selling his store). Sometimes a case can become moot for reasons that have nothing to do

with the parties' conduct, such as if the plaintiff's liquor store was struck by lightning and burned down.

Sometimes, a case can become moot because of the *defendant's conduct*. For example, imagine that the state repealed its restrictions on liquor store ads while the case was pending. That scenario is known as **voluntary cessation** because the defendant has voluntarily ceased doing the challenged action. In such a scenario, the Supreme Court's doctrine requires the defendant to satisfy a heavy burden to get the plaintiff's case dismissed as moot: the defendant must show that there is no reasonable likelihood that it will start doing the same thing to the plaintiff again. The two cases excerpted below—the Supreme Court's decision in *Fikre* (2024) and the court of appeals' decision in *Health Freedom Defense Fund* (2024)—illustrate this requirement. As you read these two cases, make sure that you understand why their outcomes were different.

FBI v. Fikre, 144 S. Ct. 771 (2024) (9-0 vote)

*[**Background:** Yonas Fikre sued because the FBI had put him on the No Fly List, which is a list of known or suspected terrorists who are not allowed to board commercial flights to, from, within, or over the United States. By the time this case reached the Supreme Court, the government had taken Fikre off the No Fly List. The Supreme Court rejected the government's argument that Fikre's case was moot. Justice Neil Gorsuch wrote the opinion for the unanimous Supreme Court.[*

Justice Neil GORSUCH wrote the opinion for the unanimous Court:

Yonas Fikre, a U.S. citizen, brought suit alleging that the government placed him on the No Fly List unlawfully. Later, the government removed him from the list. The only question we are asked to decide is whether the government's action suffices to render Fikre's claims moot.

The Constitution grants federal courts jurisdiction to decide "Cases" or "Controversies." Art. III, §§ 1, 2. A court with jurisdiction has a virtually unflagging obligation to hear and resolve questions properly before it. But the converse also holds true. Sometimes, events in the world overtake those in the courtroom, and a complaining party manages to secure outside of litigation all the relief he might have won in it. When that happens, a federal court must dismiss the case as moot. It must because federal judges are not counselors or academics; they are not free to take up

hypothetical questions that pique a party's curiosity or their own. The limited authority vested in federal courts to decide cases and controversies means that they may no more pronounce on past actions that do not have any continuing effect in the world than they may shirk decision on those that do.

None of this implies that a defendant may automatically moot a case by the simple expedient of suspending its challenged conduct after it is sued. Instead, our precedents hold, a defendant's voluntary cessation of a challenged practice will moot a case only if the defendant can show that the practice cannot reasonably be expected to recur.

We have described this as a formidable burden. And the reason for it is simple: The Constitution deals with substance, not strategies. Were the rule more forgiving, a defendant might suspend its challenged conduct after being sued, win dismissal, and later pick up where it left off; it might even repeat this cycle as necessary until it achieves all of its allegedly unlawful ends. A live case or controversy cannot be so easily disguised, and a federal court's constitutional authority cannot be so readily manipulated. To show that a case is truly moot, a defendant must prove no reasonable expectation remains that it will return to its old ways. That much holds for governmental defendants no less than for private ones.

Viewed in that light, this case is not moot. To appreciate why, it is enough to consider one aspect of Mr. Fikre's complaint. He contends that the government placed him on the No Fly List for constitutionally impermissible reasons, including his religious beliefs. The government's representation that it will not relist Mr. Fikre based on "currently available information" may mean that his past actions are not enough to warrant his relisting. But none of that speaks to whether the government might relist him if he does the same or similar things in the future—say, attend a particular mosque or refuse renewed overtures to serve as an informant. Put simply, the government's sparse declaration falls short of demonstrating that it cannot reasonably be expected to do again in the future what it is alleged to have done in the past.

A party's repudiation of its past conduct may sometimes help demonstrate that conduct is unlikely to recur. But often a case will become moot even when a defendant vehemently insists on the propriety of the conduct that precipitated the lawsuit. What matters is not whether a defendant repudiates its past actions, but what repudiation can prove about its future conduct. It is on that consideration alone—the potential for a defendant's future conduct—that we rest our judgment that this case is not moot.

Health Freedom Defense Fund v. Biden, 71 F.4th 888 (11th Cir. 2024) (3-0 vote)

*[**Background:** During the pandemic, the Centers for Disease Control and Prevention (CDC) issued a mandate requiring people to wear masks on public transportation—such as airplanes, buses, trains, and ride shares—and in transportation hubs, such as airports and train stations. Members of the plaintiff organization submitted declarations saying that they flew regularly; that they did not want to wear masks on commercial flights; and that the CDC's mandate was unlawful. The district court agreed with them, and the government appealed. While the appeal was pending, the COVID-19 public health emergency ended and the CDC's mandate expired. The court of appeals agreed with the government that the case was moot. Judge Wilson wrote the opinion for the unanimous panel of the Eleventh Circuit.]*

Judge WILSON wrote the opinion for a unanimous panel of the Eleventh Circuit:

In the winter of 2020, the Secretary of Health and Human Services (HHS) determined that the threat posed by the novel SARS-CoV-2 virus constituted a public health emergency. *Determination of Public Health Emergency*, 85 Fed. Reg. 7316-01 (Feb. 7, 2020). Not long after, then-President Trump declared that the global outbreak constituted a national emergency. *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,337 (Mar. 13, 2020). Over the course of the next three years, spanning two presidential administrations, public servants scrambled to take actions they believed would combat the spread of the disease and safeguard the well-being of Americans. With mixed results, many of those actions were challenged in our nation's courts.

The particular action before us today is a mandate promulgated by the Centers for Disease Control and Prevention (CDC). See *Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs*, 86 Fed. Reg. 8025-01 (Feb. 3, 2021) ("Mandate").

[The CDC's Mandate required individuals to wear a mask on public transportation—such as airplanes, buses, trains, and ride shares—and in transportation hubs, such as airports and train stations. The plaintiff organization, Health Freedom Defense Fund, filed this suit while the Mandate was in effect. Some of its members submitted

declarations stating that they regularly fly on commercial airplanes and do not want to wear masks as required by the Mandate.]

The district court concluded that the Mandate exceeded the CDC's statutory authority and vacated the Mandate nationwide. This appeal followed. For its part, the government sought to defend the legality of the Mandate and the sufficiency of the procedures by which it was promulgated. Plaintiffs, on the other hand, sought to defend the relief they had obtained from the district court and ensure their lives were no longer impacted by the Mandate.

A Mandate that, as we write, no longer exists. On April 10, 2023, President Biden signed a joint resolution of Congress that terminated the national emergency. More relevant to this case, on May 11, 2023, the HHS Secretary's declaration of a public health emergency expired. Therefore, even had the district court sided with the government, the Mandate would have expired by its own terms on May 11, 2023. See 86 Fed. Reg. 8025-01 at 8030 ("This Order will remain in effect ... until the Secretary of Health and Human Services rescinds the determination ... that a public health emergency exists.").

This development raises the jurisdictional question of mootness. In making this determination, we look at the events at the present time, not at the time the complaint was filed or when the federal order on review was issued. So, here, we analyze this case as if plaintiffs had originally sought to litigate the validity of a regulation which by its terms had already expired. Rarely will challenges to a law's validity survive a mootness analysis when that law is no longer effective. See *Trump v. Hawaii*, 138 S. Ct. 377 (2017) (mem.) (holding that an appeal no longer presented a "live case or controversy" because the provisions of the challenged order "expired by their own terms"). Probabilities aside, the basic question is whether events have occurred that deprive this court of the ability to provide meaningful relief.

The answer to that question is, quite clearly, yes. Plaintiffs initiated this litigation in order to have the Mandate declared unlawful and set aside. The Mandate has expired on its own terms. As a consequence, there is no longer any Mandate for us to set aside or uphold. Indeed, even if we were to decide against plaintiffs and reverse the district court—as the government desires—there would be no Mandate to reinstate.

Plaintiffs thoughtfully argue that this case is preserved by two notable exceptions to mootness: the doctrines of "voluntary cessation" and "capable of repetition, yet evading review." However, we disagree with the applicability of both.

Starting with the doctrine of "voluntary cessation," courts have long recognized that defendants cannot moot a case and avoid litigation simply by ceasing its conduct once a complaint is filed. Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends. Given this possibility, the party asserting mootness carries the "heavy burden" of demonstrating to the court "that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). When dealing with government defendants, we have held that challenges to laws that have been unambiguously terminated are moot unless there is a reasonable basis to believe that the policy will be reinstated if the suit is terminated. Absent any evidence of reinstatement, there is simply no point in allowing the suit to continue and we lack the power to allow it to do so.

Here, the government has carried its burden: there is no reasonable basis to expect the Mandate will be reinstated if this case is rendered moot. By its own terms, the Mandate expired after the HHS Secretary declared that the public health emergency has ended, and there is no hint that this decision was an effort to avoid further litigation. Further, nothing in the text of the Mandate suggests it can be revived after its expiration, and there is not a grain of evidence that the CDC has any plans to promulgate an identical mandate. And while we recognize that the government continues to defend the legality of the Mandate, that fact has little, if anything to do with the voluntary-cessation analysis. The question is simply whether there is a reasonable basis to expect the challenged conduct to start up again if this case is declared moot. We conclude there is not.

Turning to the doctrine of "capable of repetition, yet evading review," this narrow exception applies only where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.

Plaintiffs run into trouble with the second prong. While the phrase "capable of repetition" is broad and suggests that plaintiffs could hypothesize scenarios in which the government might reengage in the challenged conduct, precedent reins in the phrase's meaning. The Supreme Court has clarified that this "exception requires a reasonable expectation or a demonstrated probability that the same controversy will recur." *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 463 (2007). In addition, for this doctrine to apply, "future recurrences must involve substantially the same parties." *Id.* at 463.

We find plaintiffs' contention that there is a reasonable expectation that the CDC will issue another nationwide mask mandate for all conveyances and transportation hubs to be speculative at best. Plaintiffs point to the CDC's broad interpretation of its authority under the Public Health Services Act of 1944 and suggest that the CDC could use this interpretation to promulgate a similar mask mandate to fight against more ubiquitous diseases like the common cold and influenza. Yet, conjectures of future harms like these do not establish a reasonable expectation that a mask mandate from the CDC will reissue. Indeed, since the Public Health Services Act's enactment in 1944, no government authority has ever invoked the law to require masking for common respiratory diseases. We have no basis to expect that 79-year trend to change. Moreover, while we think a legal degree confers many advantages, we do not believe it equips us to accurately predict if or when another global respiratory pandemic will infect our shared world.

And that brings us to this final point regarding this doctrine. Recall that for this "reasonable expectation" standard to be met, future recurrences must involve substantially the same parties. We note that the COVID-19 pandemic of 2020 is often compared to the influenza pandemic of 1918. Given the primary comparator occurred over a century earlier, we simply have no reasonable basis to conclude the same parties will be involved in a future controversy if a similar situation ever does arise again. Indeed, putting aside the unanswerable question of where plaintiffs might be in this hypothetical situation, there is no guarantee that the president at that time would order agencies to issue a similar mask mandate or that such a mandate would come from the CDC as opposed to another agency.

And lastly, as in all cases, we look to the Supreme Court for guidance. Recently, the Supreme Court dismissed as moot a motion by a collection of States to intervene in a case involving "Title 42 orders"—emergency immigration decrees designed to prevent the spread of COVID-19. *Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023) (mem). While the Court's brief Order was devoid of analysis, a separate Statement from Justice Gorsuch revealed that the Court's decision was based on the end of the public health emergency underlying the Title 42 orders. See *id.* at 1313–14 (Gorsuch, J., statement). The same reasoning applies here. Accordingly, the order and judgment of the district court are VACATED, and the district court is instructed to DISMISS the case as MOOT.

Commentary: *Health Freedom* addressed two distinct exceptions to mootness:

(1) the **"voluntary cessation"** exception and;
(2) the exception for disputes that are **"capable of repetition, yet evading review."**

I have already described the first exception, which arises when the defendant voluntarily stops doing the challenged action. The second exception arises when the dispute by its nature is too short to get resolved before it is overtaken by events. The common examples are disputes involving pregnancy (because pregnancy lasts only 9 months) and disputes involving elections (because elections often happen before the legal issues are resolved). The second exception can save a case from being declared moot, but only if it is **reasonably likely that the same dispute between the same parties** will happen again. Look back at *Health Freedom* to make sure you understand why that exception did not apply.

E. POLITICAL QUESTION DOCTRINE

The phrase "political question doctrine" is a confusing term for this idea. Sometimes, but very rarely, the Supreme Court will say a dispute is a nonjusticiable political question that it can't decide even though the plaintiff has standing, the case is ripe, and the case isn't moot. The Court will say so because there are **no judicially manageable standards** in the Constitution for the Court to use to resolve the dispute. In essence, the Court is saying that the Constitution leaves this type of dispute to the political branches—Congress and the President—to resolve.

The phrase "political question" is confusing because it gives the impression that the Supreme Court shies away from disputes involving politically charged issues. But if you follow the news, you know that is not true: the Supreme Court resolves politically charged disputes all the time. The *Rucho* (2019) case that is excerpted below is extremely unusual because the Court found that the issue presented (partisan gerrymandering) was a nonjusticiable political question. The most famous case involving the political question doctrine is *Baker v. Carr* (1962), but, as the *Rucho* opinion explained, the Court in that case *rejected* the argument that another election-related dispute was a nonjusticiable political question. In other words, *Baker v. Carr* set out the standard for what counts as a nonjusticiable political question but held that the standard was not met in that case.

Rucho v. Common Cause, 588 U.S. 684 (2019) (5-4 vote)

*[**Background:** Partisan gerrymandering is the practice of dividing a geographic area into electoral districts, often of highly irregular shape, to give one political party an advantage by diluting the opposition's voting strength. Voters in North Carolina and Maryland claimed that the state legislatures in North Carolina and Maryland had engaged in partisan gerrymandering to advance Republicans and Democrats, respectively, and that those actions were unconstitutional. The Supreme Court held that this claim was a nonjusticiable political question, meaning that the Court could not decide the merits of the claim. Chief Justice John Roberts wrote the opinion for the Court, which Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh joined. Justice Elena Kagan dissented, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor.]*

Chief Justice ROBERTS wrote the opinion for the Court:

Voters and other plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State's districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State's plan discriminated against Republicans. The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2, of the Constitution. The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court.

These cases require us to consider once again whether claims of excessive partisanship in districting are "justiciable"—that is, properly suited for resolution by the federal courts. This Court has not previously struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims. The districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well.

II

A

Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." We have understood that limitation to mean that federal courts can address only questions "historically viewed as capable of resolution through the judicial process."

Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights. In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. *Baker v. Carr*, 369 U.S. 186 (1962). Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving them." *Ibid.*

The question here is whether there is an "appropriate role for the Federal Judiciary" in remedying the problem of partisan gerrymandering—whether such claims are claims of legal right, resolvable according to legal principles, or political questions that must find their resolution elsewhere.

B

Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution.

The Framers addressed the election of Representatives to Congress in the Elections Clause. Art. I, § 4, cl. 1. That provision assigns to state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress, while giving Congress the power to "make or alter" any such regulations. Whether to give that supervisory authority to the National Government was debated at the Constitutional Convention.

Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. The Apportionment Act of 1842, which required single-member districts for the first time, specified that those districts "be composed of contiguous territory," in an attempt to forbid the practice of the gerrymander.

Congress also used its Elections Clause power in 1870, enacting the first comprehensive federal statute dealing with elections as a way to enforce the Fifteenth Amendment. Starting in the 1950s, Congress enacted a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the prohibition of English-only elections.

Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. We do not agree. In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts.

But the history is not irrelevant. The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

C

In the leading case of *Baker v. Carr* (1962), voters in Tennessee complained that the State's districting plan for state representatives debased their votes, because the plan was predicated on a 60-year-old census that no longer reflected the distribution of population in the State. The plaintiffs argued that votes of people in overpopulated districts held less value than those of people in less-populated districts, and that this inequality violated the Equal Protection Clause of the Fourteenth Amendment. This Court identified various considerations relevant to determining whether a claim is a nonjusticiable political question, including whether there is "a lack of judicially discoverable and manageable standards for resolving it." The Court concluded that the claim of population inequality among districts did not fall into that category, because such a claim could be decided under basic equal protection principles.

Another line of challenges to districting plans has focused on race. Laws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race, are of course presumptively invalid. The Court applied those principles to electoral boundaries in *Gomillion v. Lightfoot*, concluding that a challenge to an "uncouth twenty-eight sided" municipal boundary line that excluded black voters from city elections stated a

constitutional claim. 364 U.S. 339, 340 (1960). The Court later extended the reasoning of *Gomillion* to congressional districting.

Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering." See, *e.g., Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (recognizing that "[p]olitics and political considerations are inseparable from districting and apportionment").

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The central problem is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is determining when political gerrymandering has gone "too far." As we summed up last Term, our cases leave unresolved whether claims of legal right may be brought in cases involving allegations of partisan gerrymandering.

III

A

In considering whether partisan gerrymandering claims are justiciable, we are mindful that any standard for resolving such claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." An important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Bandemer*, 478 U.S. at 145 (opinion of O'Connor, J.). An expansive standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process," *Vieth*, 541 U.S. at 306 (opinion of Kennedy, J.).

B

Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties deserve—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so.

Deciding among different visions of fairness poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts. *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012).

And it is only after determining how to define fairness that you can even begin to answer the determinative question: "How much is too much?" At what point does permissible partisanship become unconstitutional? Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. Nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion. Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.

The dissent argues that there are other instances in law where matters of degree are left to the courts. True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches. See Art. I, § 4, cl. 1.

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles,"

Arizona State Legislature, 576 U.S., does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. Judicial action must be governed by standard, by rule, and must be principled, rational, and based upon reasoned distinctions found in the Constitution or laws. Judicial review of partisan gerrymandering does not meet those basic requirements.

What the appellees and dissent seek is an unprecedented expansion of judicial power. We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.

Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. And the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause. Dozens of bills have been introduced in Congress to limit reliance on political considerations in redistricting. We express no view on any of these pending proposals. We simply note that the avenue for reform established by the Framers, and used by Congress in the past, remains open.

Justice Elena KAGAN dissented, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor:

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities. And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and

dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

And checking them is not beyond the courts. The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland. In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong.

Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

F. THE POWER OF JUDICIAL REVIEW

So far, we have focused on doctrines that *limit* the judicial power. We now turn to the **power of judicial review**, which is an important component of the judicial power. It arises in the subset of cases that involve challenges to a *government's action*.

The power of judicial review was first announced by the Supreme Court in *Marbury v. Madison* (1803). Although you need to know about that famous case—which is arguably the most important decision in the Supreme Court's history and still gets cited all the time—the background is confusing. In my view, the opinion is too hard for many law students to digest in an introductory con law course, especially at the start

of the semester. So, instead of making you read the opinion, I am simply telling you the key points here. But if you feel cheated because you know that *Marbury*'s author, Chief Justice John Marshall, is a legal genius, here is some reassurance. We will do a close reading of excerpts from his opinion in *McCulloch v. Maryland* (1819) later on in the book. And of course, you are always welcome to do more than the assigned reading: Supreme Court opinions are available for free, and they are easy to find online.

With that windup, here is the bottom line from *Marbury*: The Supreme Court has the final word on whether a law passed by Congress (aka a federal statute or an Act of Congress) is constitutional. That power is often described as the power of judicial review.

Why does the Supreme Court have the power of judicial review? Because Chief Justice Marshall said so in *Marbury*. His reasoning boiled down to this: Article III of the Constitution gives the Judiciary the job of resolving concrete disputes. Sometimes, a concrete dispute will involve a conflict between a law that Congress enacted and something in the Constitution. The Supremacy Clause, which is in Article VI, says the Constitution is "the supreme law of the land." Therefore, if the Supreme Court perceives a conflict between the Constitution and a federal statute, the Court must say the Constitution prevails and the federal statute is invalid. And that's the end of the matter. In the fancier language from Chief Justice Marshall: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each."

So far, I have been talking about *judicial review of federal statutes*. But the same notion of judicial review extends to other contexts. For example, the Supreme Court can decide that a *state law* conflicts with the Constitution and is therefore invalid. The Supreme Court can decide that *an action by the President (or a federal agency)* conflicts with the Constitution or a federal statute and is therefore invalid. The Supreme Court can decide that an action by a state or the President (or a federal agency) conflicts with a federal statute and is therefore invalid. In each of these scenarios, the Supreme Court's word is final.

Although I have focused so far on the Supreme Court, a suit usually starts with a single district court judge, who also has the power of judicial review. The big difference is that the decision of a district court judge can be appealed to the court of appeals, which might disagree with the district court judge. Likewise, the Supreme

Court might disagree with the court of appeals, and the Supreme Court's decision is what sets the rules for the country.

CHAPTER 2. FEDERALISM

A. POWERS OF THE LEGISLATIVE BRANCH (CONGRESS)

Congress (aka the Legislative Branch) has only **enumerated powers**, that is, only those powers that the Constitution gives it either explicitly or implicitly. Why is that? A central reason is **federalism**, which refers to the division of power between the federal government and the state governments. The Framers of the Constitution—who had just fought the Revolutionary War to gain independence from Great Britain—had two major goals that were important but contradictory. On the one hand, they wanted the new federal government to be a lot more powerful than the Continental Congress that existed under the Articles of Confederation. The weaknesses of the Continental Congress had made it hard to fight the Revolutionary War and taught the Framers the importance of having a strong central (aka federal) government. On the other hand, the Framers valued the state governments and worried that putting too much power in the hands of the new central government could lead to the abuse of that power (often described as tyranny).

Any time you see a federal statute, your first question should be: Which enumerated power(s) gave Congress the power to enact that law? To answer that question, you will need to understand the specific enumerated powers that the Constitution gives Congress. Most of those powers are found in Article I, section 8, which you should skim through right now. Although the list is fairly long, this casebook covers only the most important powers.

The Supreme Court has developed many doctrines (rules) that address the scope and limits of particular enumerated powers. Often, those rules reflect the Supreme Court's attempt to maintain a reasonable balance of powers between the federal government and the states. Soon we will dive into those particular doctrines, examining for example the rules that the Supreme Court has announced to define the scope of Congress's commerce power, taxing power, and spending power. But before we do, we will examine the values that underlie federalism. As you read the excerpts in Part B below, ask yourself: What exactly do we mean by federalism, and why should we care about preserving it?

B. THE VALUES THAT UNDERLIE FEDERALISM

The first excerpt below is from the Supreme Court's decision in ***NFIB* (2012)**, which addressed constitutional challenges to the Patient Protection and Affordable Care Act (aka Obamacare). We will be reading the legal rulings from *NFIB* later on. In the passage below, Chief Justice Roberts describes the values that federalism serves. Read this excerpt closely.

The three excerpts that follow *NFIB* were written by academics. Coauthors Edward Rubin and Malcolm Feeley argue that federalism does not really achieve the things that are attributed to it. Seth Kreimer disagrees, as does Heather Gerken. As you read these academic pieces, don't worry if you struggle to understand some of the concepts. The goal is to start getting a sense of what federalism means in practice and why we should care about preserving the power of states as a counterweight to the federal government.

NFIB v. Sebelius, 567 U.S. 519 (2012) (excerpt about federalism)

Chief Justice John ROBERTS:

Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care to all citizens whose income falls below a certain threshold. We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.

In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. Nearly two centuries ago, Chief Justice Marshall observed that "the question respecting the extent of the powers actually granted" to the Federal Government "is perpetually arising, and will probably continue to arise, as long as our system shall exist." *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819). In this case we must again determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess. Resolving this controversy requires us to examine both the limits of the Government's power, and our own limited role in policing those boundaries.

The Federal Government is acknowledged by all to be one of enumerated powers. That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. Congress may, for example, "coin Money," "establish Post Offices," and "raise and support Armies." Art. I, § 8, cls. 5, 7, 12. The enumeration of powers is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated." *Gibbons v. Ogden*, 9 Wheat. 1, 195 (1824). The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government "can exercise only the powers granted to it." *McCulloch*, supra, at 405.

Today, the restrictions on government power foremost in many Americans' minds are likely to be affirmative prohibitions, such as contained in the Bill of Rights. These affirmative prohibitions come into play, however, only where the Government possesses authority to act in the first place. If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.

Indeed, the Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government. As Alexander Hamilton put it, "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." The Federalist No. 84, p. 515 (C. Rossiter ed. 1961). And when the Bill of Rights was ratified, it made express what the enumeration of powers necessarily implied: "The powers not delegated to the United States by the Constitution ... are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions.

The same does not apply to the States, because the Constitution is not the source of their power. The Constitution may restrict state governments—as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power." *United States v. Morrison*, 529 U.S. 598, 618–619 (2000).

"State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992). Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States*, 564 U.S. 211, 222 (2011).

Edward L. Rubin and Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. REV. 903 (1994)

Federalism, Justice O'Connor states, "increases opportunity for citizen involvement in democratic processes," it "makes government more responsive by putting the States in competition for a mobile citizenry," and "it allows for more innovation and experimentation in government." But its principal virtue is that it constitutes "a check on abuses of government power" by diffusing power among separate sovereigns.

In our view, federalism in America achieves none of the beneficial goals that the Court claims for it. In fact, federalism is America's neurosis. We are not arguing for the abolition of the states. States fulfill the important governmental function of facilitating decentralization, as we will discuss below. Yet there is no policy reason why other subdivisions of the nation could not fulfill this function.

I. FEDERALISM AND DECENTRALIZATION

A. The Difference Between Federalism and Decentralization

"Federalism," like most broad political or legal terms, can mean many different things, but any definition that would justify judicial enforcement, to say nothing of the

emotional freight that we Americans attach to it, must distinguish federalism from decentralization.

Decentralization is a managerial concept; it refers to the delegation of centralized authority to subordinate units of either a geographic or a functional character. The main reason to decentralize is to achieve effective management. Very often, an administrator who is relatively close to the subject matter will be more knowledgeable, more responsive, and more involved than a higher-ranking person ensconced in some distant central office. A corporation might decentralize authority to factory managers, or a state university system might decentralize authority to the head of each constituent campus. The Israeli army employs decentralization as a military strategy; while Egyptian and Syrian field commanders are expected to follow detailed instructions, an Israeli commander in the field possesses virtually complete autonomy.

But none of this has anything to do with federalism. All these decentralized systems are hierarchically organized and the leaders at the top or center have plenary power over the other members of the organization. Decentralization represents a deliberate policy that the leaders select, or at least approve, based on their view of the best way to achieve their goals. A decentralized system can be, and often is, the product of a purely managerial decision by a centralized authority.

The essence of federalism, as a coherent political concept, is quite different. To be sure, federal systems share certain structural features with decentralized ones. The most basic is that, within a single system of governance, decisions are made by subsidiary units and the central authority defers to those decisions. But in a federal system, the subordinate units possess prescribed areas of jurisdiction that cannot be invaded by the central authority, and leaders of the subordinate units draw their power from sources independent of that central authority. Federalism is not a managerial decision by the central decision-maker, as decentralization can be, but a structuring principle for the system as a whole. The point of granting partial independence in this way, and thus the point of federalism, is to allow normative disagreement amongst the subordinate units so that different units can subscribe to different value systems.

B. Decentralization in Federalist Clothes: Public Participation, Citizen Choice, State Competition and Experimentation

1. Public Participation

One might argue that the states are “closer to the people” than the federal government. This is one of many unproven assumptions that fester in this field without either theoretical or empirical support. Actual alignments are likely to depend on the correspondence of substantive policies. For example, the white-dominated governments of the southern states undoubtedly fostered the autonomy of white-dominated towns against federal intervention; on the other hand, the federal government was correspondingly more solicitous of black communities, at least during the Reconstruction and Civil Rights eras. Support for city functions such as schools or police has often come from the federal government, not from the states.

2. Citizen Choice

A second standard argument is that federalism “makes government more responsive by putting the states in competition for a mobile citizenry.” There is something a bit fanciful in the image of people choosing a place to live the way shoppers choose their favorite breakfast cereal, and critics have pointed out that the transaction costs of obtaining information and transplanting one’s life may well overwhelm the utility gains from the selection process, particularly for people with limited resources. But there is also much truth to the argument considering our mobile, restless society.

The concept of government service packages applies better to localities, like counties, cities, and towns. States are too large to produce the necessary range of choices; telling wheat farmers in Kansas that they can obtain the kinds of schools they want by moving to New Jersey is unlikely to provide an increase in their overall utility function. What would help them is a choice of jurisdictions with different educational policies within their own region or city. But federalism only protects the autonomy of states, not the autonomy or variability of local governments.

3. State Competition

A third argument for federalism, closely related to the preceding one, is based on competition among jurisdictions rather than on choice by citizens. The idea is that jurisdictions will compete for productive assets, such as factories, and desirable people, such as chemical engineers, by creating a favorable economic climate. Once again, however, the arguments cannot really be viewed as favoring federalism, because federalism allows a multiplicity of norms and not simply a multiplicity of rules. In a truly federal system, some sub-units might not be interested in economic efficiency or social welfare at all; they might be primarily motivated by the desire to preserve an agrarian lifestyle, to protect the environment, or to encourage individual spirituality. These particular sub-units might lose out in the competition for factories

and chemical engineers, as the economic analysis predicts. But rather than perceiving their losses as a chastening lesson that induces them to change their laws, they might regard them as a necessary cost or as a positive advantage.

4. Experimentation

Another argument for federalism refers to a technique, not a policy: that federalism gives the states an opportunity to experiment with different programs. Presumably, this is desirable, not because of an abiding national commitment to pure research, but because the variations may ultimately provide information about a number of governmental programs and enable us to choose the best one. To quote Justice Brandeis: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” This has a certain ring to it, but on further examination experimentation turns out to be a happy incident of managerial decentralization, not of federalism.

Experimentation of this sort is an instrumental concept, useful only when the sub-units share a single goal. It is not particularly relevant to sub-units whose goals are different from each other. But true federalism allows governmental sub-units to choose different goals, not to experiment with different mechanisms for achieving a single one.

II. FEDERALISM AND THE DIFFUSION OF POWER

Concern about the concentration of power was one of the guiding forces in the design of our entire political system. The Founders of our nation, according to the current view, were motivated by their commitment to liberty and defined themselves as revolutionaries because of their opposition to the unchecked authority that Britain exercised over their lives. Federalism can be seen as responding to this basic concern because it insulates certain decisions from the power of the central government. By doing so, the argument goes, power is diffused among different governmental entities; in particular, the central government is disabled from imposing norms upon the states, at least in certain subject areas. The enormous growth of the national government during the course of the last century is thus seen as a threat to liberty, a threat that can be counteracted by the principle of federalism.

The image that seems to underlie this concept is that there exists some fixed amount of power, which can either be concentrated in the central government or spread between the central government and the states. In fact, there is no fixed supply of

administrative power such that increases in federal power necessarily cause decreases in state power through a zero-sum exchange. Rather, the power of government at all levels has been steadily increasing in our culture for a substantial period of time. One hundred years ago, the workplace was essentially unregulated other than by judicial enforcement of individual contracts. Now, a formidable panoply of labor, health, and safety regulations emanates from both the federal government and the states. Similarly, the government's involvement in environmental matters once consisted essentially of selling off the environment in hundred-acre parcels; now, governments at all levels monitor the quality of air and water, and regulate the emissions of factories which once spewed their fumes into the air with laissez-faire abandon. Of course, the federal government can preempt state authority in its entirety, but this is not the typical pattern; more often, federal action alters state governance, or simply adds to it.

Very few people argue that normative variation within a polity is inherently desirable. Rather, arguments in favor of the variability that federalism offers are usually advanced by those who happen to disagree with the normative position of the central government. During the Kennedy-Johnson era and the heyday of the Warren Court, states' rights became a rallying cry of those who opposed desegregation, social welfare, and controls on law enforcement agents. During the years of the Reagan and Bush administrations and the Rehnquist Court, proponents of abortion, gay rights, and abolition of the death penalty became enamored of federalism for equivalent reasons. This is perfectly good political strategy, but it is hardly a convincing argument for federalism. In fact, it demonstrates the weakness of federalism as a normative principle; because federalism's force is symbolic and not truly normative, it quickly becomes a proxy for more compelling substantive views that it happens to support.

Seth Kreimer, Federalism and Freedom, ANNALS OF THE AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCE, *March 2001*

Madison claimed that the diffusion of power between state and federal governments provides a check against "usurpation" analogous to the security provided by separation-of-power principles at the federal level: "The different governments will control each other at the same time that each will be controlled by itself." Hamilton similarly argued: "Power being almost always the rival of power, the general

government will at all times stand ready to check the usurpations of the state governments and these will have the same disposition toward the general government."

This vision seems simplistic because the threats to liberty at the federal level are likely to be supported by some states and opposed by others and "the people" will sometimes be predominantly unprotective of liberty. Still, if even a few states provide greater protection than the federal norm, the existence of alternatives to the authority of the federal government can legitimate political opposition to repression in ways that would be unattainable in the absence of a diffusion of political authority. At a minimum, the existence of alternative political visions makes it more difficult to demonize dissenters. Beyond that, local political bases provide the platform for efforts to oust potentially repressive leaders by political means. From Madison and Jefferson challenging the Alien and Sedition Acts in the legislatures of Kentucky and Virginia, to Ronald Reagan critiquing the Great Society in California, to Bill Clinton, in Arkansas, building a successful challenge to a sitting president, the existence of state-level alternatives to the nationally dominant political orthodoxy has made an electoral challenge to that orthodoxy more likely. The threat of electoral competition is a check on the temptation of political abuse, and the availability of a variety of exemplars of political values in action increases the variety of live choices that citizens may consider at the ballot box.

At the political level, experimentation with policy alternatives will allow the empirical impeachment of claims that liberty will generate a parade of horrors. The fact that recognition of gay couples in Vermont does not wreak havoc with the state's family structure will provide a basis for allowing similar rights in other states. Conversely, if a deprivation of liberty in one state fails to provide the hoped-for benefits, actual experience may bring back the nation to sounder views.

Heather K. Gerken, Distinguished Scholar in Residence Lecture: A User's Guide to Progressive Federalism, 45 HOFSTRA L. REV. 1087 (2017)

I thought it would be most useful to talk about the kinds of tools federalism provides progressives (and conservatives) during a period in which they are out of power. Let's face it, that's what people are talking about these days. So what can progressives do during a period in which they've lost control of the Presidency and Congress? They can take a chapter from conservatives' playbook and use their

control over blue cities and states to shape the national agenda, influence national policy, and encourage political compromise.

One of the features in federalism is how much the federal government depends on states and localities to carry out its policies. The federal government doesn't have enough resources to enforce its own drug laws, carry out its immigration policies, administer its own health care laws, or implement its own environmental policies. Indeed, as the federal government has moved into one traditional state domain after another, it hasn't displaced state government. Instead, the federal government has consistently found it easier to enlist the states' existing administrative apparatuses in the federal project rather than build its own from scratch.

We call these arrangements "cooperative federalism," but we often overlook how many opportunities they create for what Jessica Bulman-Pozen and I term "uncooperative federalism." States serve as the agents of the federal government, and you only have to spend a few days studying administrative law to realize just how powerful an agent can be.

One of the tools of "uncooperative federalism" is simply refusing to partner with the federal government. The GOP-controlled federal government can't put cops on every beat or a bureaucrat at every desk. For instances, states simply refused to carry out parts of the PATRIOT Act. The same is true of immigration policy and environmental regulations. Perhaps the most spectacular example of uncooperative federalism we've seen in recent years has been marijuana enforcement. Federal dependence on states is so pronounced in criminal law that Professor Robert Mikos insists that states can "nullify" federal marijuana law simply by withdrawing enforcement resources, as did Colorado and Washington.

States don't just opt out of federal programs. Sometimes they engage in so-called cooperative regimes but do so begrudgingly. Rather than refuse to carry out federal law, they slow walk it or undermine it from within. Think about what happened to the No Child Left Behind Act, which was to be a signature reform of the Bush Administration. The states manipulated testing standards and put up all manner of roadblocks. Eventually the Bush Administration effectively gave up on the whole enterprise, giving the states so many waivers that the program was essentially gutted.

Uncooperative federalism is often paired with uncooperative localism. We're witnessing a clear example of uncooperative localism right now with the sanctuary city movement. Cities have simply refused to assist with certain homeland security and deportation efforts, and the federal government lacks the staff and resources to

carry out those policies itself. Little wonder that the Trump Administration is so panicked about sanctuary cities that it's threatened to cut off all federal funding to sanctuary cities.

States and localities possess another, important power in "our federalism": spillovers. When one state regulates, it often affects its neighbors. Think, for instance, about who really sets emissions standards in the United States. You'd guess it was the federal EPA. It's not. It's California. California sets higher standards for itself than the federal government has set for the nation. And no car company can afford to ignore those standards because no company can give up on the California market.

There is one, final way in which states can be a tool for progressive values. It creates the necessary conditions for change. When we think about democratic change, we usually look to the First Amendment, not federalism. We forget, however, that federalism and localism play an important role in effecting change. Indeed, social movements have long used state and local policymaking as an organizing tool, a rallying cry, a testing ground for their ideas. The same-sex marriage movement is one of the most recent examples. Proponents of marriage equality used states and localities as staging grounds for organizing and debate. In doing so, they didn't just change policy; they changed how we, as a nation, think about this issue.

We see lots of examples of where core parts of the equality project are pushed through state and local sites. Just think about the work being done on immigration, policing, sentencing, and the living wage movement. National policy, after all, is a *giant* gear to move. As with a clock, you need movement from lots of small, interlocking gears to move a bigger one. Federalism and the First Amendment *are* those interlocking gears. Debate leads to policy, which in turn provides a rallying point for still more debate. Social movements include pragmatic insiders, forging bargains from within, and principled outsiders, demanding more and better from without.

Now let me widen the lens and talk about why federalism should matter to progressives and conservatives alike. Federalism is for everyone. There's nothing inherently progressive or conservative about federalism. Just as we witness uncooperative federalism with regard to sanctuary cities and states, we also saw it with states' resistance to Obamacare. Federalism moves all kinds of debates forward, from gun rights to gay rights. Nothing excuses either side from suiting up and getting into the game of politics.

C. SPECIFIC POWERS OF CONGRESS

1. Introduction

As Chief Justice Roberts explained in *NFIB*, the federal government has **limited powers**, that is, only those powers that the Constitution gives it explicitly or implicitly. By contrast, state governments have general **police powers** that they can exercise unless the Constitution or federal law takes away a particular power. The term "police powers" is a lot broader than it may sound. A state's police powers include not only the power to regulate crime but also to regulate education, health, safety, family relations (marriage, divorce, etc.), and many other activities that affect the day-to-day lives of the state's residents.

This chapter covers Congress's **commerce power**; its **taxing power**; its **spending power**; and its power to enact laws that are **necessary and proper** to accomplish Congress's other powers. The focus of this chapter is on federalism principles: the rules that the Supreme Court has established to preserve a balance of power between the federal government and the states. Chapter 4 examines Congress's foreign affairs powers, such as its power to declare war and to regulate immigration. Chapter 9 examines Congress's powers to enforce the Civil War Amendments, which is the collective term for the Thirteenth, Fourteenth, and Fifteenth Amendments.

2. Congress's commerce power

We begin with Congress's **commerce power**. The Commerce Clause, which is Article I, section 8, clause 3, gives Congress the power "to regulate Commerce … among the several States." That clause may not look like much at first glance, but it is the source of power for a lot of federal laws. Indeed, the authority for many federal civil rights statutes and many federal criminal laws is the combination of the Commerce Clause and the Necessary & Proper Clause—a combination that is often referred to as the commerce power. We will examine the Necessary & Proper Clause more closely after we read the excerpts from the commerce power cases in this subsection.

For the first century of the nation's existence, the Commerce Clause was applied not so much to justify laws enacted by Congress, but to limit state regulation that intruded into the sphere of interstate commerce. The Commerce Clause still functions in this manner, as we will see when we read about limits on state power. When it is applied in this way, it is often referred to as the "negative" or "dormant Commerce Clause," descriptions that are a little confusing but firmly entrenched.

In the late nineteenth century, Congress for the first time undertook broad-scale regulation of commerce. The first major enactments, such as the Interstate Commerce Act of 1887—which regulated the railroad industry—could easily be understood as regulation of interstate commerce. But the Supreme Court began striking down other federal statutes as exceeding Congress's power to regulate interstate commerce.

Matters came to a head with the federal legislation that was enacted as part of President Franklin Delano Roosevelt's "New Deal" in the 1930's. The Supreme Court invalidated several major pieces of legislation as exceeding Congress's Commerce Clause powers. After his landslide reelection in November 1936, FDR proposed the so-called "Court-packing" legislation, which would have given the President power to appoint an additional Justice to the Supreme Court, up to a maximum of six, for every member of the court over the age of 70 years and 6 months. That proposal was a political misstep and did not pass, but it may have had the effect of hastening the departure of some of the justices over the age of 70 years and six months. By the end of January 1941, FDR had appointed seven Supreme Court justices. The last of these was Justice Robert Jackson, who had been FDR's Solicitor General and then Attorney General. Justice Jackson wrote the opinion in *Wickard v. Filburn* (1942) that is excerpted below, which took a broad view of Congress's power to regulate interstate commerce.

By the time *Wickard* was issued, the Court had established what today remains the basic framework for Commerce Clause analysis. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937), the Court upheld the National Labor Relations Act, holding that intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within Congress's power to regulate. In *United States v. Darby*, 312 U.S. 100 (1941), the Court upheld the minimum wage and hours provisions of the Fair Labor Standards Act. And in *Wickard*, the unanimous Court applied those decisions to the Agricultural Adjustment Act, which was a statutory scheme designed to stabilize agricultural production and prices.

As you read the commerce power cases, look for these rules that the Supreme Court decisions have established, which are still good law:

#1. The commerce power allows Congress to regulate three categories of activity:

(1) **Channels** of interstate commerce, such as highways, waterways, and the internet;
(2) **Instrumentalities** of interstate commerce, such as planes, trains, and trucks, as well as **persons or things moving in interstate commerce;**
(3) Activities that **substantially affect** interstate commerce

#2. In deciding whether a federal statute is within category (3), a court will **aggregate** (add up) individual instances of an **economic** activity.

#3. A court will uphold the statute if Congress had a **rational basis** for concluding that **the class** of economic activities as a whole substantially affects interstate commerce.

#4. Congress's power to regulate an activity **includes the power to ban** the activity.

#5. Congress **cannot** use its commerce power to **regulate inactivity**, that is, to compel someone to engage in commerce.

As you read the case excerpts, pay attention to (and include in your case outline) the key facts; the rule(s) that the opinion sets out; and how the Court applied those rule(s) to the facts. You also should focus on (and include in your case outline) how the Court compared and contrasted the facts of the case before it with its earlier cases, such as by distinguishing them or drawing analogies to them. For constitutional law in general, attending to all these aspects of an opinion is the only way to gain a true understanding of a case.

United States v. Lopez, 514 U.S. 549 (1995) (historical excerpt)

*[**Background:** The excerpt below summarizes the historical evolution of the Supreme Court's commerce power doctrine. We will return to Lopez after we read a few of the earlier cases.]*

Chief Justice William REHNQUIST wrote the opinion for the Court:

The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. The Court, through Chief Justice Marshall, first defined the nature of Congress' commerce power in ***Gibbons v. Ogden*, 9 Wheat. 1 (1824)**. The commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed." *Gibbons* acknowledged, however, that the limitations on the commerce power are inherent in the very language of the Commerce Clause:

> It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States.
>
> Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one.... The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State.

For nearly a century thereafter, the Court's Commerce Clause decisions dealt but rarely with the extent of Congress' power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce. Under this line of precedent, the Court held that certain categories of activity such as "production," "manufacturing," and "mining" were within the province of state governments, and thus were beyond the power of Congress under the Commerce Clause.

In 1887, Congress enacted the Interstate Commerce Act, and in 1890, Congress enacted the Sherman Antitrust Act. These laws ushered in a new era of federal regulation under the commerce power. When cases involving these laws first reached this Court, we imported from our negative Commerce Clause cases the approach that Congress could not regulate activities such as "production," "manufacturing," and "mining." In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court struck down regulations that fixed the hours and wages of individuals employed by an intrastate business because the activity being regulated related to interstate commerce only indirectly. In doing so, the Court characterized the distinction between direct and indirect effects of intrastate

transactions upon interstate commerce as "a fundamental one, essential to the maintenance of our constitutional system." Activities that affected interstate commerce directly were within Congress' power; activities that affected interstate commerce indirectly were beyond Congress' reach. The justification for this formal distinction was rooted in the fear that otherwise "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."

Two years later, in the watershed case of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court upheld the National Labor Relations Act against a Commerce Clause challenge, and in the process, departed from the distinction between "direct" and "indirect" effects on interstate commerce. The Court held that intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within Congress' power to regulate.

In *United States v. Darby*, 312 U.S. 100 (1941), the Court upheld the Fair Labor Standards Act. The Court overruled *Schechter Poultry*, stating:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

See also United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942) (the commerce power "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power").

Wickard v. Filburn, 317 U.S. 111 (1942)
(unanimous)

*[**Background:** Farmers were hard hit by the Great Depression. To stabilize the price of crops, Congress enacted the Agricultural Adjustment Act, which put limits on the amounts that a farmer could grow in a particular year and imposed penalties on farmers that exceeded their quotas. There was no serious dispute that Congress could establish such quotas for crops that were sold in interstate markets. The question in Wickard was whether Congress's commerce power allowed it to include wheat that was consumed on the farm rather than sold. Writing for the unanimous Court, Justice Robert Jackson (FDR's former Attorney General) said "yes."]*

Justice Robert JACKSON wrote the opinion for the unanimous Court:

Roscoe Filburn for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding. The intended disposition of the crop here involved has not been expressly stated.

In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, there were established for Filburn's 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels, which under the terms of the Act as amended on May 26, 1941, constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or $117.11 in all.

The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. Within prescribed limits and by prescribed standards the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms. Loans and payments to wheat farmers are authorized in stated circumstances. The Act provides further that whenever it appears that the total supply of wheat as of the

beginning of any marketing year, beginning July 1, will exceed a normal year's domestic consumption and export by more than 35 per cent, the Secretary shall so proclaim not later than May 15 prior to the beginning of such marketing year; and that during the marketing year a compulsory national marketing quota shall be in effect with respect to the marketing of wheat.

It is urged that under the Commerce Clause of the Constitution, Article I, § 8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in *United States v. Darby* sustaining the federal power to regulate production of goods for commerce except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm. The Act includes a definition of "market" and its derivatives so that as related to wheat in addition to its conventional meaning it also means to dispose of "by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of." Hence, marketing quotas not only embrace all that may be sold without penalty but also what may be consumed on the premises. Wheat produced on excess acreage is designated as "available for marketing" as so defined and the penalty is imposed thereon. Penalties do not depend upon whether any part of the wheat either within or without the quota is sold or intended to be sold. The sum of this is that the Federal Government fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty or except it is stored as required by the Act or delivered to the Secretary of Agriculture.

Even if Filburn's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

The parties have stipulated a summary of the economics of the wheat industry. Commerce among the states in wheat is large and important. Although wheat is raised in every state but one, production in most states is not equal to consumption. Sixteen states on average have had a surplus of wheat above their own requirements for feed, seed, and food. Thirty-two states and the District of Columbia, where production has been below consumption, have looked to these surplus-producing states for their supply as well as for wheat for export and carryover.

The wheat industry has been a problem industry for some years. Largely as a result of increased foreign production and import restrictions, annual exports of wheat and

flour from the United States during the ten-year period ending in 1940 averaged less than 10 per cent of total production, while during the 1920's they averaged more than 25 per cent. The decline in the export trade has left a large surplus in production which in connection with an abnormally large supply of wheat and other grains in recent years caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion.

The effect of consumption of homegrown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That Filburn's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Agricultural Adjustment Act was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

It is said, however, that this Act, forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers. It is of the essence of regulation that it lays a restraining hand on the self interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do.

Commentary: The decision in *Wickard* is often described as a case about a farmer's consumption of home-grown wheat and as the farthest extension of the commerce power. The law review article below explains that this account is a considerable oversimplification.

Jim Chen, Filburn's Legacy, 52 EMORY L.J. 1719 (2003)

Contemporary lawyers often believe that Roscoe Filburn converted his excess wheat into home-baked loaves of bread. In reality, the notion that "Farmer Filburn was an organic home baker who had decided to raise wheat for a few loaves of bread" boggles the imagination. To consume the 239 excess bushels at issue in the July 1941 wheat harvest, the Filburns would have had to consume nearly forty-four one-pound loaves of bread each day for the following year. In Filburn's time, farmers fed twenty times more wheat to livestock than they ground into flour for home use. Roscoe Filburn, successful farmer that he was, surely did not stray from this proven path to agricultural profitability.

Transforming a field crop into grocery staples requires nothing more mysterious than the feeding of farm animals. New anthropological evidence suggests that this act, and not the tilling of crop fields, may have been the first step in the development of agriculture. If not as old as civilization, one variant of the practice is at least as old as regulation. By converting excess wheat into milk, meat, poultry, and eggs, the Filburn farm engaged in a time-honored practice of regulated firms: manipulating investments between a regulated line of business (wheat) and nonregulated lines (meat, dairy, poultry, and eggs). The Department of Agriculture responded in like fashion by treating each wheat farmer's total acreage in wheat as a workable surrogate for the "impossible task" of "computing the actual quantity of wheat

marketed by each farmer in the form of wheat or meat." Reliance on acreage limitations allowed the wheat program to control prices and supply not only in the market for the regulated commodity, but also in several derivative product markets. Ironically, the Federal Extension Service, another office within the Department of Agriculture, was exhorting American farmers to feed as much of their wheat crop to livestock, ostensibly to beef up the protein profile of America's wartime diet, but not coincidentally to ease the wheat glut.

What we now call *Filburn*'s "aggregation" doctrine reflects economic reality. The simultaneous, uncoordinated acts of vertically integrated, diversified wheat producers take on a significance vastly outstripping that of any single farmer. Like ants, cities, and the Internet, this segment of twentieth century American agriculture exhibited the "emergent behavior" of a "complex adaptive system." To be sure, neither Filburn nor any other farmer acting alone exercised enough power to affect global prices merely by deciding either to sell wheat or to consume it by integrating wheat production with other on-farm activities. Filburn had to take the market price as he found it; finding the price less than fully satisfactory, he sought an alternative use for his wheat. Such "price taking" has been the farmer's lot in a world dominated by agribusiness purchasers. But each wheat farmer's seemingly discrete act, multiplied across a large population, profoundly affected prices and supplies in the larger market. The relatively inelastic demand for wheat as food and seed transformed on-farm consumption into the legal equivalent of wheat sales on Chicago's Board of Trade, where even the pre-New Deal Court easily discerned that "[s]ales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it." "Untouched, unassailable, undefiled, that mighty world-force, that nourisher of nations, wrapped in Nirvanic calm, indifferent to the human swarm, gigantic, resistless, moved onward in its appointed grooves." Congress unquestionably had the power to regulate this market.

Katzenbach v. McClung, 379 U.S. 294 (1964)
(unanimous)

*[**Background:** Many people assume that most federal civil rights statutes—such as the federal law that prohibits employers from discriminating on the basis of characteristics like race and gender—are exercises of Congress's power to enforce the Equal Protection Clause. But the Equal Protection Clause restricts only government action. It is the commerce power that provides the authority for federal laws that prohibit private employment discrimination.*

In companion cases that were decided the same day in 1964, the Supreme Court unanimously rejected Commerce Clause challenges to different provisions of Title II of the Civil Rights Act of 1964. Under Section 201(a) of the Act, all persons shall be entitled to the full and equal enjoyment of the goods and services of any place of public accommodation without discrimination or segregation on the ground of race, color, religion, or national origin. The term "public accommodation" is defined differently depending on the type of public accommodation that is at issue. In Heart of Atlanta Motel v. United States (1964), the Court upheld the part of a statute that applied to "any inn, hotel, motel, or other establishment which provides lodging to transient guests." In the Katzenbach v. McClung (1964) case that is excerpted below—often referred to as the Ollie's Barbecue case—the Court upheld the part of the statute that applied to any "restaurant" that is "principally engaged in selling food for consumption on the premises" if the restaurant "serves or offers to serve interstate travelers or a substantial portion of the food which it serves" has "moved in [interstate] commerce."

As you read Katzenbach, think about the different strands of reasoning that the Court drew upon in upholding the statute under Congress's commerce power. Are some strands of reasoning broader than others? How do the strands relate to each other? Is each strand sufficient to uphold the statute, or are they all necessary in combination to get to the Court's bottom line that the statute is within Congress's commerce power?]

Mr. Justice CLARK wrote the opinion for the unanimous Court:

Ollie's Barbecue is a family-owned restaurant in Birmingham, Alabama, specializing in barbecued meats and homemade pies, with a seating capacity of 220 customers. It is located on a state highway 11 blocks from an interstate one and a somewhat greater distance from railroad and bus stations. The restaurant caters to a family and

white-collar trade with a take-out service for Negroes. It employs 36 persons, two-thirds of whom are Negroes.

In the 12 months preceding the passage of the Act, the restaurant purchased locally approximately $150,000 worth of food, $69,683 or 46% of which was meat that it bought from a local supplier who had procured it from outside the State. The District Court expressly found that a substantial portion of the food served in the restaurant had moved in interstate commerce. The restaurant has refused to serve Negroes in its dining accommodations since its original opening in 1927, and since July 2, 1964, it has been operating in violation of the Act.

Section 201(a) of Title II commands that all persons shall be entitled to the full and equal enjoyment of the goods and services of any place of public accommodation without discrimination or segregation on the ground of race, color, religion, or national origin; and s 201(b) defines establishments as places of public accommodation if their operations affect commerce or segregation by them is supported by state action. Sections 201(b)(2) and (c) place any “restaurant” that is “principally engaged in selling food for consumption on the premises” under the Act if “it serves or offers to serve interstate travelers or a substantial portion of the food which it serves” has “moved in [interstate] commerce.”

There is no claim that interstate travelers frequented Ollie’s Barbecue. The sole question, therefore, narrows down to whether Title II, as applied to a restaurant annually receiving about $70,000 worth of food which has moved in [interstate] commerce, is a valid exercise of the power of Congress. The Government has contended that Congress had ample basis upon which to find that racial discrimination at restaurants which receive from out of state a substantial portion of the food served does, in fact, impose commercial burdens of national magnitude upon interstate commerce. The appellees’ major argument is directed to this premise. They urge that no such basis existed. It is to that question that we now turn.

As we noted in *Heart of Atlanta Motel*, both Houses of Congress conducted prolonged hearings on the Act. And, as we said there, while no formal findings were made, which of course are not necessary, it is well that we make mention of the testimony at these hearings the better to understand the problem before Congress and determine whether the Act is a reasonable and appropriate means toward its solution. The record is replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants. A comparison of per capita spending by Negroes in restaurants, theaters, and like establishments indicated less spending, after discounting income differences, in areas where discrimination is

widely practiced. This condition, which was especially aggravated in the South, was attributed in the testimony of the Under Secretary of Commerce to racial segregation. See Hearings before the Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess., 695. This diminutive spending springing from a refusal to serve Negroes and their total loss as customers has, regardless of the absence of direct evidence, a close connection to interstate commerce. The fewer customers a restaurant enjoys the less food it sells and consequently the less it buys. S. Rep. No. 872, 88th Cong., 2d Sess., at 19; Senate Commerce Committee Hearings, at 207. In addition, the Attorney General testified that this type of discrimination imposed "an artificial restriction on the market" and interfered with the flow of merchandise. Id., at 18—19. In addition, there were many references to discriminatory situations causing wide unrest and having a depressant effect on general business conditions in the respective communities. See, e.g., Senate Commerce Committee Hearings, at 623—630, 695—700, 1384—1385.

Moreover, there was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes. This resulted, it was said, because discriminatory practices prevent Negroes from buying prepared food served on the premises while on a trip, except in isolated and unkempt restaurants and under most unsatisfactory and often unpleasant conditions. This obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating. Likewise, it was said, that discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there. S. Rep. No. 872, supra, at 18—19.

We believe that this testimony afforded ample basis for the conclusion that established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it.

It goes without saying that, viewed in isolation, the volume of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in commerce. But, as our late Brother Jackson said for the Court in *Wickard v. Filburn*, 317 U.S. 111 (1942):

> That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal

> regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

We noted in *Heart of Atlanta Motel* that a number of witnesses attested to the fact that racial discrimination was not merely a state or regional problem but was one of nationwide scope. Against this background, we must conclude that while the focus of the legislation was on the individual restaurant's relation to interstate commerce, Congress appropriately considered the importance of that connection with the knowledge that the discrimination was but "representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce."

With this situation spreading as the record shows, Congress was not required to await the total dislocation of commerce.

Much is said about a restaurant business being local, but "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Wickard v. Filburn*. The activities that are beyond the reach of Congress are "those which are completely which a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Gibbons v. Ogden*, 9 Wheat. 1, 195 (1824). This rule is as good today as it was when Chief Justice Marshall laid it down almost a century and a half ago.

Congress has determined that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end. The only remaining question—one answered in the affirmative by the court below—is whether the particular restaurant either serves or offers to serve interstate travelers or serves food a substantial portion of which has moved in interstate commerce.

Confronted as we are with the facts laid before Congress, we must conclude that it had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. Insofar as the sections of the Act here relevant are concerned, ss 201(b)(2) and (c), Congress prohibited

discrimination only in those establishments having a close tie to interstate commerce, i.e., those, like the McClungs', serving food that has come from out of the State. We think in so doing that Congress acted well within its power to protect and foster commerce in extending the coverage of Title II only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce.

Perez v. United States, 402 U.S. 146 (1971)
(8-1 vote)

*[**Background:** Perez was convicted of federal "loan sharking" activities, that is, unlawfully using extortionate means in collecting and attempting to collect an extension of credit, in violation of Title II of the Consumer Credit Protection Act. He challenged the statute on the ground that Congress has no power to control the local activity of loan sharking. The Supreme Court upheld his conviction in reasoning that swept quite broadly. But as we'll see when we read Lopez, the Court in Lopez recharacterized Perez in a way that limited its significance.]*

Justice DOUGLAS wrote the opinion for the Court:

The question in this case is whether Title II of the Consumer Credit Protection Act as applied to Perez, is a permissible exercise by Congress of its powers under the Commerce Clause of the Constitution.

Petitioner is one of the species commonly known as 'loan sharks' which Congress found are in large part under the control of 'organized crime.' 'Extortionate credit transactions' are defined as those characterized by the use or threat of the use of 'violence or other criminal means' in enforcement. There was ample evidence showing petitioner was a 'loan shark' who used the threat of violence as a method of collection. He loaned money to one Miranda, owner of a new butcher shop, making a $1,000 advance to be repaid in installments of $105 per week for 14 weeks. After paying at this rate for six or eight weeks, petitioner increased the weekly payment to $130. In two months Miranda asked for an additional loan of $2,000 which was made, the agreement being that Miranda was to pay $205 a week. In a few weeks petitioner increased the weekly payment to $330. When Miranda objected, petitioner told him about a customer who refused to pay and ended up in a hospital. So

Miranda paid. In a few months petitioner increased his demands to $500 weekly which Miranda paid, only to be advised that at the end of the week petitioner would need $1,000. Miranda made that payment by not paying his suppliers; but, faced with a $1,000 payment the next week, he sold his butcher shop. Petitioner pursued Miranda, first making threats to Miranda's wife and then telling Miranda he could have him castrated. When Miranda did not make more payments, petitioner said he was turning over his collections to people who would not be nice but who would put him in the hospital if he did not pay. Negotiations went on, Miranda finally saying he could only pay $25 a week. Petitioner said that was not enough, that Miranda should steal or sell drugs if necessary to get the money to pay the loan, and that if he went to jail it would be better than going to a hospital with a broken back or legs. He added, 'I could have sent you to the hospital, you and your family, any moment I want with my people.'

The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods or of persons who have been kidnaped. Second, protection of the instrumentalities of interstate commerce, as for example, the destruction of an aircraft or persons or things in commerce, as, for example, thefts from interstate shipments. Third, those activities [substantially] affecting commerce. It is with this last category that we are here concerned.

Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.

Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce. In the setting of the present case there is a tie-in between local loan sharks and interstate crime.

The findings by Congress are quite adequate on that ground. The McDade Amendment in the House was adopted. As stated by Congressman McDade it grew out of a 'profound study of organized crime, its ramifications and its implications' undertaken by some 22 Congressmen in 1966—1967. 114 Cong. Rec. 14391. The results of that study were included in a report, The Urban Poor and Organized Crime, submitted to the House on August 29, 1967, which revealed that 'organized crime takes over $350 million a year from America's poor through loan-sharking alone.' See 113 Cong. Rec. 24460—24464. Congressman McDade also relied on The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice (February 1967) which stated that loan

sharking was 'the second largest source of revenue for organized crime,' id., at 189, and is one way by which the underworld obtains control of legitimate businesses. Id., at 190.

The Congress also knew about New York's Report, An Investigation of the Loan Shark Racket (1965). See 114 Cong. Rec. 1428—1431. That report shows the loan shark racket is controlled by organized criminal syndicates, either directly or in partnership with independent operators; that in most instances the racket is organized into three echelons, with the top underworld 'bosses' providing the money to their principal 'lieutenants,' who in turn distribute the money to the 'operators' who make the actual individual loans; that loan sharks serve as a source of funds to bookmakers, narcotics dealers, and other racketeers; that victims of the racket include all classes, rich and poor, businessmen and laborers; that the victims are often coerced into the commission of criminal acts in order to repay their loans; that through loan sharking the organized underworld has obtained control of legitimate businesses, including securities brokerages and banks which are then exploited; and that '(e)ven where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce.'

Shortly before the Conference bill was adopted by Congress a Senate Committee had held hearings on loan sharking and that testimony was made available to members of the House. See 114 Cong. Rec. 14390.

The essence of all these reports and hearings was summarized and embodied in formal congressional findings. They supplied Congress with the knowledge that the loan shark racket provides organized crime with its second most lucrative source of revenue, exacts millions from the pockets of people, coerces its victims into the commission of crimes against property, and causes the takeover by racketeers of legitimate businesses.

We have mentioned in detail the economic, financial, and social setting of the problem as revealed to Congress. We do so not to infer that Congress need make particularized findings in order to legislate. We relate the history of the Act in detail to answer the impassioned plea of petitioner that all that is involved in loan sharking is a traditionally local activity. It appears, instead, that loan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations.

Commentary and questions: For more than fifty years after the Supreme Court decided *Wickard*, the Court did not invalidate any federal statute as beyond the reach of Congress's commerce power. It became conventional wisdom that the Court would never do so. Then came the Rehnquist Court's federalism revolution—a series of cases that established new limits on federal power under various constitutional provisions. In *United States v. Lopez* (1995) and *United States v. Morrison* (2000), the Court struck down two statutes as exceeding Congress's commerce power. When *Lopez* was decided, it was perceived as a major shift in the direction of the commerce power doctrine. But when you read *Lopez*, ask yourselves whether that's a fair characterization. Or did the statutes in *Lopez* and *Morrison* push the limits of Congress's commerce power in a way that wasn't true of the statutes at issue in earlier cases like *Wickard*, *Katzenbach*, and *Perez*? And if there was a federalism revolution, why, then, did the federal government later win *Gonzales v. Raich* (2005), where the statute made it a federal crime to grow marijuana for personal use?

United States v. Lopez, 514 U.S. 549 (1995) (5-4 vote)

*[**Background:** The federal statute at issue in this case made it a crime to possess a firearm in a school zone. The Supreme Court held that the statute exceeded Congress's commerce power. Chief Justice William Rehnquist wrote the opinion for the Court, which was joined by Justices Antonin Scalia, Clarence Thomas, Anthony Kennedy, and Sandra Day O'Connor. Justice Kennedy wrote a separate concurrence, which Justice O'Connor joined. Justice Stephen Breyer wrote the principal dissent, which Justices John Paul Stevens, David Souter, and Ruth Bader Ginsburg joined.]*

Chief Justice REHNQUIST wrote the opinion for the Court:

In the Gun-Free School Zones Act of 1990, Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A). The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "[t]o regulate Commerce ... among the several States...." U.S. Const., Art. I, § 8, cl. 3.

We have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. See, e.g., *Darby*, 312 U.S., at 114; *Heart of Atlanta Motel*, at

256 ("[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. See, e.g., *Southern R. Co. v. United States*, 222 U.S. 20 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez*, at 150 ("for example, the destruction of an aircraft or ... thefts from interstate shipments"). Finally, Congress' commerce authority includes the power to regulate those activities that substantially affect interstate commerce.

We now turn to consider the power of Congress, in the light of this framework, to enact § 922(q) [the Gun Free School Zones Act]. The first two categories of authority may be quickly disposed of: § 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

We have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining, see *Hodel*; intrastate extortionate credit transactions, see *Perez*; restaurants utilizing substantial interstate supplies, see *Katzenbach v. McClung*; inns and hotels catering to interstate guests, see *Heart of Atlanta Motel*; and production and consumption of homegrown wheat, see *Wickard*. These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not. Roscoe Filburn operated a small farm in Ohio, on which, in the year involved, he raised 23 acres of wheat. It was his practice to sow winter wheat in the fall, and after harvesting it in July to sell a portion of the crop, to feed part of it to poultry and livestock on the farm, to use some in making flour for home consumption, and to keep the remainder for seeding future crops. The Secretary of Agriculture assessed a penalty against him under the Agricultural Adjustment Act of 1938 because he harvested about 12 acres more

wheat than his allotment under the Act permitted. The Act was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices, which had previously obtained. The Court said, in an opinion sustaining the application of the Act to Filburn's activity:

> One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. 317 U.S., at 128.

Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms.

First, Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce. [**Note:** The commentary that comes after *United States v. Morrison*, 529 U.S. 598 (2000), explains what it means for a federal regulation to be an essential part of a larger regulation of economic activity.]

Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. [**Note:** The commentary after *Morrison* explains what a jurisdictional element is.]

The Government's essential contention is that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be

expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. See Tr. of Oral Arg. 8-9. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Justice BREYER's dissent focuses, for the most part, on the threat that firearm possession in and near schools poses to the educational process and the potential economic consequences flowing from that threat. Specifically, the dissent reasons that (1) gun-related violence is a serious problem; (2) that problem, in turn, has an adverse effect on classroom learning; and (3) that adverse effect on classroom learning, in turn, represents a substantial threat to trade and commerce. This analysis would be equally applicable, if not more so, to subjects such as family law and direct regulation of education [which are core state police powers].

For instance, if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, a fortiori, it also can regulate the educational process directly. Congress could determine that a school's curriculum has a "significant" effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant "effect on classroom learning," and that, in turn, has a substantial effect on interstate commerce.

The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local**.** This we are unwilling to do.

Justice KENNEDY wrote a concurring opinion, which Justice O'Connor joined:

The constitutional framework has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government. The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses: first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role.

It does not follow, however, that in every instance the Court lacks the authority and responsibility to review congressional attempts to alter the federal balance. This case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution.

Federalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. "In the compound republic of America, the power surrendered

by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison). Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.... In the tension between federal and state power lies the promise of liberty. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.

The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the Federal and State Governments are to control each other, and hold each other in check by competing for the affections of the people, those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. Federalism serves to assign political responsibility, not to obscure it. Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.

To be sure, one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process. Whatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance. For these reasons, it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.

At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often

attendant upon their failure to do so, argue against a complete renunciation of the judicial role.

The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required. As THE CHIEF JUSTICE explains, unlike the earlier cases to come before the Court here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far. If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern. An interference of these dimensions occurs here, for it is well established that education is a traditional concern of the States.

While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.

If a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those measures. Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds.

Other, more practicable means to rid the schools of guns may be thought by the citizens of some States to be preferable for the safety and welfare of the schools those States are charged with maintaining. These might include inducements to inform on violators where the information leads to arrests or confiscation of the guns; programs to encourage the voluntary surrender of guns with some provision for amnesty; penalties imposed on parents or guardians for failure to supervise the child; laws providing for suspension or expulsion of gun-toting students; or programs for expulsion with assignment to special facilities.

The federal statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce

in the ordinary and usual sense of that term. Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference [with state sovereignty] contradicts the federal balance the Framers designed and that this Court is obliged to enforce.

Justice BREYER wrote the principal dissent, which Justices Stevens, Souter, and Ginsburg joined:

To hold this statute constitutional is not to "obliterate" the "distinction between what is national and what is local," nor is it to hold that the Commerce Clause permits the Federal Government to "regulate any activity that it found was related to the economic productivity of individual citizens," to regulate "marriage, divorce, and child custody," or to regulate any and all aspects of education. First, this statute is aimed at curbing a particularly acute threat to the educational process—the possession (and use) of life-threatening firearms in, or near, the classroom. The empirical evidence that I have discussed above unmistakably documents the special way in which guns and education are incompatible. Second, the immediacy of the connection between education and the national economic well-being is documented by scholars and accepted by society at large in a way and to a degree that may not hold true for other social institutions. It must surely be the rare case, then, that a statute strikes at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce.

In sum, a holding that the particular statute before us falls within the commerce power would not expand the scope of that Clause. Rather, it simply would apply preexisting law to changing economic circumstances. See *Heart of Atlanta Motel*. It would recognize that, in today's economic world, gun-related violence near the classroom makes a significant difference to our economic, as well as our social, well-being. Such a holding would permit Congress to act in terms of economic realities, would interpret the commerce power as an affirmative power commensurate with the national needs, and would acknowledge that the commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy.

Commentary: The Supreme Court's decision in *Lopez* caught the federal government by surprise. After all, the Court had not invalidated legislation on Commerce Clause grounds in over half a century, and it perhaps seemed as though there was no real limit on Congress's authority. Certainly, at the oral argument, Solicitor General Drew Days (an excellent lawyer) offered the Supreme Court no

limiting principles that might have cabined the government's theory. These excerpts from the oral argument transcript below are illustrative.

> QUESTION: If this case is one Congress can reach under the interstate commerce power, what would be an example of a case which you couldn't reach?
>
> GENERAL DAYS: Well, Your Honor, I'm not prepared to speculate generally ...
>
> QUESTION: General Days, just to understand what we're talking about, do I correctly understand your position to be that all violent crime, if Congress so desired, could be placed in the Federal court for prosecution, all violent crime, or is there any stopping point? Is there any violent crime that doesn't affect interstate commerce on your rationale?
>
> GENERAL DAYS: Well, Your Honor, I think that the answer is that it may be possible for Congress to do that under the commerce power. Again, one would have to look at was Congress legislating rationally, with a rational basis for thinking that regulating violence would have an impact on interstate commerce, would have—would be the type of activity that affected instate commerce?

United States v. Morrison, 529 U.S. 598 (2000)
(5-4 vote)

*[**Background:** This case addressed the constitutionality of the provision of the Violence Against Women Act that allowed victims of gender-motivated violence (typically rape or domestic violence) to sue the perpetrators for money. That provision was, in essence, a federal tort remedy, which the opinion refers to as the civil remedy in 42 U.S.C. § 13981. The Supreme Court held that this remedy exceeds Congress's commerce power. The same four Justices who dissented in Lopez also dissented in Morrison, but I have not reproduced their dissenting opinions here.]*

Chief Justice Rehnquist wrote the opinion for the Court, which Justices Scalia, Thomas, Kennedy, and O'Connor joined. Justices Souter and Breyer wrote dissents, which Justices Stevens and Ginsburg joined.

Chief Justice REHNQUIST wrote the opinion for the Court:

We consider the constitutionality of 42 U.S.C. § 13981, which provides a federal civil remedy for the victims of gender-motivated violence. The United States Court of Appeals for the Fourth Circuit, sitting en banc, struck down § 13981 because it concluded that Congress lacked constitutional authority to enact the section's civil remedy. Believing that this case is controlled by our decisions in *United States v. Lopez*, 514 U.S. 549 (1995), we affirm.

Petitioner Christy Brzonkala enrolled at Virginia Polytechnic Institute (Virginia Tech) in the fall of 1994. In September of that year, Brzonkala met respondents Antonio Morrison and James Crawford, who were both students at Virginia Tech and members of its varsity football team. Brzonkala alleges that, within 30 minutes of meeting Morrison and Crawford, they assaulted and repeatedly raped her. In language quoted verbatim in the briefs on file with the Court, Morrison and Crawford made debased remarks about what Morrison would do to women, vulgar remarks that cannot fail to shock and offend.

Brzonkala alleges that this attack caused her to become emotionally disturbed and depressed. Shortly after the rape Brzonkala stopped attending classes and withdrew from the university. Brzonkala filed a complaint against respondents under Virginia Tech's Sexual Assault Policy. During the school-conducted hearing on her complaint, Morrison admitted having sexual contact with her despite the fact that she had twice told him "no." After the hearing, Virginia Tech's Judicial Committee found insufficient evidence to punish Crawford, but found Morrison guilty of sexual assault and sentenced him to suspension for two semesters.

Virginia Tech's dean of students upheld the judicial committee's sentence. However, in July 1995, Virginia Tech informed Brzonkala that Morrison intended to initiate a court challenge to his conviction under the Sexual Assault Policy. University officials told her that a second hearing would be necessary to remedy the school's error in prosecuting her complaint under that policy, which had not been widely circulated to students. The university therefore conducted a second hearing under its Abusive Conduct Policy, which was in force prior to the dissemination of the Sexual Assault Policy. Following this second hearing the Judicial Committee again found Morrison guilty and sentenced him to an identical 2–semester suspension. This time, however,

the description of Morrison's offense was, without explanation, changed from "sexual assault" to "using abusive language."

Morrison appealed his second conviction through the university's administrative system. On August 21, 1995, Virginia Tech's senior vice president and provost set aside Morrison's punishment. She concluded that it was "excessive when compared with other cases where there has been a finding of violation of the Abusive Conduct Policy." Virginia Tech did not inform Brzonkala of this decision. After learning from a newspaper that Morrison would be returning to Virginia Tech for the fall 1995 semester, she dropped out of the university.

In December 1995, Brzonkala sued Morrison, Crawford, and Virginia Tech in the United States District Court for the Western District of Virginia. Her complaint alleged that Morrison's and Crawford's attack violated § 13981. Morrison and Crawford moved to dismiss this complaint on the grounds that it failed to state a claim and that § 13981's civil remedy is unconstitutional. The United States intervened to defend § 13981's constitutionality.

In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. But these findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. Congress found that gender-motivated violence affects interstate commerce

> by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; ... by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

Given these findings and petitioners' arguments, the concern that we expressed in Lopez that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial

effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. See, e.g., *Cohens v. Virginia*, 6 Wheat. 264, 426, 428 (Marshall, C.J.) (stating that Congress "has no general right to punish murder committed within any of the States," and that it is "clear ... that congress cannot punish felonies generally"). Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.

Commentary: Before we transition to *Gonzales v. Raich*, 545 U.S. 1 (2005), I am explaining the language that I bolded below in this passage from *Lopez*:

> Section 922(q) [the Gun-Free School Zones Act] is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms.
>
> First, Section 922(q) is **not an essential part of a larger regulation of economic activity**, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

> Second, § 922(q) contains **no jurisdictional element** which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.

What is a **jurisdictional element**? In the context of the commerce power, a jurisdictional element is text in the federal statute that requires proof—in each case—that the activity has an impact on interstate commerce. There are many different forms of jurisdictional elements, so I'm providing some concrete examples to give you a sense of what jurisdictional elements look like (oversimplifying a bit). The federal arson statute makes it a crime to commit arson of *property used in interstate commerce*. The federal kidnapping statute makes kidnapping a crime *if the victim is transported interstate*. The Food, Drug, and Cosmetic Act makes it unlawful to sell a drug that FDA has not approved *in interstate commerce*. The version of Title VII of the Civil Rights Act that we read in *Katzenbach* prohibited race discrimination by a restaurant that "serves or offers to serve interstate travelers or a substantial portion of the food which it serves" has "moved in interstate commerce." (FYI, Title VII was later amended and now covers most private employers with 15 or more employees.) The elements that I have put in italics are jurisdictional elements, which have to be proven with evidence in each case.

What does it mean for a federal regulation to be **"an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated"**? The opinion we read in *Wickard v. Filburn* (1942) is a nice example. The larger regulatory scheme in that case was Congress's regulation of the interstate wheat market. The Supreme Court upheld the particular statutory provision that was at issue in *Wickard*—which made it unlawful to grow excess wheat that was consumed on the farm rather than sold—because Congress's larger effort to stabilize the price of wheat in the interstate market could have been undercut if the federal law did not include wheat consumed on the farm. To be more precise, the Supreme Court upheld that provision because Congress **rationally concluded** that it needed to sweep in home-consumed wheat to avoid undercutting its regulation of the interstate wheat market. The opinion in *Raich* is another important example of how Congress can regulate local conduct as part of a broader scheme to regulate interstate commerce. As you read *Raich*, identify the interstate commerce that Congress is regulating and why regulating the local conduct is a key part of that broader regulation.

Gonzales v. Raich, 545 U.S. 1 (2005)
(6-3 vote)

*[**Background:** The federal Controlled Substances Act (CSA or Act) makes it unlawful to manufacture, distribute, or possess any controlled substance (drug) except as authorized by the CSA. Drugs are grouped together in five different schedules based on their accepted medical uses, the potential for abuse, and their effects on the body. Marijuana is categorized as a schedule 1 drug, which means that it is a federal crime to manufacture, distribute, or possess marijuana, with the sole exception being use of the drug as part of a Food and Drug Administration (FDA) pre-approved research study. The question in Raich was whether the commerce power allows Congress to ban the possession of home-grown marijuana that was not intended for sale. The Supreme Court said "yes."]*

Justice Stevens wrote the opinion of the Court, which Justices Kennedy, Souter, Ginsburg, and Breyer joined. Justice Scalia wrote an opinion concurring in the judgment. Justice O'Connor wrote the principal dissent, which Chief Justice Rehnquist and Justice Thomas joined.

Justice STEVENS wrote the opinion for the Court:

In 1996, California voters passed Proposition 215, now codified as the Compassionate Use Act of 1996. The proposition was designed to ensure that seriously ill residents of the State have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps towards ensuring the safe and affordable distribution of the drug to patients in need. The act creates an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician.

Respondents Angel Raich and Diane Monson are California residents who suffer from a variety of serious medical conditions and have sought to avail themselves of medical marijuana pursuant to the terms of the Compassionate Use Act. They are being treated by licensed, board- certified family practitioners, who have concluded, after prescribing a host of conventional medicines to treat respondents' conditions and to alleviate their associated symptoms, that marijuana is the only drug available that provides effective treatment. Both women have been using marijuana as a medication for several years pursuant to their doctors' recommendation, and both rely heavily on cannabis to function on a daily basis. Indeed, Raich's physician

believes that forgoing cannabis treatments would certainly cause her excruciating pain and could very well prove fatal.

Respondent Monson cultivates her own marijuana, and ingests the drug in a variety of ways including smoking and using a vaporizer. Respondent Raich, by contrast, is unable to cultivate her own, and thus relies on two caregivers, litigating as "John Does," to provide her with locally grown marijuana at no charge. These caregivers also process the cannabis into hashish or keif, and Raich herself processes some of the marijuana into oils, balms, and foods for consumption.

On August 15, 2002, county deputy sheriffs and agents from the federal Drug Enforcement Administration (DEA) came to Monson's home. The county officials concluded that her use of marijuana was entirely lawful as a matter of California law. Nevertheless, after a 3-hour standoff, the federal agents seized and destroyed all six of her cannabis plants.

Respondents thereafter brought this action against the Attorney General of the United States and the head of the DEA seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA), 21 U.S.C. § 801 et seq., to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. Respondents claimed that enforcing the CSA against them would violate the Commerce Clause.

The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels. To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. The CSA categorizes all controlled substances into five schedules. The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body. Each schedule is associated with a distinct set of controls regarding the manufacture, distribution, and use of the substances listed therein. The CSA and its implementing regulations set forth strict requirements regarding registration, labeling and packaging, production quotas, drug security, and recordkeeping.

In enacting the CSA, Congress classified marijuana as a Schedule I drug. Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. These three factors, in varying gradations, are also used to

categorize drugs in the other four schedules. For example, Schedule II substances also have a high potential for abuse which may lead to severe psychological or physical dependence, but unlike Schedule I drugs, they have a currently accepted medical use. By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study.

Respondents do not dispute that passage of the CSA was well within Congress' commerce power. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents' challenge is quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause.

Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. Our decision in *Wickard* is of particular relevance. Filburn argued that even though we had sustained Congress' power to regulate the production of goods for commerce, that power did not authorize "federal regulation of production not intended in any part for commerce but wholly for consumption on the farm." Justice Jackson's opinion for a unanimous Court rejected this submission. He wrote:

> The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

Wickard thus establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.

The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the

Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses ..." and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

More concretely, one concern prompting inclusion of wheat grown for home consumption in the 1938 Act was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market. While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.[29]

> [29] To be sure, the wheat market is a lawful market that Congress sought to protect and stabilize, whereas the marijuana market is an unlawful market that Congress sought to eradicate. This difference, however, is of no constitutional import. It has long been settled that Congress' power to regulate commerce includes the power to prohibit commerce in a particular commodity.

Nonetheless, respondents suggest that *Wickard* differs from this case in three respects: (1) the Agricultural Adjustment Act, unlike the CSA, exempted small farming operations; (2) *Wickard* involved a "quintessential economic activity"—a commercial farm—whereas respondents do not sell marijuana; and (3) the *Wickard* record made it clear that the aggregate production of wheat for use on farms had a significant impact on market prices. Those differences, though factually accurate, do not diminish the precedential force of this Court's reasoning.

The fact that Filburn's own impact on the market was "trivial by itself" was not a sufficient reason for removing him from the scope of federal regulation. Moreover, even though Filburn was indeed a commercial farmer, the activity he was engaged in—the cultivation of wheat for home consumption—was not treated by the Court as part of his commercial farming operation. And while it is true that the record in the Wickard case itself established the causal connection between the production for local use and the national market, we have before us findings by Congress to the same effect.

In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce ... among the several States." U.S. Const., Art. I, § 8. That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

Unlike the activities at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.[36] Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.

> [36] See 16 U.S.C. § 668(a) (bald and golden eagles); 18 U.S.C. § 175(a) (biological weapons); § 831(a) (nuclear material); § 842(n)(1) (certain plastic explosives); § 2342(a) (contraband cigarettes).

The Court of Appeals was able to conclude otherwise only by isolating a "separate and distinct" class of activities that it held to be beyond the reach of federal power, defined as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law." The court characterized this class as "different in kind from drug trafficking." The differences between the members of a class so defined and the principal traffickers in Schedule I substances might be sufficient to justify a policy decision exempting the narrower class from the coverage of the CSA. The question, however, is whether Congress' contrary policy judgment, i.e., its decision to include this narrower "class of activities" within the larger regulatory scheme, was constitutionally deficient. We have no difficulty concluding that Congress acted rationally in determining that none of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA; rather, the subdivided class of activities defined by the Court of Appeals was an essential part of the larger regulatory scheme.

Justice O'CONNOR wrote the principal dissent, which Chief Justice Rehnquist and Justice Thomas joined:

We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court approves an application of the federal Controlled Substances Act that extinguishes that experiment. In so doing, the Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision. That rule and

the result it produces in this case are irreconcilable with our decisions in *Lopez* and *Morrison*.

Commentary and questions: The Supreme Court in *Raich* said the similarities with *Wickard* are striking. But what about the differences? Roscoe Filburn, after all, was a commercial farmer, and, as we've seen, the wheat he kept off the market was used for commercial purposes. If you take *Wickard* and *Raich* together, does it follow that Congress can pass a law that makes it unlawful for anyone to grow tomato plants at home, so that everyone has an incentive to buy tomatoes instead? Imagine that you are hired to challenge the constitutionality of the "No Homegrown Tomatoes" statute. What would you argue, and how would you distinguish *Wickard* and *Raich*?

NFIB v. Sebelius, 567 U.S. 519 (2012) (5-4 vote on the commerce power ruling)

*[**Background:** This case involved constitutional challenges to various provisions of the Patient Protection and Affordable Care Act (aka Obamacare). In this chapter, we read short excerpts that involved three different legal rulings. Two of these rulings involved the same Obamacare provision—known as the "individual mandate"—which required most people either to buy health insurance or else pay a penalty to the IRS. In the excerpt below, Chief Justice Roberts concluded that the individual mandate exceeds Congress's commerce power. The four conservative Justices agreed with him on that point. But in a different excerpt, the Chief Justice concluded that the individual mandate is a valid exercise of Congress's taxing power. The four liberal Justices joined that ruling, which meant that the individual mandate was upheld. That bottom line was a huge win for the federal government. The four conservative Justices were so miffed at the outcome that they refused to join the Chief Justice's commerce power ruling even though they agreed with it. Instead, they wrote a separate dissent that said essentially the same thing about the commerce power.*

Here are some basics about how Obamacare works. Most people in the U.S. get health insurance through an employer or through a government program such as Medicare or Medicaid. But some people don't have access to these types of insurance and, before Obamacare, buying insurance on the "individual market" was difficult and expensive. Insurers would refuse to sell insurance to people with preexisting conditions or charge unaffordable premiums. So, to fix that dysfunctional

individual market, Obamacare included three related provisions: (1) It prohibited insurers from denying coverage or charging higher premiums based on a person's medical history or condition. (2) It provided large federal subsidies ($$) to help people pay for insurance. (3) The individual mandate required everyone to obtain coverage or else pay a tax—otherwise, there would be an incentive for healthy people to wait to get coverage until they were sick, which would destroy the insurance markets. The bottom line of the Chief Justice's opinion below is that the commerce power does not allow Congress to compel people to buy stuff. As you'll see, Justice Ginsburg's dissent does not dispute that proposition as a general matter; instead, she makes an argument based on unique features of the health care market (which was the government's actual argument).]

Opinion of Chief Justice ROBERTS:

The power to regulate commerce presupposes the existence of commercial activity to be regulated. The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. Every day, individuals do not do an infinite number of things. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could potentially make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him.

Wickard has long been regarded as perhaps the most far reaching example of Commerce Clause authority over intrastate activity, but the Government's theory in this case would go much further. Under *Wickard* it is within Congress's power to regulate the market for wheat by supporting its price. But price can be supported by increasing demand as well as by decreasing supply. The aggregated decisions of some consumers not to purchase wheat have a substantial effect on the price of wheat, just as decisions not to purchase health insurance have on the price of insurance. On the Government's logic, Congress could therefore command that those not buying wheat do so, just as it argues here that it may command that those not buying health insurance do so. Indeed, the Government's logic would justify a mandatory purchase to solve almost any problem. To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would

not have been lost on the Framers, who were “practical statesmen,” not metaphysical philosophers.

Justice GINSBURG wrote a dissent, which Justices Breyer, Kagan, and Sotomayor joined:

In enacting the Patient Protection and Affordable Care Act, Congress comprehensively reformed the national market for health-care products and services. By any measure, that market is immense. Collectively, Americans spent $2.5 trillion on health care in 2009, accounting for 17.6% of our Nation’s economy. Unlike the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate. Although every U.S. domiciliary will incur significant medical expenses during his or her lifetime, the time when care will be needed is often unpredictable. An accident, a heart attack, or a cancer diagnosis commonly occurs without warning.

To manage the risks associated with medical care—its high cost, its unpredictability, and its inevitability—most people in the United States obtain health insurance. Many (approximately 170 million in 2009) are insured by private insurance companies. Others, including those over 65 and certain poor and disabled persons, rely on government-funded insurance programs, notably Medicare and Medicaid. Combined, private health insurers and State and Federal Governments finance almost 85% of the medical care administered to U.S. residents.

Not all U.S. residents, however, have health insurance. In 2009, approximately 50 million people were uninsured, either by choice or, more likely, because they could not afford private insurance and did not qualify for government aid. As a group, uninsured individuals annually consume more than $100 billion in healthcare services, nearly 5% of the Nation’s total. Over 60% of those without insurance visit a doctor’s office or emergency room in a given year.

The large number of individuals without health insurance, Congress found, heavily burdens the national health-care market. The cost of emergency care or treatment for a serious illness generally exceeds what an individual can afford to pay on her own. Unlike markets for most products, however, the inability to pay for care does not mean that an uninsured individual will receive no care. Federal and state law, as well as professional obligations and embedded social norms, require hospitals and physicians to provide care when it is most needed, regardless of the patient’s ability to pay. As a consequence, medical-care providers deliver significant amounts of care to the uninsured for which the providers receive no payment. In 2008, for example, hospitals, physicians, and other health-care professionals received no compensation

for $43 billion worth of the $116 billion in care they administered to those without insurance.

Health-care providers do not absorb these bad debts. Instead, they raise their prices, passing along the cost of uncompensated care to those who do pay reliably: the government and private insurance companies. In response, private insurers increase their premiums, shifting the cost of the elevated bills from providers onto those who carry insurance. The net result: Those with health insurance subsidize the medical care of those without it. As economists would describe what happens, the uninsured "free ride" on those who pay for health insurance.

The size of this subsidy is considerable. Congress found that the cost-shifting just described "increases family [insurance] premiums by on average over $1,000 a year." Higher premiums, in turn, render health insurance less affordable, forcing more people to go without insurance and leading to further cost-shifting.

Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce. Not only do those without insurance consume a large amount of health care each year; critically, their inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability. Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to "doing nothing." It is, instead, an economic decision Congress has the authority to address under the Commerce Clause.

Commentary: As you will see when we read about Congress's taxing power, the Supreme Court upheld Obamacare's "individual mandate" as a tax, which was a huge real-world victory for the federal government because it meant that this provision could be implemented. *NFIB*'s commerce power reasoning has not had much real-world significance because Congress ordinarily does not try to regulate inactivity under its commerce power. Still, the commerce power ruling established an important marker in the modern caselaw and gave Congress guidance about what exercises of the commerce power are unlikely to be upheld.

3. Congress's power under the Necessary & Proper Clause

If you skim through the list of Congress's enumerated powers in Article I, section 8, you won't see any references to creating a national bank, establishing a federal prison system, or many other programs that Congress creates by statute. Why can Congress enact such laws?

The answer was supplied more than 200 years ago by Chief Justice Marshall in *McCulloch v. Maryland* (1819). The Necessary & Proper Clause at the very end of Article I, section 8—which allows Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"—allows Congress to enact laws that are **appropriate means** to the accomplishment of its enumerated powers. That holding is still good law.

Important note: The Necessary & Proper Clause is not, standing alone, a source of authority for Congress to enact a law. Instead, the Necessary & Proper Clause is always used in combination with another enumerated power. Think of it as a **helper power**.

McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819)
(unanimous)

*[**Background:** Although this case is more than 200 years old, the principles that it established remain important and are often cited today. The dispute involved the Bank of the United States (aka the National Bank), which Congress established by statute in 1791 and again in 1816, after the 20-year charter for the first Bank had expired.[*

Chief Justice Marshall decided two big questions in *McCulloch*: (1) Did Congress have the power to create the Bank? (2) Could Maryland tax the Bank's operations? The Court said "yes" to question 1 and "no" to question 2. The excerpt below addresses question 1. We'll read an excerpt addressing question 2 when we study limits on state power.

Regarding question 1, here's the gist of the argument that the Bank's opponents made: "Congress has only enumerated powers. The Constitution doesn't say that Congress has the power to create a bank. Therefore, Congress can't create the

Bank." Writing for the Court, Chief Justice Marshall rejected that argument. You should read the excerpt from his opinion closely and map out his reasoning in your notes, because he is one of the best legal thinkers in U.S. history. Paraphrasing here, this is what he says: "Of course Congress can establish a National Bank." Even the strongest opponents of the first Bank (Thomas Jefferson and James Madison) came around by 1816 and supported the second Bank. True, the Constitution doesn't refer specifically to creating a national bank, but that's no surprise. The Constitution enumerates Congress's big substantive powers, such as regulating interstate commerce, taxing, spending, and declaring war. It's implicit, as a matter of common sense and political theory, that Congress also can do the small things—like creating a bank—that are simply means of accomplishing those big ends. The Necessary & Proper Clause makes that power explicit and lets Congress choose any means that are appropriate (aka convenient) to accomplish its enumerated powers, as long as the means are not prohibited by the Constitution.

Chief Justice John MARSHALL wrote the opinion for the unanimous Court:

The power now contested was exercised by the first congress elected under the present constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. After being resisted, first, in the fair and open field of debate, and afterwards, in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure [Jefferson and Madison] of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity, to assert that a measure adopted under these circumstances, was a bold and plain usurpation, to which the constitution gave no countenance.

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only, that the powers "not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole

instrument. The men who drew and adopted the 10th amendment had experienced the embarrassments resulting from the insertion of the word [“expressly”] in the articles of confederation, and probably omitted it, to avoid those embarrassments.

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.

Although, among the enumerated powers of government, we do not find the word “bank” or “incorporation,” we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. It can never be pretended, that these vast powers draw after them others of inferior importance, merely because they are inferior. But the power of creating a corporation [here, the Bank] is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else.

The argument on which most reliance is placed [by those challenging the Bank] is drawn from that peculiar language of the Necessary and Proper Clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be “*necessary and proper*” for carrying them into execution. [Those challenging the Bank argue that] the word “*necessary*” limits the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word “necessary” is always used? Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. A thing may be necessary, very necessary, absolutely or indispensably necessary. The comment on the word is well illustrated

by the passage from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying "imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws," with that which authorizes congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction, that the Constitutional Convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word ["necessary"], then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared, that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of congress. Take, for example, the power "to establish post-offices and post-roads." This power is executed, by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post- office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, too, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences,

is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Commentary: Here's a bit of historical trivia. The whiz kid Alexander Hamilton had lugged around books on economics during the Revolutionary War to prepare to set up a new U.S. government. After the war, President George Washington made Hamilton the first Secretary of the Treasury, and the first Bank of the U.S. was a key component of Hamilton's economic plan. But after Congress passed a law that adopted that plan, President Washington's Attorney General Edmund Randolph and his Secretary of State Thomas Jefferson said Congress had no power to create the Bank. So President Washington turned to Hamilton—a brilliant lawyer as well as an economic genius—and told Hamilton that he needed to write a legal opinion explaining why the Bank was constitutional. Which Hamilton did in 1791. Twenty-eight years later, Chief Justice Marshall's opinion in *McCulloch* drew heavily on Hamilton's legal opinion. And in the 2015 musical *Hamilton*, the original debate over Hamilton's economic plan is reenacted in the song Cabinet Battle #1, which you might enjoy listening to now that you are experts!

Gonzales v. Raich, 545 U.S. 1 (2005)
(Justice Scalia's concurrence)

*[**Background:** We already read the majority's reasoning in this case. Justice Scalia's concurrence is interesting because of the way he relies on McCulloch and the Necessary & Proper Clause. Justice Scalia is not writing for the Court, so you should not treat his opinion as establishing doctrine. Moreover, in the two decades since Raich was decided, the Supreme Court has not adopted his reasoning. Nonetheless, I find his opinion to be a helpful way to think about and make sense of the Supreme Court's modern commerce power cases.]*

Justice SCALIA wrote an opinion concurring in the judgment:

I agree with the Court's holding that the Controlled Substances Act (CSA) may validly be applied to respondents' cultivation, distribution, and possession of marijuana for personal, medicinal use. I write separately because my understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced.

Since *Perez* (1971), our cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. The first two categories are self-evident, since they are the ingredients of interstate commerce itself. The third category, however, is different in kind, and its recitation without explanation is misleading and incomplete.

It is misleading because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. And the category of "activities that substantially affect interstate commerce" is incomplete because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress

may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

Our cases show that the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce in two general circumstances. Most directly, the commerce power permits Congress not only to devise rules for the governance of commerce between States but also to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants. That is why the Court has repeatedly sustained congressional legislation on the ground that the regulated activities had a substantial effect on interstate commerce. See, e.g., *Hodel* (surface coal mining); *Katzenbach* (discrimination by restaurants); *Heart of Atlanta* (discrimination by hotels). *Lopez* and *Morrison* recognized the expansive scope of Congress's authority in this regard: “Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”

This principle is not without limitation. In *Lopez* and *Morrison*, the Court—conscious of the potential of the “substantially affects” test to “obliterate the distinction between what is national and what is local”—rejected the argument that Congress may regulate noneconomic activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences. Thus, although Congress's authority to regulate intrastate activity that substantially affects interstate commerce is broad, it does not permit the Court to “pile inference upon inference” to establish that noneconomic activity has a substantial effect on interstate commerce.

The *Lopez* Court nevertheless recognized that noneconomic activity could be regulated as “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” Where Congress has the authority to enact a regulation of interstate commerce, “it possesses every power needed to make that regulation effective.” Although this power “to make ... regulation effective” commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce, and may in some cases have been confused with that authority, the two are distinct. Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. The Necessary and Proper Clause empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation. See *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

The application of these principles to the case before us is straightforward. In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I

controlled substances, including marijuana. The Commerce Clause unquestionably permits this. The power to regulate interstate commerce extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. To effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I substances—both economic activities (manufacture, distribution, possession with the intent to distribute) and noneconomic activities (simple possession). That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation. Rather, Congress's authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce.

By this measure, I think the regulation must be sustained. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market—and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State. Congress need not accept on faith that state law will be effective in maintaining a strict division between a lawful market for "medical" marijuana and the more general marijuana market. "To impose on Congress the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution." *McCulloch*.

---

4. Congress's taxing power

Article I, section 8, clause 1 provides: "**The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises**, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." The bolded clause is the taxing power. The clause that follows it is the spending power, which we'll turn to next.

The taxing power was very important to the Framers of the Constitution. Under the Articles of Confederation, the Continental Congress had no taxing power and had to rely on states to contribute funds. States often refused, which made it hard to fight the Revolutionary War or pay the war debts. In 1789, Ben Franklin famously wrote: "Our new Constitution is now established, everything seems to promise it will be durable; but, in this world, nothing is certain except death and taxes." The Constitution puts technical limits on taxes, but we're not studying those technical limits in this book. If you're curious, the Supreme Court addressed them in *Moore v. United States*, 602 U.S. 572 (2024).

The Supreme Court cases excerpted below addressed this big question: To what extent can Congress use its taxing power as a *regulatory device*, that is, with the goal of *influencing conduct* as opposed to raising revenue? The Supreme Court has long said it's ok for Congress to use taxes to influence conduct, but that there are limits. To police those limits, the Court invented a multifactor test to distinguish a valid tax from a penalty (aka a punishment). As you read the taxing power rulings in *Bailey v. Drexel Furniture* (1922) (aka the Child Labor Tax Case) and *NFIB* (2012), pay particular attention to (and include in your case outlines): (1) the test (factors) that the Supreme Court uses to distinguish a valid tax from a penalty/punishment; (2) the facts of each case that were relevant to each of those factors; and (3) why the Court came out differently in the two cases.

Bailey v. Drexel Furniture, 259 U.S. 20 (1922)
(aka the Child Labor Tax Case) (8-1 vote)

*[**Background:** Drexel Furniture was assessed a tax for employing a 14-year-old in violation of the federal Child Labor Tax Law. A few years before issuing this decision, the Supreme Court held that the commerce power did not allow Congress to prohibit child labor. In the 1940s, the Court overruled that commerce power case; however, it was good law at the time of this 1922 decision, so the question here was whether this federal law could be upheld as an exercise of Congress's taxing power. The Court said "no," and that reasoning has not been overruled.]*

Chief Justice Taft delivered the opinion of the Court. Justice Clarke dissented.

Chief Justice TAFT wrote the opinion for the Court:

This case presents the question of the constitutional validity of the Child Labor Tax Law. The law is attacked on the ground that it is a regulation of the employment of child labor in the states—an exclusively state function under the federal Constitution and within the reservations of the Tenth Amendment. It is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation conferred by section 8, article 1, of the federal Constitution.

Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty?

This law provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries, children of an age greater than 16 years; in mills and factories, children of an age greater than 14 years, and shall prevent children of less than 16 years in mills and factories from working more than 8 hours a day or 6 days in the week. If an employer departs from this prescribed course of business, he is to pay to the government one-tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs 500 children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. Scienters are associated with penalties, not with taxes. The employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, which is the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates, whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

Out of a proper respect for the acts of a co-ordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject. But in the act before us the presumption of validity cannot prevail. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest,

jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it.

To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states.

Taxes are occasionally imposed by Congress with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses character as such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us.

[The Court distinguished various prior cases.] *United States v. Doremus*, 249 U.S. 86 (1919), involved the validity of the Narcotic Drug Act, which imposed a special tax on the manufacture, importation and sale or gift of opium or cocoa leaves or their compounds or derivatives. The court said that the act could not be declared invalid just because another motive than taxation, not shown on the face of the act, might have contributed to its passage. That case does not militate against the conclusion we have reached in respect to the law now before us. The court, there, made manifest its view that the provisions of the so-called taxing act must be naturally and reasonably adapted to the collection of the tax and not solely to the achievement of some other purpose plainly within state power.

NFIB v. Sebelius, 567 U.S. 519 (2012)
(5-4 vote on this taxing power ruling)

*[**Background:** Like the excerpt from NFIB that we read before, this excerpt addressed Obamacare's individual mandate. But whereas the Chief Justice concluded in the other excerpt that the individual mandate exceeded Congress's commerce power, he concluded here that it was within Congress's taxing power.*

That taxing power ruling got 5 votes—it was joined by the liberal Justices Ginsburg, Breyer, Sotomayor, and Kagan—which is why the individual mandate survived.]

Chief Justice ROBERTS wrote the taxing power ruling for the Court:

Because the Commerce Clause does not support the individual mandate, it is necessary to turn to the Government's second argument: that the mandate may be upheld as within Congress's enumerated power to "lay and collect Taxes." Art. I, § 8, cl. 1.

Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes. See § 5000A(b). That, according to the Government, means the mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax.

The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The "[s]hared responsibility payment," as the statute entitles it, is paid into the Treasury by "taxpayer[s]" when they file their tax returns. 26 U.S.C. § 5000A(b). It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which must assess and collect it "in the same manner as taxes." This process yields the essential feature of any tax: It produces at least some revenue for the Government. Indeed, the payment is expected to raise about $4 billion per year by 2017. Congressional Budget Office, Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act (rev. Apr. 30, 2010).

It is of course true that the Act describes the payment as a "penalty," not a "tax." But that label does not determine whether the payment may be viewed as an exercise of Congress's taxing power. Our precedent reflects this: In 1922, we held that an exaction, although labeled a tax, was not in fact authorized by Congress's taxing power. *Drexel Furniture*. That constitutional question was not controlled by

Congress's choice of label. We have similarly held that exactions not labeled taxes nonetheless were authorized by Congress's power to tax.

Our cases confirm this functional approach. For example, in *Drexel Furniture*, we focused on three practical characteristics of the so-called tax on employing child laborers that convinced us the "tax" was actually a penalty. First, the tax imposed an exceedingly heavy burden—10 percent of a company's net income—on those who employed children, no matter how small their infraction. Second, it imposed that exaction only on those who knowingly employed underage laborers. Such scienter requirements are typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law. Third, this "tax" was enforced in part by the Department of Labor, an agency responsible for punishing violations of labor laws, not collecting revenue.

The same analysis here suggests that the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty. First, for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more. It may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the "prohibitory" financial punishment in *Drexel Furniture*. Second, the individual mandate contains no scienter requirement. Third, the payment is collected solely by the IRS through the normal means of taxation—except that the Service is not allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution. The reasons the Court in *Drexel Furniture* held that what was called a "tax" there was a penalty support the conclusion that what is called a "penalty" here may be viewed as a tax.

None of this is to say that the payment is *not* intended to affect individual conduct. Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage. But taxes that seek to influence conduct are nothing new. Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry. Today, federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking. And we have upheld such obviously regulatory measures as taxes on selling marijuana and sawed-off shotguns. See *United States v. Sanchez*, 340 U.S. 42 (1950); *Sonzinsky v. United States*, 300 U.S. 506 (1937). Indeed, every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. That § 5000A seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power.

In distinguishing penalties from taxes, this Court has explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission." While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance. See Congressional Budget Office, Payments of Penalties, at 71. We would expect Congress to be troubled by that prospect if such conduct were unlawful. That Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws. It suggests instead that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance.

The joint dissenters argue that we cannot uphold § 5000A as a tax because Congress did not "frame" it as such. In effect, they contend that even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be struck down because Congress used the wrong labels. An example may help illustrate why labels should not control here. Suppose Congress enacted a statute providing that every taxpayer who owns a house without energy efficient windows must pay $50 to the IRS. The amount due is adjusted based on factors such as taxable income and joint filing status, and is paid along with the taxpayer's income tax return. Those whose income is below the filing threshold need not pay. The required payment is not called a "tax," a "penalty," or anything else. No one would doubt that this law imposed a tax, and was within Congress's power to tax. That conclusion should not change simply because Congress used the word "penalty" to describe the payment.

There may, however, be a more fundamental objection to a tax on those who lack health insurance. Even if only a tax, the payment under § 5000A(b) remains a burden that the Federal Government imposes for an omission, not an act. If it is troubling to interpret the Commerce Clause as authorizing Congress to regulate those who abstain from commerce, perhaps it should be similarly troubling to permit Congress to impose a tax for not doing something.

Three considerations allay this concern. First, and most importantly, it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity. A "capitation," after all, is a tax that everyone must pay simply for existing, and capitations are expressly contemplated by the Constitution. Art. I, sec. 9, cl. 4. Moreover, Congress's use of the Taxing Clause to encourage buying something is

not new. Tax incentives already promote, for example, purchasing homes and professional educations.

Second, Congress's ability to use its taxing power to influence conduct is not without limits. A few of our cases policed these limits aggressively, invalidating punitive exactions obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority. See, e.g., *Drexel Furniture*. More often and more recently we have declined to closely examine the regulatory motive or effect of revenue-raising measures. We have nonetheless maintained that "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment."

Third, although the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. An individual who disobeys may be subjected to criminal sanctions. Those sanctions can include not only fines and imprisonment, but all the consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes.

By contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it. We do not make light of the severe burden that taxation—especially taxation motivated by a regulatory purpose—can impose. But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice. Of course, individuals do not have a lawful choice not to pay a tax due, and may sometimes face prosecution for failing to do so. But that does not show that the tax restricts the lawful choice whether to undertake or forgo the activity on which the tax is predicated. Those subject to the individual mandate may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes. The only thing they may not lawfully do is not buy health insurance and not pay the resulting tax.

---

5. Congress's spending power

As you just learned, Article I, section 8, clause 1 gives Congress the power to raise revenue through taxes, tariffs, and similar measures. Clause 2 gives Congress the power to raise revenue by borrowing money. What can Congress do with this money? Spend it!

Congress spends trillions of dollars each year. Congress's spending power is also known as Congress's **control of the purse**. In *Biden v. Nebraska*, 143 S. Ct. 235 (2023), the Supreme Court described Congress's control of the purse as one of its "most important" powers.

If you read the text of the Constitution, the spending power is easy to miss because the text doesn't use the word "spend." Article I, section 8, clause 1 gives Congress the power to "lay and collect Taxes, Duties, Imposts, and Excises, **to pay the Debts and provide for the common Defence and general Welfare of the United States**." The bolded language is the spending power. It allows Congress to spend the revenue it raises for the purposes described: to pay the nation's debts and to pay for programs that promote the common defense (military spending) and the general welfare (everything else).

The spending power is especially important because Congress can attach conditions (strings) to federal funds. Each year, Congress gives more than $1 trillion to state and local governments. By attaching conditions to such grants, Congress can use its spending power to *entice* state and local governments to do things that Congress can't *make* them do directly.

Is that power unlimited? Of course not. In *South Dakota v. Dole* (1987), the Supreme Court set out four limits on Congress's power to attach conditions to grants to state and local governments. The Supreme Court also hinted at a fifth limit, which the Court eventually elaborated on in *NFIB* (2012).

Under the *Dole* test, a condition on a federal grant to state or local governments must satisfy all four of these elements:

1. The condition must **promote the general welfare.**
2. The condition must be **clearly stated**.
3. The condition must be **related** (aka **germane**) to the grant's purpose.
4. The condition **cannot induce the state to violate the Constitution**.

In addition to those four elements, the Supreme Court said in *Dole* that a condition should not cross the line from **tempting** a state to comply with the condition to **coercing** it to do so. But at the same time, *Dole* warned: "To hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." What does that mean? It means that drawing the line between temptation and coercion would be very hard for courts to do. That's still true. Although *NFIB* held that the condition at issue in that case was coercive, it's the only case that has ever accepted a coercion-based challenge to a spending condition. Even after *NFIB* was decided, the courts of appeals have repeatedly rejected coercion-based challenges to other grant conditions.

South Dakota v. Dole, 483 U.S. 203 (1987)
(7-2 vote)

*[**Background:** South Dakota challenged a federal statute that conditioned a state's receipt of a portion of federal highway funds (5%) on the state's adoption of a minimum drinking age of 21. The Supreme Court upheld the federal law as a valid exercise of Congress's spending power. Chief Justice Rehnquist wrote the opinion for the Court, joined by Justices White, Marshall, Blackmun, Powell, Stevens, and Scalia. Justices O'Connor and Brennan dissented.]*

Chief Justice REHNQUIST wrote the opinion for the Court:

The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds. The breadth of this power was made clear in *United States v. Butler*, 297 U.S. 1 (1936), where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution. Thus, objectives not thought to be within Article I's enumerated legislative fields may be attained through the use of the spending power and the conditional grant of federal funds.

The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of "the general welfare." In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. The level of deference to the congressional decision is such that the Court has more recently questioned whether "general welfare" is a judicially enforceable restriction at all.

Second, we have required that if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs.

Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.

South Dakota does not claim that § 158 is inconsistent with the first three restrictions mentioned above. We can readily conclude that the provision is designed to serve the general welfare. The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress. And the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel. This goal of the interstate highway system had been frustrated by varying drinking ages among the States. A Presidential commission appointed to study alcohol-related accidents and fatalities on the

Nation’s highways concluded that the lack of uniformity in the States' drinking ages created an incentive to drink and drive because young persons commute to border States where the drinking age is lower. By enacting § 158, Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended.

The “independent constitutional bar” limitation on the spending power is not, as South Dakota suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, it stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action would be an illegitimate exercise of the Congress’ broad spending power. But no such claim can be or is made here. Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State’s action in so doing would not violate the constitutional rights of anyone.

Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which “pressure turns into compulsion.” Here, however, Congress has directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds. Petitioner contends that the coercive nature of this program is evident from the degree of success it has achieved. We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective.

When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact. As we said a half century ago: “To hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties.”

Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory, but in fact. Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in § 158 is a valid use of the spending power.

Justice O'CONNOR wrote a dissenting opinion:

My disagreement with the Court is relatively narrow on the spending power issue: it is a disagreement about the application of a principle rather than a disagreement on the principle itself. I agree with the Court that Congress may attach conditions on the receipt of federal funds to further the federal interest in particular national projects or programs. I also subscribe to the established proposition that the reach of the spending power is not limited by the direct grants of legislative power found in the Constitution. Finally, I agree that there are four separate types of limitations on the spending power: the expenditure must be for the general welfare; the conditions imposed must be unambiguous; they must be reasonably related to the purpose of the expenditure; and the legislation may not violate any independent constitutional prohibition.

But the Court's application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended is cursory and unconvincing. The Court asserts the reasonableness of the relationship between the supposed purpose of the expenditure—"safe interstate travel"—and the drinking age condition. The Court reasons that Congress wishes that the roads it builds may be used safely, that drunken drivers threaten highway safety, and that young people are more likely to drive while under the influence of alcohol under existing law than would be the case if there were a uniform national drinking age of 21. It hardly needs saying, however, that if the purpose of § 158 is to deter drunken driving, it is far too over and under-inclusive. It is over-inclusive because it stops teenagers from drinking even when they are not about to drive on interstate highways. It is under-inclusive because teenagers pose only a small part of the drunken driving problem in this Nation.

When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced.

Commentary: We now shift to the element of coercion. In *Dole*, the Supreme Court "recognized that in some circumstances the financial inducement offered by

Congress might be so coercive as to pass the point at which pressure turns into compulsion." But as you just saw, the Supreme Court rejected South Dakota's argument that losing 5% of its highway grant crossed that line. In addition, the Supreme Court declared that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." In other words, it would be very difficult for courts to draw the line between temptation and coercion. Any large amount of money is hard for a state to give up. How would courts decide when an offer of funds crosses the line from temptation to coercion? Would courts focus on the absolute dollar amount that a state would lose if it doesn't comply with the condition? Would courts consider that amount as a percentage of the total federal grant? As a percentage of a state's budget? And could the same grant condition be deemed coercive as applied to a relatively poor state but tempting as applied to a more affluent state?

The Supreme Court's opinion in *Dole* gave no guidance to lower courts on how to resolve such thorny questions. And, in the 25 years after *Dole* was decided, no court of appeals invalidated any grant condition as coercive. On the contrary, lower courts repeatedly rejected coercion arguments. Summing up the state of affairs, the Tenth Circuit observed:

> The Supreme Court has never employed the coercion theory to invalidate a funding condition, and federal courts have been similarly reluctant to use it. The boundary between incentive and coercion has never been made clear, and courts have found no coercion in situations where similarly large amounts of federal money were at stake. The courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely with a hard choice. We therefore follow the lead of other courts that have explicitly declined to enter this thicket when similar funding conditions have been at issue.

Kansas v. United States, 214 F.3d 1196 (10th Cir. 2000).

The Supreme Court eventually gave additional guidance on coercion in *NFIB*, which you will read next. But you should be careful not to draw the wrong lesson. *NFIB* is the only case in history that found a grant condition to be impermissibly coercive. And even since NFIB was decided, the lower courts have rejected coercion-based challenges to other grant conditions.

NFIB v. Sebelius, 567 U.S. 519 (2012)
(7-2 vote on this spending power ruling)

*[**Background:** The Affordable Care Act (ACA or Obamacare) has many different provisions. We have already read about the individual mandate, which—together with the ACA's new restrictions on health insurance companies and new premium subsidies—was designed to increase access to private insurance. The ACA provision at issue in the excerpt below is different. This provision was designed to increase the number of people covered by Medicaid, which is a government program that provides health insurance for people with very low income.]*

The Medicaid program was first established in 1965 through a federal law that Congress enacted as an exercise of its spending power. The federal law made a gigantic amount of federal money available to states that agree to comply with the program's conditions, which include a requirement that the state pay a portion of health care costs for low-income beneficiaries. The 1965 federal law specified which categories of low-income people must be covered—categories that Congress expanded over time through amendments to the original statute. For example, before the ACA was enacted, the federal law required participating states to cover low-income children, their parents, pregnant women, and adults with severe disabilities. By contrast, states generally did not have to cover childless adults, even if these adults were very poor.

Although no state is required to accept federal Medicaid money, all states do. As part of the ACA, Congress for the first time required participating states to cover all low-income individuals rather than just certain subsets. And the ACA provided that if a state refused to do so, the state would lose *all* its federal Medicaid money. In this part of *NFIB*, the Supreme Court concluded that this so-called "choice" was too coercive because no state could realistically give up all its federal Medicaid money.

The upshot of the Supreme Court's decision was that each state got to choose whether to participate in the ACA's Medicaid expansion. If a state opted out, it would lose only the new federal funds that the ACA made available to cover low-income adults. That new money was very tempting. To date, 41 states (including D.C.) have opted to expand their Medicaid programs and 10 have not.

Chief Justice ROBERTS wrote the spending power ruling for the Court:

Congress's spending power gives the Federal Government considerable influence even in areas where it cannot directly regulate. In exercising its spending power,

Congress may offer funds to the States, and may condition those offers on compliance with specified conditions. These offers may well induce the States to adopt policies that the Federal Government itself could not impose.

The States, however, argue that the ACA's Medicaid expansion is far from the typical case. They object that Congress has crossed the line distinguishing encouragement from coercion, in the way it has structured the funding: Instead of simply refusing to grant the *new* ACA funds to States that will not accept the new conditions, Congress has also threatened to withhold those States' *existing* Medicaid funds. The States claim that this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage.

Given the nature of the threat and the programs at issue here, we must agree. In *South Dakota v. Dole*, we considered a challenge to a federal law that threatened to withhold five percent of a State's federal highway funds if the State did not raise its drinking age to 21. The Court found that the condition was directly related to one of the main purposes for which highway funds are expended—safe interstate travel. At the same time, the condition was not a restriction on how the highway funds—set aside for specific highway improvement and maintenance efforts—were to be used. We accordingly asked whether the financial inducement offered by Congress was "so coercive as to pass the point at which pressure turns into compulsion." We found that the inducement was not impermissibly coercive, because all South Dakota would lose if she adhered to her chosen course as to a suitable minimum drinking age was 5% of her highway funds.

In this case, the financial "inducement" Congress has chosen is much more than "relatively mild encouragement"—it is a gun to the head. A State that opts out of the ACA's expansion in health care coverage stands to lose not merely "a relatively small percentage" of its existing Medicaid funding, but *all* of it. Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs. The threatened loss of over 10 percent of a State's overall budget is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.

Justice GINSBURG claims that *Dole* is distinguishable because here "Congress has not threatened to withhold funds earmarked for any other program" except Medicaid. The ACA's Medicaid expansion, however, accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly

population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.

Commentary: It's easy to be confused by what *NFIB*'s coercion ruling means. Some students (and some attorneys) think that, after *NFIB*, a condition on federal funds will be treated as impermissibly coercive if the state would lose an entire large grant rather than just a small percentage of it. In my view, that's a misreading of the opinion. First, the facts of *NFIB* were quite extreme. As the Chief explained in his opinion, federal grants for traditional Medicaid amounted to *$3 trillion* over a 10-year period. Moreover, such grants often amount to 10% of a state's entire budget.

Second—and equally important—the Chief contrasted the ACA with earlier amendments expanding the Medicaid program. The earlier amendments added requirements the Chief described as minor, such as requiring states cover pregnant women and older children. By contrast, he described the ACA as creating a new healthcare program. He said states would not have anticipated that change when they accepted traditional Medicaid grants and developed the infrastructure for their Medicaid programs. But his opinion made clear that it was OK for Congress to make a state's entire traditional Medicaid grant contingent upon its compliance with minor amendments, like the requirement to cover pregnant women.

I'll wrap up with an interesting question that the Supreme Court has not yet resolved. The big Supreme Court cases on the spending power—*Dole* and *NFIB*—involved federal grants offered to state governments. But often, Congress makes federal funds available to *private entities*, such as private colleges, businesses, and nonprofit organizations. Do the same constraints apply in that context? In my view, the Second Circuit rightly said no. As the Second Circuit explained, the Supreme Court's decisions in *Dole* and *NFIB* were driven by federalism concerns—that is, concerns about the relationship between the federal government and the states. The same concerns do not apply to grants to private recipients. *See Boehringer Ingelheim Pharms., Inc. v. United States Dep't of Health & Hum. Servs.*, 150 F.4th 76, 90 (2d Cir. 2025). So, in my view, courts should not mechanically apply the *Dole* elements (including coercion) to grants to private recipients.

D. FEDERALISM-BASED LIMITS ON STATE POWER

1. Introduction

In Part C above, we learned about various powers that the Constitution gives to the federal government. Now, our attention shifts to various ways that the Constitution limits the powers of state governments. A key principle is the **Supremacy Clause**, which is in Article VI of the Constitution. The Supremacy Clause provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, **shall be the supreme law of the land**; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

In other words, a valid federal law overrides state law if there's a conflict. In this context, "state law" includes anything a state or local government does, whether through a law that's passed by state or local legislature or some other form of state or local policy. "Federal law" includes the Constitution and anything that the federal government does, whether through a federal statute, a treaty, an executive order, an agency rule, or other form of federal policy.

The cases that we are reading in this part illustrate the limits on state power that flow from four different sources: (a) preemption by federal statute; (b) the Privileges and Immunities Clause in Article IV; (c) the Dormant Commerce Clause; and (d) the intergovernmental immunity doctrine. (There are also many limits on state power that flow from the individual-rights provisions of the Constitution, which are covered in Part Two of this book. I'm using the phrase "federalism-based limits on state power" to differentiate the concepts we are studying here from the Constitution's individual-rights provisions.)

(a) *Preemption by federal statute (aka statutory preemption).* A law that Congress enacts can preempt—that is, override—state law. However, Congress instead can choose to allow states to regulate concurrently in a particular area; for example, the federal minimum wage law sets a floor ($7.25 per hour) but does not prevent states from setting a higher minimum wage (such as $15 per hour). The decision whether to preempt state law is Congress's choice. Thus, when courts

analyze whether a federal statute preempts state law, they are trying to figure out if Congress *intended* to preempt state law, using various tools of statutory interpretation.

There are **three forms of statutory preemption**: **express preemption, conflict preemption** (which has two subparts), and **field preemption**. As you learn about these categories, do not lose sight of the big picture. These categories are different ways that courts figure out if Congress intended to preempt state law.

Express preemption means that the text of the federal statute addresses the issue of preemption. For example, Congress might pass a law that directs the Federal Aviation Administration to regulate airplane safety and specifies that "no state may regulate airplane safety" (or other words to that effect). The quoted language would be an express preemption provision. When you read *Wyeth* (2009), keep an eye out for the express preemption provision that's quoted in my bracketed note.

Conflict preemption can occur in either of two ways:

1. **Impossibility preemption.** State law is preempted because it is **impossible** for regulated people or entities to comply with both federal and state law. Impossibility preemption does not happen often, but *PLIVA* (2013) is an example. Your case outline should explain why it was impossible for the drug manufacturer to comply with both federal and state law in that case.

2. **Obstacle preemption.** State law is preempted because it is an **obstacle** to achieving Congress's objectives. Obstacle preemption is common, though it's difficult to predict when a court will deem a state law to be an obstacle to Congress's objectives. *Crosby* (2000) is an example of obstacle preemption. Your case outline should explain why the Massachusetts law was preempted even though regulated entities could comply with federal and state law.

Field preemption is rare. Basically, it means federal law on a particular topic is so detailed that it occupies the field, leaving no room for states to regulate on the same topic. For example, federal law regulates airplane safety in such detail that a court could infer that Congress intended to occupy the field, leaving states with no power to regulate airplane safety. In real-world practice, the line between obstacle preemption and field preemption is fuzzy and there's little reason to worry about the difference. Any good lawyer who makes a field preemption argument will make an obstacle preemption argument too.

(b) *Article IV's Privileges and Immunities (P&I) Clause*. This clause provides that "the Citizens of each State shall be entitled to all Privileges and Immunities of

Citizens in the several States." The Framers intended for this clause to prevent conflicts among states and fuse the nation into a single union. The clause prevents a state from discriminating against *nonresidents*, but only with regard to certain rights (aka privileges) that the Supreme Court perceives as especially important to fusing the nation into a single union. As *Piper* (1985) illustrates, the P&I Clause gives nonresident individuals the right to go to another state for work (such as to practice law). But as *Piper* explains, the P&I Clause does not give nonresidents a right to go into another state for recreation (such as recreational elk-hunting).

There are additional limits on the P&I Clause. The Supreme Court has interpreted it to give rights to *human U.S. citizens* but *not to corporations* or *noncitizens*.

Moreover, even if a human U.S. citizen is asserting a right that the P&I Clause protects (such as the right to work), the clause's protection is not absolute. A state can discriminate against nonresident individuals if it has a **substantial reason** for doing so and there are **no less restrictive means** to advance that state interest. As you read *Piper*, pay close attention to the reasons that New Hampshire offered to defend the challenged restriction and why the Supreme Court rejected each of those arguments.

Note: The Fourteenth Amendment has a Privileges or Immunities Clause, which we'll study in Part Two of this book. You will want to avoid mixing up these two clauses.

(c) *Dormant Commerce Clause*. You will **not** find the Dormant Commerce Clause in the Constitution. Think of it as a negative inference that the Supreme Court has drawn from Congress's affirmative power to regulate interstate commerce. The basic idea is that a state law will be declared unconstitutional if it intrudes too much into the area of interstate commerce. The central theme is that states can't engage in **economic protectionism**, that is, they can't protect in-state businesses by shielding them from out-of-state competition. Like the P&I Clause, the Supreme Court has described the Dormant Commerce Clause as preventing competition among states and helping to fuse the nation into a single union.

In contrast to the P&I Clause, the Dormant Commerce Clause protects both corporations and individuals. Indeed, corporations often bring claims under the Dormant Commerce Clause.

If a state law **discriminates on its face** against out-of-state businesses, it is very likely to be held unconstitutional under the Dormant Commerce Clause. When we say "on its face" (or "facially"), we mean that you can tell from the text of the state law

that it is treating out-of-state businesses worse than in-state businesses. The Supreme Court's decision in ***Granholm* (2005)** is a nice example: it invalidated a New York law that allowed New York wineries to sell directly to consumers but prohibited out-of-state wineries from doing so. If a state law facially discriminates against out-of-state businesses, it may nonetheless be upheld if the state law advances an **important state interest** and the state has **no reasonable alternatives**. The Supreme Court upheld such a discriminatory state law in *Maine v. Taylor* (1986), but that outcome is quite unusual—typically a state loses if its law discriminates on its face against out-of-state businesses.

Even if a state law does not discriminate on its face against out-of-state businesses, it violates the Dormant Commerce Clause if the **burden on out-of-state business is clearly excessive** when compared to the **legitimate interests that the state law serves**. That principle is known as the ***Pike* balancing test** (from a case called *Pike*) and it is illustrated by *Kassel* (1981). But as you will see in *National Pork Producers* (2023), *Pike* balancing can be hard for courts to apply, and there are some Justices who want to abandon or narrow that test. As of now, however, the *Pike* balancing test is still good law.

There are two important exceptions to the Dormant Commerce Clause principles that I just described. First, **Congress can authorize** states to do what otherwise would be a violation of the Dormant Commerce Clause.

Second, a state can favor its own residents if the state is acting as a **market participant**. This exception typically arises when the state buying or paying for something. For instance, if a state is paying for a construction project (like building a bridge), the state can give a hiring preference to in-state contractors. Similarly, if a state-owned utility is selling electric power, the state can give a discount or other preferences to businesses located in the state. There are limits to this exception that prevent a state from leveraging its market participation to affect other markets. The market participant exception may be the reason that state-funded universities can give tuition breaks to their own residents, but the Supreme Court has never decided that question, and this student note argues that such tuition discounts violate the Dormant Commerce Clause. *See* Stephanie Faye Sauer, *Higher Education's Great Divide: Tuition Discrimination and the Dormant Commerce Clause*, 93 GEO. WASH. L. REV. 410 (2025).

(d) *Intergovernmental immunity*. Under this doctrine, states generally cannot regulate the federal government's programs or operations. That principle was first announced by Chief Justice John Marshall in the second part of *McCulloch v.*

Maryland (1819). As you know, the first question in *McCulloch* was whether Congress had the power to establish the National Bank. After answering that question "yes," Chief Justice Marshall turned to the question whether a state (Maryland) could tax the operations of the National Bank. He answered that question "no." Your case outline should walk carefully through his reasoning. The central themes of the opinion remain important today, as you will see in the Supreme Court's decisions in *Term Limits* (1995) and *Trump v. Anderson* (2024). Indeed, the doctrine of intergovernmental immunity is often described as the *McCulloch* principle.

Important note: Someone who doesn't like a law can challenge it under *multiple legal theories*. For instance, they might argue that a state law is preempted by federal statute, that it violates the Privileges & Immunities Clause of Article IV, and that it violates the Dormant Commerce Clause. As an example of how a law can be challenged on multiple legal theories, take a look at footnote 2 in *Piper*. In general, whether you are writing an essay for an exam or representing a client, you will want to consider all possible claims that might be brought, even if you decide that some theories are too weak to include in the essay or complaint.

2. Preemption by federal statute

As the introduction to Part D explained, Congress can enact laws that preempt (override) state law. There are many cases that involve preemption disputes. In part, that's because such cases can have huge economic consequences for regulated entities. Businesses usually prefer to be regulated by one government rather than two, which means they want courts to say that a federal statute preempts additional requirements imposed by state or local law. There is a lot of room for creative lawyering in making (or opposing) preemption arguments, so there is a lot of litigation about preemption.

The three cases excerpted below illustrate different theories of preemption. *Wyeth* (2009) rejected arguments that the state law was preempted on either an impossibility preemption or obstacle preemption theory. *PLIVA* (2013) is one of the rare cases to find state law preempted on an impossibility preemption theory. *Crosby* (2000) found state law preempted under an obstacle preemption theory.

Wyeth v. Levine, 555 U.S. 555 (2009)
(5-4 vote)

*[**Background:** The plaintiff brought a state-law tort claim against a drug manufacturer after she was severely injured by the injection of its drug. The Supreme Court rejected the drug manufacturer's argument that the tort claims were preempted by the federal statute that regulates drug safety. As you read the excerpt, keep an eye out for the express preemption provision and think about why it mattered to the outcome.]*

Justice Stevens wrote the opinion for the Court, which Justices Kennedy, Souter, Ginsburg, and Breyer joined. Justice Alito dissented, joined by Chief Justice Roberts and Justice Scalia.

Justice STEVENS wrote the opinion for the Court:

Directly injecting the drug Phenergan into a patient's vein creates a significant risk of catastrophic consequences. Based on state-law tort claims, a Vermont jury found that petitioner Wyeth, the manufacturer of the drug, had failed to provide an adequate warning of that risk and awarded damages to respondent Diana Levine to compensate her for the amputation of her arm. The warnings on Phenergan's label had been deemed sufficient by the federal Food and Drug Administration (FDA) when it approved Wyeth's new drug application in and when it later approved changes in the drug's labeling.

The question presented is whether federal law preempts Levine's claim that Phenergan's label did not contain an adequate warning about using the IV-push method of administration. Our answer to that question must be guided by two cornerstones of our preemption jurisprudence. First, the purpose of Congress is the ultimate touchstone in every preemption case. Second, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Wyeth makes two separate preemption arguments: first, that it would have been impossible for it to comply with the state-law duty to modify Phenergan's labeling without violating federal law, and second, that recognition of Levine's state tort action creates an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress, because it substitutes a lay jury's decision about drug labeling for the expert judgment of the FDA.

Impossibility preemption is a demanding defense. Wyeth has failed to demonstrate that it was impossible for it to comply with both federal and state requirements. Federal law permitted Wyeth to unilaterally strengthen its warning, and the mere fact that the FDA approved Phenergan's label does not establish that the FDA would have prohibited such a change.

Wyeth also argues that requiring it to comply with a state-law duty to provide a stronger warning about Phenergan would obstruct the purposes and objectives of federal drug labeling regulation. [This is an obstacle preemption theory.] Levine's tort claims, it maintains, are preempted because they interfere with "Congress's purpose to entrust an expert agency to make drug labeling decisions that strike a balance between competing objectives." Wyeth contends that the federal Food, Drug, and Cosmetic Act establishes both a floor and a ceiling for drug regulation: Once the FDA has approved a drug's label, a state-law verdict may not deem the label inadequate, regardless of whether there is any evidence that the FDA has considered the stronger warning at issue.

The most glaring problem with this argument is that all evidence of Congress' purposes is to the contrary. If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express preemption provision at some point during the FDCA's 70–year history. Despite the 1976 enactment of an express preemption provision for medical devices, Congress has not enacted such a provision for prescription drugs.

**[*Note:* *This is the FDCA's express preemption provision for medical devices*:

> (a) General rule
>
> Except as provided in subsection (b), no State or political subdivision of a State may establish or continue in effect with respect to a [medical] device intended for human use any requirement—
>
> (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and
> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.**]**

Congress's silence on the preemption issue in the Act's drug provisions, coupled with its awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness.

Justice ALITO wrote the dissent:

This case illustrates that tragic facts make bad law. The Court holds that a state tort jury, rather than the Food and Drug Administration (FDA), is ultimately responsible for regulating warning labels for prescription drugs. That result cannot be reconciled with general principles of conflict preemption. I respectfully dissent.

Federal law relies on the FDA to make safety determinations like the one it made here. The FDA has long known about the risks associated with IV push in general and its use to administer Phenergan in particular. Whether wisely or not, the FDA has concluded—over the course of extensive, 54–year–long regulatory proceedings—that the drug is "safe" and "effective" when used in accordance with its FDA-mandated labeling.

Under the Federal Food, Drug, and Cosmetic Act (FDCA), a drug manufacturer may not market a new drug before first submitting a new drug application (NDA) to the FDA and receiving the agency's approval. An NDA must contain, among other things, "the labeling proposed to be used for such drug," "full reports of investigations which have been made to show whether or not such drug is safe for use and whether such drug is effective in use," and "a discussion of why the benefits exceed the risks of the drug under the conditions stated in the labeling." The FDA will approve an NDA only if the agency finds, among other things, that the drug is "safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling thereof," there is "substantial evidence that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof," and the proposed labeling is not "false or misleading in any particular."

After the FDA approves a drug, the manufacturer remains under an obligation to investigate and report any adverse events associated with the drug, and must periodically submit any new information that may affect the FDA's previous conclusions about the safety, effectiveness, or labeling of the drug. If the FDA finds that the drug is not "safe" when used in accordance with its labeling, the agency "shall" withdraw its approval of the drug. The FDA also "shall" deem a drug "misbranded" if "it is dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof."

Thus, a drug's warning label serves as the standard under which the FDA determines whether a product is safe and effective. Labeling communicates to health care practitioners the agency's formal, authoritative conclusions regarding the conditions under which the product can be used safely and effectively. Neither the FDCA nor its implementing regulations suggest that juries may second-guess the FDA's labeling decisions.

Where the FDA determines, in accordance with its statutory mandate, that a drug is on balance "safe," our conflict preemption cases prohibit any State from countermanding that determination. It is irrelevant in conflict preemption cases whether Congress "enacted an express pre-emption provision at some point during the FDCA's 70–year history." See *Geier*, 529 U.S., at 869 (holding the absence of an express preemption clause "does not bar the ordinary working of conflict pre-emption principles"). Rather, the ordinary principles of conflict preemption turn solely on whether a State has upset the regulatory balance struck by the federal agency. A faithful application of this Court's conflict preemption cases compels the conclusion that the FDA's 40–year–long effort to regulate the safety and efficacy of Phenergan preempts respondent's tort suit.

PLIVA, Inc. v. Mensing, 564 U.S. 604 (2013)
(5-4 vote)

*[**Background:** Similar to Wyeth, the plaintiffs brought state-law tort claims alleging that a drug manufacturer's label failed to provide adequate warnings. But in contrast to Wyeth, the Supreme Court held that the tort claims were preempted on an impossibility preemption theory. As you read the excerpt, think about why this case came out differently from Wyeth.]*

Justice Thomas wrote the opinion for the Court, which Chief Justice Roberts and Justices Scalia, Alito, and Kennedy joined. Justice Sotomayor dissented, joined by Justices Ginsburg, Breyer, and Kagan.

Justice THOMAS wrote the opinion for the Court:

These lawsuits involve state tort-law claims based on certain drug manufacturers' alleged failure to provide adequate warning labels for generic drug metoclopramide. The question presented is whether federal drug regulations applicable to generic

drug manufacturers directly conflict with, and thus preempt, these state-law claims. We hold that they do.

The Supremacy Clause establishes that federal law "shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. Where state and federal law directly conflict, state law must give way. We have held that state and federal law conflict where it is impossible for a private party to comply with both state and federal requirements.

We find impossibility here. It was not lawful under federal law for the Manufacturers to do what state law required of them. If the Manufacturers had independently changed their labels to satisfy their state-law duty, they would have violated federal law. The plaintiffs argue that state law imposed on the Manufacturers a duty to attach a safer label to their generic metoclopramide. Federal law, however, demanded that generic drug labels be the same as the corresponding brand-name drug labels. Thus, it was impossible for the Manufacturers to comply with both their state-law duty to change the label and their federal-law duty to keep the label the same.

Wyeth is not to the contrary. There, as here, the plaintiff contended that a drug manufacturer had breached a state tort-law duty to provide an adequate warning label. The Court held that the lawsuit was not preempted because it was possible for Wyeth, a brand-name drug manufacturer, to comply with both state and federal law. The federal regulations applicable to Wyeth allowed the company, of its own volition, to strengthen its label in compliance with its state tort duty.

We recognize that from the perspective of plaintiffs Mensing and Demahy, finding preemption here but not in *Wyeth* makes little sense. Had Mensing and Demahy taken Reglan, the brand-name drug prescribed by their doctors, *Wyeth* would control and their lawsuits would not be pre-empted. But because pharmacists, acting in full accord with state law, substituted generic metoclopramide instead, federal law pre-empts these lawsuits. We acknowledge the unfortunate hand that federal drug regulation has dealt Mensing, Demahy, and others similarly situated.

But it is not this Court's task to decide whether the statutory scheme established by Congress is unusual or even bizarre. It is beyond dispute that the federal statutes and regulations that apply to brand-name drug manufacturers are meaningfully different than those that apply to generic drug manufacturers. Indeed, it is the special, and different, regulation of generic drugs that allowed the generic drug market to expand, bringing more drugs more quickly and cheaply to the public. But different federal statutes and regulations may, as here, lead to different preemption

results. We will not distort the Supremacy Clause in order to create similar preemption across a dissimilar statutory scheme. As always, Congress and the FDA retain the authority to change the law and regulations if they so desire.

Justice SOTOMAYOR wrote the dissent:

We have traditionally held defendants claiming impossibility to a demanding standard. The FDA permits generic-drug manufacturers to propose a label change to the FDA when they believe that their labels are inadequate. If it agrees that the labels are inadequate, the FDA can initiate a change to the brand-name label, triggering a corresponding change to the generic labels. Once that occurs, a generic manufacturer is in full compliance with both federal law and a state-law duty to warn. Although generic manufacturers may be able to show impossibility in some cases, petitioners, generic manufacturers of metoclopramide, have shown only that they might have been unable to comply with both federal law and their state-law duties to warn respondents Gladys Mensing and Julie Demahy. This, I would hold, is insufficient to sustain their burden.

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000)
(unanimous)

*[**Background:** Because of human rights violations in Burma (now Myanmar), Massachusetts enacted a law that prohibited its state agencies from doing business with companies that did business with Burma. The Supreme Court held that the state law was preempted on an obstacle preemption theory by a federal law that imposed a different set of sanctions against Burma. Justice Souter wrote the opinion for the unanimous Court. As you read the case, think about why Massachusetts lost even though the goal of its state law was the same as the goal of the federal sanctions statute: to put pressure on Burma to stop violating human rights.]*

Justice SOUTER wrote the opinion for the Court:

The issue is whether the Burma law of the Commonwealth of Massachusetts, restricting the authority of its agencies to purchase goods or services from companies doing business with Burma, is invalid under the Supremacy Clause of the National

Constitution owing to its threat of frustrating federal statutory objectives. We hold that it is.

I.

In June 1996, Massachusetts adopted "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)," The statute generally bars state entities from buying goods or services from any person (defined to include a business organization) identified on a "restricted purchase list" of those doing business with Burma.

In September 1996, three months after the Massachusetts law was enacted, Congress passed a statute imposing a set of mandatory and conditional sanctions on Burma. The federal Act has five basic parts, three substantive and two procedural.

First, it imposes three sanctions directly on Burma. It bans all aid to the Burmese Government except for humanitarian assistance, counternarcotics efforts, and promotion of human rights and democracy. These restrictions are to remain in effect "[u]ntil such time as the President determines and certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government."

Second, the federal Act authorizes the President to impose further sanctions subject to certain conditions. He may prohibit "United States persons" from "new investment" in Burma, and shall do so if he determines and certifies to Congress that the Burmese Government has physically harmed, rearrested, or exiled Daw Aung San Suu Kyi (the opposition leader selected to receive the Nobel Peace Prize), or has committed "large-scale repression of or violence against the Democratic opposition." "New investment" specifically excludes (and thus excludes from any Presidential prohibition) "entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology."

Third, the statute directs the President to work to develop "a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." He is instructed to cooperate with members of the Association of Southeast Asian Nations (ASEAN) and with other countries having major trade and investment interests in Burma to devise such an approach, and to pursue the additional objective of fostering dialogue between the ruling State Law and Order Restoration Council (SLORC) and democratic opposition groups.

As for the procedural provisions of the federal statute, the fourth section requires the President to report periodically to certain congressional committee chairmen on the progress toward democratization and better living conditions in Burma as well as on the development of the required strategy. And the fifth part of the federal Act authorizes the President “to waive, temporarily or permanently, any sanction” under the federal Act “if he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States.”

On May 20, 1997, the President issued the Burma Executive Order, Exec. Order No. 13047, 3 CFR 202 (1997 Comp.). He certified that the Government of Burma had “committed large-scale repression of the democratic opposition in Burma” and found that the Burmese Government's actions and policies constituted “an unusual and extraordinary threat to the national security and foreign policy of the United States,” a threat characterized as a national emergency. The President then prohibited new investment in Burma “by United States persons,” any approval or facilitation by a United States person of such new investment by foreign persons, and any transaction meant to evade or avoid the ban. The order generally incorporated the exceptions and exemptions addressed in the statute. Finally, the President delegated to the Secretary of State the tasks of working with ASEAN and other countries to develop a strategy for democracy, human rights, and the quality of life in Burma, and of making the required congressional reports.

II.

Respondent National Foreign Trade Council (Council) is a nonprofit corporation representing companies engaged in foreign commerce; 34 of its members were on the Massachusetts restricted purchase list in 1998. The Council argued that the state law unconstitutionally infringed on the federal foreign affairs power, violated the Foreign Commerce Clause, and was preempted by the federal Act.

III.

A fundamental principle of the Constitution is that Congress has the power to preempt state law. Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances. When Congress intends federal law to “occupy the field,” state law in that area is preempted. And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute. We will find preemption where it is impossible for a private party to comply with both state and federal law, and where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. What is a sufficient obstacle is a matter of judgment, to be

informed by examining the federal statute as a whole and identifying its purpose and intended effects.

Applying this standard, we see the state Burma law as an obstacle to the accomplishment of Congress's full objectives under the federal Act. We find that the state law undermines the intended purpose and natural effect of at least three provisions of the federal Act.

First, Congress clearly intended the federal Act to provide the President with flexible and effective authority over economic sanctions against Burma. The Act authorized the President to terminate any and all of those measures upon determining and certifying that there had been progress in human rights and democracy in Burma and "to waive, temporarily or permanently, any sanction ... if he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States."

It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action. And that is just what the Massachusetts Burma law would do in imposing a different, state system of economic pressure against the Burmese political regime. The state sanctions are immediate and perpetual, there being no termination provision. This unyielding application undermines the President's intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy when he may choose to take the discretionary action open to him, whether he believes that the national interest requires sanctions to be lifted, or believes that the promise of lifting sanctions would move the Burmese regime in the democratic direction. Quite simply, if the Massachusetts law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence. In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), we used the metaphor of the bargaining chip to describe the President's control of funds valuable to a hostile country; here, the state Act reduces the value of the chips created by the federal statute. It thus stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

In addition, the state statute conflicts with federal law by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions. The state Act, moreover, imposes restrictions on foreign companies as well as domestic, whereas the federal Act limits its reach to United States persons.

The conflicts are not rendered irrelevant by the State's argument that the statutes share the same goals and because some companies may comply with both sets of restrictions. The fact of a common end hardly neutralizes conflicting means, and the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ. Sanctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force.

Finally, the state Act is at odds with the President's intended authority to speak for the United States in developing a "comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." Congress called for Presidential cooperation with members of ASEAN and other countries in developing such a strategy, directed the President to encourage a dialogue between the Government of Burma and the democratic opposition, and required him to report to the Congress on the progress of his diplomatic efforts. Again, the state Act undermines the President's capacity, in this instance for effective diplomacy. It is not merely that the differences between the state and federal Acts in scope and type of sanctions threaten to complicate discussions; they compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments.

The State stresses that Congress was aware of the state Act in 1996, but did not preempt it explicitly when it adopted its own Burma statute. But Congress's failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply.

---

3. The Privileges & Immunities Clause of Article IV

As the introduction explained, the Privileges & Immunities Clause in Article IV prevents a state from denying certain rights to *nonresidents*, such as the right to work in the state. There are far fewer cases involving this clause than there are preemption cases, but the principles that underlie this clause are important. The case below should be near and dear to your hearts as aspiring lawyers.

Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985)
(8-1 vote)

*[**Background:** A Vermont resident challenged a New Hampshire rule that limited bar admission to New Hampshire residents. The Supreme Court held that this limitation violated the Privileges & Immunities Clause of Article IV. Justice Powell wrote the opinion for the Court. Justice Rehnquist dissented. How was this New Hampshire rule different from the familiar requirement to pass a state's bar exam to practice law in that state?]*

Justice POWELL wrote the opinion for the Court:

The Rules of the Supreme Court of New Hampshire limit bar admission to state residents. We here consider whether this restriction violates the Privileges and Immunities Clause of the United States Constitution, Art. IV, § 2.

I

Kathryn Piper lives in Lower Waterford, Vermont, about 400 yards from the New Hampshire border. In 1979, she applied to take the February 1980 New Hampshire bar examination. Piper submitted with her application a statement of intent to become a New Hampshire resident. Following an investigation, the Board of Bar Examiners found that Piper was of good moral character and met the other requirements for admission. She was allowed to take, and passed, the examination. Piper was informed by the Board that she would have to establish a home address in New Hampshire prior to being sworn in.

Piper requested from the Clerk of the New Hampshire Supreme Court a dispensation from the residency requirement. Although she had a "possible job" with a lawyer in Littleton, New Hampshire, Piper stated that becoming a resident of New Hampshire would be inconvenient. Her house in Vermont was secured by a mortgage with a favorable interest rate, and she and her husband recently had become parents. The Clerk informed Piper that her request had been denied. She then formally petitioned the New Hampshire Supreme Court for permission to become a member of the bar. The New Hampshire Supreme Court denied Piper's formal request.

Piper filed this action, alleging that Rule 42 of the New Hampshire Supreme Court, which excludes nonresidents from the bar, violates the Privileges and Immunities Clause of Art. IV, § 2, of the United States Constitution. The District Court concluded

that New Hampshire's residency requirement violated the Privileges and Immunities Clause.[2]

> [2] The District Court did not consider Piper's claims that Rule 42: (i) deprived her of property without due process of law, in violation of the Fourteenth Amendment; (ii) denied her equal protection of the law, in violation of the Fourteenth Amendment; and (iii) placed an undue burden upon interstate commerce, in violation of Art. I, § 8, of the United States Constitution. The Court of Appeals did not address these claims, and our resolution of this case makes it unnecessary for us to reach them.

An evenly divided Court of Appeals for the First Circuit, sitting en banc, affirmed. We now affirm the judgment of the court below.

II

Article IV, § 2, of the Constitution provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This Clause was intended to "fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). Recognizing this purpose, we have held that it is "[o]nly with respect to those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity" that a State must accord residents and nonresidents equal treatment. *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371 (1978). In *Baldwin*, for example, we concluded that a State may charge a nonresident more than it charges a resident for the same elk-hunting license. Because elk hunting is "recreation" rather than a "means of a livelihood," we found that the right to a hunting license was not "fundamental" to the promotion of interstate harmony.

Derived, like the Commerce Clause, from the fourth of the Articles of Confederation, the Privileges and Immunities Clause was intended to create a national economic union. It is therefore not surprising that this Court repeatedly has found that "one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer v. Witsell*, 334 U.S., at 396. In *Ward v. Maryland*, 12 Wall. 418 (1871), the Court invalidated a statute under which nonresidents were required to pay $300 per year for a license to trade in goods not manufactured in Maryland, while resident traders paid a fee varying from $12 to $150. Similarly, in *Toomer*, the Court held that nonresident fishermen could not be required to pay a license fee of $2,500 for each shrimp boat owned when residents were charged only $25 per boat. Finally, in *Hicklin*

v. Orbeck, 437 U.S. 518 (1978), we found violative of the Privileges and Immunities Clause a statute containing a resident hiring preference for all employment related to the development of the State's oil and gas resources. Like the occupations considered in our earlier cases, the practice of law is important to the national economy. The right to practice law is thus protected by the Privileges and Immunities Clause.[5]

> [5] Our holding in this case does not interfere with the ability of the States to regulate their bars. The nonresident who seeks to join a bar must have the same professional and personal qualifications required of resident lawyers. Furthermore, the nonresident member of the bar is subject to the full force of New Hampshire's disciplinary rules.

III

The conclusion that Rule 42 deprives nonresidents of a protected privilege does not end our inquiry. Like many other constitutional provisions, the Privileges and Immunities Clause is not an absolute. The Clause does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective. In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means.

The Supreme Court of New Hampshire offers several justifications for its refusal to admit nonresidents to the bar. It asserts that nonresident members would be less likely (i) to become, and remain, familiar with local rules and procedures; (ii) to behave ethically; (iii) to be available for court proceedings; and (iv) to do pro bono work in the State.[6]

> [6] A former president of the American Bar Association has suggested another possible reason for the rule: "Many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition." Smith, Time for a National Practice of Law Act, 64 A.B.A.J. 557 (1978). This reason is not "substantial." The Privileges and Immunities Clause was designed primarily to prevent such economic protectionism.

We find that none of these reasons meets the test of "substantiality," and that the means chosen do not bear the necessary relationship to the State's objectives.

There is no evidence to support appellant's claim that nonresidents might be less likely to keep abreast of local rules and procedures. Nor may we assume that a nonresident lawyer—any more than a resident—would disserve his clients by failing to familiarize himself with the rules. As a practical matter, we think that unless a lawyer has, or anticipates, a considerable practice in the New Hampshire courts, he would be unlikely to take the bar examination and pay the annual dues of $125.[7]

> [7] Because it is markedly overinclusive, the residency requirement does not bear a substantial relationship to the State's objective. A less restrictive alternative would be to require mandatory attendance at periodic seminars on state practice. There already is a rule requiring all new admittees to complete a "practical skills course" within one year of their admission.

We also find the appellant's second justification to be without merit, for there is no reason to believe that a nonresident lawyer will conduct his practice in a dishonest manner. The nonresident lawyer's professional duty and interest in his reputation should provide the same incentive to maintain high ethical standards as they do for resident lawyers. A lawyer will be concerned with his reputation in any community where he practices, regardless of where he may live. Furthermore, a nonresident lawyer may be disciplined for unethical conduct. The Supreme Court of New Hampshire has the authority to discipline all members of the bar, regardless of where they reside.

There is more merit to the appellant's assertion that a nonresident member of the bar at times would be unavailable for court proceedings. In the course of litigation, pretrial hearings on various matters often are held on short notice. At times a court will need to confer immediately with counsel. Even the most conscientious lawyer residing in a distant State may find himself unable to appear in court for an unscheduled hearing or proceeding. Nevertheless, we do not believe that this type of problem justifies the exclusion of nonresidents from the state bar. One may assume that a high percentage of nonresident lawyers willing to take the state bar examination and pay the annual dues will reside in places reasonably convenient to New Hampshire. Furthermore, in those cases where the nonresident counsel will be unavailable on short notice, the State can protect its interests through less restrictive means. The trial court, by rule or as an exercise of discretion, may require any lawyer who resides at a great distance to retain a local attorney who will be available for unscheduled meetings and hearings.

The final reason advanced by appellant is that nonresident members of the state bar would be disinclined to do their share of pro bono and volunteer work. Perhaps this is

true to a limited extent, particularly where the member resides in a distant location. We think it is reasonable to believe, however, that most lawyers who become members of a state bar will endeavor to perform their share of these services. This sort of participation, of course, would serve the professional interest of a lawyer who practices in the State. Furthermore, a nonresident bar member, like the resident member, could be required to represent indigents and perhaps to participate in formal legal-aid work.

In summary, appellant neither advances a substantial reason for its discrimination against nonresident applicants to the bar, nor demonstrates that the discrimination practiced bears a close relationship to its proffered objectives.

---

4. The Dormant Commerce Clause

The basics of the Dormant Commerce Clause doctrine are described above in the introduction, which you should reread now. As a quick reminder, the Dormant Commerce Clause is the rather clunky name for the idea that the actual Commerce Clause—which gives Congress the affirmative power to regulate interstate commerce—implicitly prevents states from burdening interstate commerce too much. The Supreme Court's decisions have established the rules (tests) used to figure out what counts as "too much." As usual, your case outlines should describe those rules, explain how the Court applied the rules to the facts, and explain how the Court distinguished or built on earlier cases.

Granholm v. Healy, 544 U.S. 460 (2005)
(unanimous in relevant part)

*[**Background:** The state laws that were challenged in Granholm allowed in-state wineries to sell wine directly to consumers, but prohibited out-of-state wineries from doing so. The Supreme Court held that these laws violated the Dormant Commerce Clause. Justice Kennedy wrote the opinion of the Court, which Justices Scalia, Souter, Ginsburg, and Breyer joined. Although there were dissenting Justices, they relied on the Twenty-first Amendment's special provisions regarding alcohol, so I have not included an excerpt from the dissent.]*

Justice KENNEDY wrote the opinion for the Court:

These consolidated cases present challenges to state laws regulating the sale of wine from out-of-state wineries to consumers in Michigan and New York. The details and mechanics of the two regulatory schemes differ, but the object and effect of the laws are the same: to allow in-state wineries to sell wine directly to consumers in that State but to prohibit out-of-state wineries from doing so, or, at the least, to make direct sales impractical from an economic standpoint. It is evident that the object and design of the Michigan and New York statutes is to grant in-state wineries a competitive advantage over wineries located beyond the States' borders. We hold that the laws in both States discriminate against interstate commerce in violation of the Commerce Clause, Art. I, § 8, cl. 3.

Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. This rule is essential to the foundations of the Union. The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States. States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. This mandate "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325–326 (1979).

The rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. States do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests. Rivalries among the States are thus kept to a minimum, and a proliferation of trade zones is prevented.

Laws of the type at issue in the instant cases contradict these principles. They deprive citizens of their right to have access to the markets of other States on equal terms. The perceived necessity for reciprocal sale privileges risks generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid. State laws that protect local wineries have led to the enactment of statutes under which some States

condition the right of out-of-state wineries to make direct wine sales to in-state consumers on a reciprocal right in the shipping State. California, for example, passed a reciprocity law in 1986, retreating from the State's previous regime that allowed unfettered direct shipments from out-of-state wineries. The obvious aim of the California statute was to open the interstate direct-shipping market for the State's many wineries. The current patchwork of laws—with some States banning direct shipments altogether, others doing so only for out-of-state wines, and still others requiring reciprocity—is essentially the product of an ongoing, low-level trade war. Allowing States to discriminate against out-of-state wine invites a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.

We still must consider whether either state regime advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. The States offer two primary justifications for restricting direct shipments from out-of-state wineries: keeping alcohol out of the hands of minors and facilitating tax collection. We consider each in turn.

The States claim that allowing direct shipment from out-of-state wineries undermines their ability to police underage drinking. Minors, the States argue, have easy access to credit cards and the Internet and are likely to take advantage of direct wine shipments as a means of obtaining alcohol illegally.

The States provide little evidence that the purchase of wine over the Internet by minors is a problem. Indeed, there is some evidence to the contrary. A recent study by the staff of the FTC found that the 26 States currently allowing direct shipments report no problems with minors' increased access to wine. This is not surprising for several reasons. First, minors are less likely to consume wine, as opposed to beer, wine coolers, and hard liquor. FTC Report at 12. Second, minors who decide to disobey the law have more direct means of doing so. Third, direct shipping is an imperfect avenue of obtaining alcohol for minors who, in the words of the past president of the National Conference of State Liquor Administrators, "want instant gratification." *Id.* at 33 & n.137 (explaining why minors rarely buy alcohol via the mail or the Internet). Without concrete evidence that direct shipping of wine is likely to increase alcohol consumption by minors, we are left with the States' unsupported assertions. Under our precedents, which require the "clearest showing" to justify discriminatory state regulation, this is not enough.

Even were we to credit the States' largely unsupported claim that direct shipping of wine increases the risk of underage drinking, this would not justify regulations limiting only out-of-state direct shipments. As the wineries point out, minors are just as likely to order wine from in-state producers as from out-of-state ones. Michigan, for

example, already allows its licensed retailers (over 7,000 of them) to deliver alcohol directly to consumers. Michigan counters that it has greater regulatory control over in-state producers than over out-of-state wineries. This does not justify Michigan's discriminatory ban on direct shipping. Out-of-state wineries face the loss of state and federal licenses if they fail to comply with state law. This provides strong incentives not to sell alcohol to minors. In addition, the States can take less restrictive steps to minimize the risk that minors will order wine by mail. For example, the Model Direct Shipping Bill developed by the National Conference of State Legislatures requires an adult signature on delivery and a label so instructing on each package.

The States' tax-collection justification is also insufficient. Increased direct shipping, whether originating in state or out of state, brings with it the potential for tax evasion. While their concerns are not wholly illusory, their regulatory objectives can be achieved without discriminating against interstate commerce. In particular, New York could protect itself against lost tax revenue by requiring a permit as a condition of direct shipping. This is the approach taken by New York for in-state wineries. The State offers no reason to believe the system would prove ineffective for out-of-state wineries.

Michigan and New York offer a handful of other rationales, such as facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability. These objectives can also be achieved through the alternative of an evenhanded licensing requirement. FTC Report 40–41. Finally, it should be noted that improvements in technology have eased the burden of monitoring out-of-state wineries. Background checks can be done electronically. Financial records and sales data can be mailed, faxed, or submitted via e-mail.

In summary, the States provide little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries. Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods. The burden is on the State to show that 'the discrimination is demonstrably justified. The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable. See, e.g., *Maine v. Taylor*, 477 U.S. 131 (1986). Michigan and New York have not satisfied this exacting standard.

Maine v. Taylor, 477 U.S. 131 (1986)
(8-1 vote)

*[**Background:** The Maine law challenged in this case made it unlawful to import live baitfish into Maine. The Supreme Court upheld the Maine law even though it was an express prohibition on interstate commerce. That outcome is quite unusual; the outcome of the more recent Granholm decision is much more typical. But it is useful to see how the Court analyzed Maine's reasons for its discriminatory law. Justice Blackmun wrote the opinion for the Court. Justice Stevens dissented.]*

Justice BLACKMUN wrote the opinion for the Court:

A little fish has caused a commotion. The fish in this case is the golden shiner, a species of minnow commonly used as live bait in sport fishing. Robert Taylor operates a bait business in Maine. Despite a Maine statute prohibiting the importation of live baitfish, he arranged to have 158,000 live golden shiners delivered to him from outside the State. Taylor contends that Maine's import ban unconstitutionally burdens interstate commerce.

The Commerce Clause of the Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade. Maine's statute restricts interstate trade in the most direct manner possible, blocking all inward shipments of live baitfish at the State's border. Still, this fact alone does not render the law unconstitutional. The limitation imposed by the Commerce Clause on state regulatory power is by no means absolute, and the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected.

In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), statutes in the second group are subject to more demanding scrutiny. Once a state law is shown to discriminate against interstate commerce either on its face or in

practical effect, the burden falls on the State to demonstrate both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means.

At the evidentiary hearing on which the District Court based its conclusions upholding the Maine law, three scientific experts testified for the prosecution and one for the defense. The State's experts testified that live baitfish imported into the State posed two significant threats to Maine's unique and fragile fisheries. First, Maine's population of wild fish—including its own indigenous golden shiners—would be placed at risk by three types of parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine. Second, nonnative species inadvertently included in shipments of live baitfish could disturb Maine's aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways.

The State's experts further testified that there was no satisfactory way to inspect shipments of live baitfish for parasites or commingled species. According to their testimony, the small size of baitfish and the large quantities in which they are shipped made inspection for commingled species "a physical impossibility." Parasite inspection posed a separate set of difficulties because the examination procedure required destruction of the fish. Although statistical sampling and inspection techniques had been developed for salmonids (i.e., salmon and trout), so that a shipment could be certified parasite-free based on a standardized examination of only some of the fish, no scientifically accepted procedures of this sort were available for baitfish.

Taylor's expert denied that any scientific justification supported Maine's total ban on the importation of baitfish. He testified that none of the three parasites discussed by the State's witnesses posed any significant threat to fish in the wild, and that sampling techniques had not been developed for baitfish precisely because there was no need for them He further testified that professional baitfish farmers raise their fish in ponds that have been freshly drained to ensure that no other species is inadvertently collected.

Weighing all the testimony, the District Court found that Maine "clearly has a legitimate and substantial purpose in prohibiting the importation of live bait fish," because "substantial uncertainties" surrounded the effects that baitfish parasites would have on the State's unique population of wild fish, and the consequences of introducing nonnative species were similarly unpredictable. Second, the court concluded that less discriminatory means of protecting against these threats were

currently unavailable, and that, in particular, testing procedures for baitfish parasites had not yet been devised. Even if procedures of this sort could be effective, the court found that their development probably would take a considerable amount of time.

We cannot say that the District Court clearly erred in finding that substantial scientific uncertainty surrounds the effect that baitfish parasites and nonnative species could have on Maine's fisheries. Moreover, we agree with the District Court that Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible.

Nor do we think that much doubt is cast on the legitimacy of Maine's purposes by what the Court of Appeals took to be signs of protectionist intent. Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to "simple economic protectionism" consequently have been subject to a "virtually per se rule of invalidity." But there is little reason in this case to believe that the legitimate justifications the State has put forward for its statute are merely a sham or a post hoc rationalization. The fact that Maine allows importation of salmonids, for which standardized sampling and inspection procedures are available, hardly demonstrates that Maine has no legitimate interest in prohibiting the importation of baitfish, for which such procedures have not yet been devised.

Justice STEVENS wrote a dissent:

There is something fishy about this case. Maine is the only State in the Union that blatantly discriminates against out-of-state baitfish by flatly prohibiting their importation. Although golden shiners are already present and thriving in Maine (and, perhaps not coincidentally, the subject of a flourishing domestic industry), Maine excludes golden shiners grown and harvested (and, perhaps not coincidentally sold) in other States. This kind of stark discrimination against out-of-state articles of commerce requires rigorous justification by the discriminating State. When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.

This is not to derogate the State's interest in ecological purity. But the invocation of environmental protection or public health has never been thought to confer some kind of special dispensation from the general principle of nondiscrimination in interstate commerce. If Maine wishes to rely on its interest in ecological preservation, it must show that interest, and the infeasibility of other alternatives, with far greater

specificity. Otherwise, it must further that asserted interest in a manner far less offensive to the notions of comity and cooperation that underlie the Commerce Clause.

Significantly, the Court of Appeals, which is more familiar with Maine's natural resources and with its legislation than we are, was concerned by the uniqueness of Maine's ban. That court felt, as I do, that Maine's unquestionable natural splendor notwithstanding, the State has not carried its substantial burden of proving why it cannot meet its environmental concerns in the same manner as other States with the same interest in the health of their fish and ecology.

Kassel v. Consol. Freightways Corp. of Delaware, 450 U.S. 662 (1981)
(4-2-3 vote)

*[**Background:** This older case illustrates the Pike balancing test. An Iowa law prohibited certain large trucks from using Iowa's highways. The state law did not on its face distinguish between trucks operating in interstate transportation and trucks operating in-state only. However, the burden of the state law fell much more heavily on interstate transportation, particularly given exemptions in the state law. Six Justices concluded that the state law violated the Dormant Commerce Clause. Justice Powell wrote a plurality opinion that Justices White, Blackmun, and Stevens joined. Justices Brennan and Marshall concurred in the result. Justice Rehnquist dissented, joined by Chief Justice Burger and Justice Stewart.]*

Justice POWELL wrote the plurality opinion:

The question is whether an Iowa statute that prohibits the use of certain large trucks within the State unconstitutionally burdens interstate commerce.

I

Appellee Consolidated Freightways Corporation of Delaware (Consolidated) is one of the largest common carriers in the country. It offers service in 48 States under a certificate of public convenience and necessity issued by the Interstate Commerce Commission. Among other routes, Consolidated carries commodities through Iowa

on Interstate 80, the principal east-west route linking New York, Chicago, and the west coast, and on Interstate 35, a major north-south route.

Consolidated mainly uses two kinds of trucks. One consists of a three-axle tractor pulling a 40-foot two-axle trailer. This unit, commonly called a single, or "semi," is 55 feet in length overall. Such trucks have long been used on the Nation's highways. Consolidated also uses a two-axle tractor pulling a single-axle trailer which, in turn, pulls a single-axle dolly and a second single-axle trailer. This combination, known as a double, or twin, is 65 feet long overall. Many trucking companies, including Consolidated, increasingly prefer to use doubles to ship certain kinds of commodities. Doubles have larger capacities, and the trailers can be detached and routed separately if necessary. Consolidated would like to use 65-foot doubles on many of its trips through Iowa.

The State of Iowa, however, by statute restricts the length of vehicles that may use its highways. Unlike all other States in the West and Midwest, Iowa generally prohibits the use of 65-foot doubles within its borders. Instead, most truck combinations are restricted to 55 feet in length. Doubles, mobile homes, trucks carrying vehicles such as tractors and other farm equipment, and singles hauling livestock, are permitted to be as long as 60 feet. Notwithstanding these restrictions, Iowa's statute permits cities abutting the state line by local ordinance to adopt the length limitations of the adjoining State. Where a city has exercised this option, otherwise oversized trucks are permitted within the city limits and in nearby commercial zones.

Iowa also provides for two other relevant exemptions. An Iowa truck manufacturer may obtain a permit to ship trucks that are as large as 70 feet. Permits also are available to move oversized mobile homes, provided that the unit is to be moved from a point within Iowa or delivered for an Iowa resident.

Because of Iowa's statutory scheme, Consolidated cannot use its 65-foot doubles to move commodities through the State. Instead, the company must do one of four things: (i) use 55-foot singles; (ii) use 60-foot doubles; (iii) detach the trailers of a 65-foot double and shuttle each through the State separately; or (iv) divert 65-foot doubles around Iowa.

Dissatisfied with these options, Consolidated filed this suit in the District Court averring that Iowa's statutory scheme unconstitutionally burdens interstate commerce. Iowa defended the law as a reasonable safety measure enacted pursuant to its police power. The State asserted that 65-foot doubles are more dangerous than

55-foot singles and, in any event, that the law promotes safety and reduces road wear within the State by diverting much truck traffic to other States.

In a 14-day trial, both sides adduced evidence on safety, and on the burden on interstate commerce imposed by Iowa's law. On the question of safety, the District Court found that the "evidence clearly establishes that the twin is as safe as the semi." For that reason, "there is no valid safety reason for barring twins from Iowa's highways because of their configuration.

II

It is unnecessary to review in detail the evolution of the principles of Commerce Clause adjudication. The Clause is both a prolific source of national power and an equally prolific source of conflict with legislation of the states. The Clause requires that some aspects of trade generally must remain free from interference by the States. When a State ventures excessively into the regulation of these aspects of commerce, it trespasses upon national interests, and the courts will hold the state regulation invalid under the Clause alone.

The Commerce Clause does not, of course, invalidate all state restrictions on commerce. The extent of permissible state regulation is not always easy to measure. It may be said with confidence, however, that a State's power to regulate commerce is never greater than in matters traditionally of local concern. For example, regulations that touch upon safety—especially highway safety—are those that the Court has been most reluctant to invalidate.

But the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause. This "weighing" by a court requires—and indeed the constitutionality of the state regulation depends on—a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

III

Applying these general principles, we conclude that the Iowa truck-length limitations unconstitutionally burden interstate commerce. In the absence of congressional action to set uniform standards, some burdens associated with state safety regulations must be tolerated. But where, as here, the State's safety interest has been found to be illusory, and its regulations impair significantly the federal interest in

efficient and safe interstate transportation, the state law cannot be harmonized with the Commerce Clause.

Perhaps recognizing the weakness of the evidence supporting its safety argument, and the substantial burden on commerce that its regulations create, Iowa urges the Court simply to "defer" to the safety judgment of the State. It argues that the length of trucks is generally, although perhaps imprecisely, related to safety. The task of drawing a line is one that Iowa contends should be left to its legislature.

The Court normally does accord special deference to state highway safety regulations. This traditional deference derives in part from the assumption that where such regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other States' economic interests, thus ensuring that a State's own political processes will serve as a check against unduly burdensome regulations. Less deference to the legislative judgment is due, however, where the local regulation bears disproportionately on out-of-state residents and businesses. Such a disproportionate burden is apparent here. Iowa's scheme, although generally banning large doubles from the State, nevertheless has several exemptions that secure to Iowans many of the benefits of large trucks while shunting to neighboring States many of the costs associated with their use.

At the time of trial there were two particularly significant exemptions. First, singles hauling livestock or farm vehicles were permitted to be as long as 60 feet. This provision undoubtedly was helpful to local interests. Second cities abutting other States were permitted to enact local ordinances adopting the larger length limitation of the neighboring State. This exemption offered the benefits of longer trucks to individuals and businesses in important border cities without burdening Iowa's highways with interstate through traffic.

The origin of the "border cities exemption" also suggests that Iowa's statute may not have been designed to ban dangerous trucks, but rather to discourage interstate truck traffic. In 1974, the legislature passed a bill that would have permitted 65-foot doubles in the State. Governor Ray vetoed the bill. He said:

> I find sympathy with those who are doing business in our state and whose enterprises could gain from increased cargo carrying ability by trucks. However, with this bill, the Legislature has pursued a course that would benefit only a few Iowa-based companies while providing a great advantage for out-of-state trucking firms and competitors at the expense of our Iowa citizens.

After the veto, the “border cities exemption” was immediately enacted and signed by the Governor.

It is thus far from clear that Iowa was motivated primarily by a judgment that 65-foot doubles are less safe than 55-foot singles. Rather, Iowa seems to have hoped to limit the use of its highways by deflecting some through traffic. In the District Court and Court of Appeals, the State explicitly attempted to justify the law by its claimed interest in keeping trucks out of Iowa. The Court of Appeals correctly concluded that a State cannot constitutionally promote its own parochial interests by requiring safe vehicles to detour around it.

In sum, the statutory exemptions, their history, and the arguments Iowa has advanced in support of its law in this litigation, all suggest that the deference traditionally accorded a State’s safety judgment is not warranted. Because Iowa has imposed this burden without any significant countervailing safety interest, its statute violates the Commerce Clause.

National Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023) (splintered vote)

*[**Background:** The California law challenged in this case made it unlawful to sell in California pork products that came from pigs that were cruelly confined (such as in very small pens). Although this California law applies regardless of whether the pigs were confined in California or in other states, nearly all pork production occurs in other states. In a splintered decision, the Court rejected the argument that the California law violates the Dormant Commerce Clause. There was so much disagreement about the reasoning that this case doesn’t establish any clear legal principles, but your case summary should describe the reasons that different Justices gave for saying the California law should be upheld or struck down. Justice Gorsuch announced the judgment of the Court and delivered the opinion of the Court, except as to Parts IV–B, IV–C, and IV–D. Justice Sotomayor filed an opinion concurring in part, in which Justice Kagan joined. Justice Amy Coney Barrett filed an opinion concurring in part. Chief Justice Roberts filed an opinion concurring in part and dissenting in part, in which Justices Alito, Kavanaugh, and Ketanji Brown Jackson joined. Justice Kavanaugh filed an opinion concurring in part and dissenting in part.]*

Justice GORSUCH wrote for the Court except in Parts IV-B, IV-C, and IV-D:

What goods belong in our stores? Usually, consumer demand and local laws supply some of the answer. Recently, California adopted just such a law banning the in-state sale of certain pork products derived from breeding pigs confined in stalls so small they cannot lie down, stand up, or turn around. In response, two groups of out-of-state pork producers filed this lawsuit, arguing that the law unconstitutionally interferes with their preferred way of doing business in violation of this Court's dormant Commerce Clause precedents. Both the district court and court of appeals dismissed the producers' complaint for failing to state a claim.

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

I

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

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

Arizona, Maine, Michigan, Oregon, and Rhode Island, too, have laws regulating animal confinement practices within their borders.

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

A spirited debate preceded the vote on Proposition 12. Proponents observed that, in some farming operations, pregnant pigs remain “encased” for 16 weeks in “fit-to-size” metal crates. These animals may receive their only opportunity for exercise when they are moved to a separate barn to give birth and later returned for another 16 weeks of pregnancy confinement—with the cycle repeating until the pigs are slaughtered. Proponents hoped that Proposition 12 would go a long way toward eliminating pork sourced in this manner “from the California marketplace.” Proponents also suggested that the law would have health benefits for consumers because “packing animals in tiny, filthy cages increases the risk of food poisoning.”

Opponents pressed their case in strong terms too. They argued that existing farming practices did a better job of protecting animal welfare (for example, by preventing pig-on-pig aggression) and ensuring consumer health (by avoiding contamination) than Proposition 12 would. See Voter Guide 70–71. They also warned voters that Proposition 12 would require some farmers and processors to incur new costs. Ones that might be “passed through” to California consumers.

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

In support of that legal claim, petitioners pleaded a number of facts. They acknowledged that, in response to consumer demand and the laws of other States, 28% of their industry has already converted to some form of group housing for pregnant pigs. But, petitioners cautioned, even some farmers who already raise group-housed pigs will have to modify their practices if they wish to comply with

Proposition 12. Much of pork production today is vertically integrated, too, with farmers selling pigs to large processing firms that turn them into different "cuts of meat" and distribute the "different parts ... all over to completely different end users." Revising this system to segregate and trace Proposition 12-compliant pork, petitioners alleged, will require certain processing firms to make substantial new capital investments. Ultimately, petitioners estimated that "compliance with Proposition 12 will increase production costs" by "9.2% ... at the farm level." These compliance costs will fall on California and out-of-state producers alike. But because California imports almost all the pork it consumes, petitioners emphasized, "the majority" of Proposition 12's compliance costs will be initially borne by out-of-state firms.

After considerable motions practice, the district court held that petitioners' complaint failed to state a claim as a matter of law and dismissed the case. The Ninth Circuit affirmed. Petitioners sought certiorari and we agreed to consider the complaint's legal sufficiency for ourselves.

II

The Constitution vests Congress with the power to "regulate Commerce ... among the several States." Art. I, § 8, cl. 3. Everyone agrees that Congress may seek to exercise this power to regulate the interstate trade of pork, much as it has done with various other products. Everyone agrees, too, that congressional enactments may preempt conflicting state laws. See Art. VI, cl. 2. But everyone also agrees that we have nothing like that here. Despite the persistent efforts of certain pork producers, Congress has yet to adopt any statute that might displace Proposition 12 or laws regulating pork production in other States.

That has led petitioners to resort to litigation, pinning their hopes on what has come to be called the dormant Commerce Clause. Reading between the Constitution's lines, this Court has held that the Commerce Clause not only vests Congress with the power to regulate interstate trade; the Clause also contains a further, negative command, one effectively forbidding the enforcement of certain state economic regulations even when Congress has failed to legislate on the subject. This Court held that state laws offend the Commerce Clause when they seek to "build up ... domestic commerce" through "burdens upon the industry and business of other States," regardless of whether Congress has spoken. *Guy v. Baltimore*, 100 U.S. 434, 443 (1880). At the same time, though, the Court reasoned that, absent discrimination, "a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to" the interests of its citizens. *Ibid*.

Today, this antidiscrimination principle lies at the very core of our dormant Commerce Clause jurisprudence. In its modern cases, this Court has said that the Commerce Clause prohibits the enforcement of state laws "driven by ... 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–338 (2008).

Petitioners begin in a tough spot. They do not allege that California's law seeks to advantage in-state firms or disadvantage out-of-state rivals. In fact, petitioners disavow any discrimination-based claim, conceding that Proposition 12 imposes the same burdens on in-state pork producers that it imposes on out-of-state ones.

IV

Petitioners retreat to an argument they associate with *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under *Pike*, they say, a court must at least assess "'the burden imposed on interstate commerce'" by a state law and prevent its enforcement if the law's burdens are "'clearly excessive in relation to the putative local benefits.'" Petitioners then rattle off a litany of reasons why they believe the benefits Proposition 12 secures for Californians do not outweigh the costs it imposes on out-of-state economic interests. We see problems with this theory too.

[**Note:** The following parts of Justice's Gorsuch opinion did not get 5 votes and therefore did not establish a holding of the Supreme Court.]

B

Petitioners urge us to read *Pike* as authorizing judges to strike down duly enacted state laws regulating the in-state sale of ordinary consumer goods (like pork) based on nothing more than their own assessment of the relevant law's "costs" and "benefits." That we can hardly do. Our cases have expressly cautioned against judges using the dormant Commerce Clause as "a roving license for federal courts to decide what activities are appropriate for state and local government to undertake."

This case illustrates the problem. On the "cost" side of the ledger, petitioners allege they will face increased production expenses because of Proposition 12. On the "benefits" side, petitioners acknowledge that Californians voted for Proposition 12 to vindicate a variety of interests, many noneconomic. See App. to Pet. for Cert. 192a (alleging in their complaint that "Proposition 12's requirements were driven by [a] conception of what qualifies as 'cruel' animal housing" and by the State's concern for the "'health and safety of California consumers'"). How is a court supposed to compare or weigh economic costs (to some) against noneconomic benefits (to

others)? No neutral legal rule guides the way. The competing goods before us are insusceptible to resolution by reference to any juridical principle. Really, the task is like being asked to decide "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment).

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

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

More accurately, your guess is better than ours. In a functioning democracy, policy choices like these usually belong to the people and their elected representatives. They are entitled to weigh the relevant political and economic costs and benefits for themselves, and "try novel social and economic experiments" if they wish, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). If, as petitioners insist, California's law really does threaten a "massive" disruption of the pork industry—if pig husbandry really does demand a single uniform nationwide rule—they are free to petition Congress to intervene. Under the (wakeful) Commerce Clause, that body enjoys the power to adopt federal legislation that may preempt conflicting state laws. That body is better equipped than this Court to identify and assess all the pertinent economic and political interests at play across the country. And that body is certainly better positioned to claim democratic support for any policy choice it may make.

C

Even as petitioners conceive *Pike*, they face a problem. As they read it, *Pike* requires a plaintiff to plead facts plausibly showing that a challenged law imposes "substantial

burdens" on interstate commerce before a court may assess the law's competing benefits or weigh the two sides against each other. And the complaint before us fails to clear even that bar.

Under Proposition 12, farmers have a choice: they may provide all their pigs the space the law requires; they may segregate their operations to ensure pork products entering California meet its standards; or they may withdraw from California's market. The complaint also acknowledges that many producers have already converted to some form of group housing, even if they have not all yet met Proposition 12's standards, and other out-of-state competitors seeking to enhance their own profits may choose to modify their existing operations or create new ones to fill the void. Of course, as the complaint alleges, a shift from one set of production methods to another promises some costs. But the complaint concedes that complying producers will be able to pass along at least some of their increased costs to California consumers. And no one thinks that costs ultimately borne by in-state consumers thanks to a law they adopted counts as a cognizable harm under our dormant Commerce Clause precedents.

Today, many States prohibit the sale of horsemeat for human consumption. These prohibitions harm the interstate market for horsemeat by denying outlets for its sale. Not only that, they distort the market for animal products more generally by pressuring horsemeat manufacturers to transition to different products, ones they can lawfully sell nationwide. Under the lead dissent's test, all it would take is one complaint from an unhappy out-of-state producer and—presto—the Constitution would protect the sale of horsemeat. Just find a judge anywhere in the country who considers the burden to producers "excessive." The same would go for all manner of consumer products currently banned by some States but not by others—goods ranging from fireworks, to single-use plastic grocery bags. Rather than respecting federalism, a rule like that would require any consumer good available for sale in one State to be made available in every State.

Justice Amy Coney BARRETT concurred in part:

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

But to weigh benefits and burdens, it is axiomatic that both must be judicially cognizable and comparable. I agree with Justice GORSUCH that the benefits and burdens of Proposition 12 are incommensurable. California's interest in eliminating allegedly inhumane products from its markets cannot be weighed on a scale opposite dollars and cents—at least not without second-guessing the moral judgments of California voters or making the kind of policy decisions reserved for politicians.

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

Chief Justice ROBERTS concurred in part and dissented in part, joined by Justices Samuel Alito, Brett Kavanaugh, and Ketanji Brown Jackson:

Pike provides that nondiscriminatory state regulations are valid under the Commerce Clause "unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits." I would find that petitioners' have plausibly alleged a substantial burden against interstate commerce. The complaint alleges that the interstate pork market is so interconnected that producers will be "forced to comply" with Proposition 12, "even though some or even most of the cuts from a hog are sold in other States." Proposition 12 may not *expressly* regulate farmers operating out of State. But due to the nature of the national pork market, California has enacted rules that carry implications for producers as far flung as Indiana and North Carolina, whether or not they sell in California. In my view, petitioners plausibly allege a substantial burden against interstate commerce. I would therefore remand the case for the Ninth Circuit to decide whether it is plausible that the "burden ... is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S., at 142.

Justice KAVANAUGH concurred in part and dissented in part:

In today's fractured decision, six Justices of this Court affirmatively retain the longstanding *Pike* balancing test for analyzing dormant Commerce Clause challenges to state economic regulations. Although Parts IV–B and IV–D of Justice GORSUCH's opinion would essentially overrule the *Pike* balancing test, those subsections are not controlling precedent, as I understand it.

Under the Constitution, Congress could enact a national law imposing minimum space requirements or other regulations on pig farms involved in the interstate pork market. In the absence of action by Congress, each State may of course adopt health and safety regulations for products sold in that State. And each State may regulate as it sees fit with respect to farming, manufacturing, and production practices in that State. Through Proposition 12, however, California has tried something quite different and unusual. It has attempted, in essence, to unilaterally impose its moral and policy preferences for pig farming and pork production on the rest of the Nation. It has sought to deny market access to out-of-state pork producers unless their farming and production practices in those other States comply with California's dictates. The State has aggressively propounded a "California knows best" economic philosophy—where California in effect seeks to regulate pig farming and pork production in all of the United States. California's approach undermines federalism and the authority of individual States by forcing individuals and businesses in one State to conduct their farming, manufacturing, and production practices in a manner required by the laws of a different State.

Notably, future state laws of this kind might not be confined to the pork industry**.** As the amici brief of 26 States points out, what if a state law prohibits the sale of fruit picked by noncitizens who are unlawfully in the country? What if a state law prohibits the sale of goods produced by workers paid less than $20 per hour? Or as those States suggest, what if a state law prohibits "the retail sale of goods from producers that do not pay for employees' birth control or abortions" (or alternatively, that do pay for employees' birth control or abortions)?

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

5. Federal immunity from state regulation (intergovernmental immunity)

The term **intergovernmental immunity** is the somewhat confusing name for the doctrine that limits the power of state governments to regulate the federal government's programs and operations. As you will see in Part D below, states do not have the same immunity from federal regulation, which is why the term intergovernmental can be confusing.

The doctrine of intergovernmental immunity was first announced by Chief Justice Marshall in the second part of *McCulloch* (1819), which held that Maryland lacked the power to tax the National Bank. The key point is that a state cannot regulate, tax, or otherwise directly burden the federal government or its activities (except with Congress's consent). That principle is often referred to as the *McCulloch* principle, and it remains important today. Your case outline for *McCulloch* part 2 should walk through the different strands of Chief Justice Marshall's reasoning. Then, in your case outlines for *Term Limits* (1995) and *Trump v. Anderson* (2024)—two election-law cases that addressed the question whether states can restrict who can be a candidate for Congress or the President—you should explain how the logic of *McCulloch* underlies these modern decisions.

McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819)
(unanimous)

Chief Justice MARSHALL wrote the opinion for the unanimous Court:

It being the opinion of the court, that the Act of Congress incorporating the National Bank is constitutional, we proceed to inquire——

2. Whether the state of Maryland may, without violating the constitution, tax the Maryland branch of the National Bank?

The Constitution and the laws made in pursuance thereof are supreme; they control the constitution and laws of the respective states, and cannot be controlled by them. From this great principle, which may be almost termed an axiom, other propositions are deduced as corollaries. 1st. That a power to create implies a power to preserve.

2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

The power of congress to create, and of course, to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable. That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied.

Taxation, it is said [by Maryland], does not necessarily and unavoidably destroy. To carry it to the excess of destruction, would be an abuse, to presume which, would banish that confidence which is essential to all government. But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose, that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.

If we apply the principle for which the state of Maryland contends, to the constitution, generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states. If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states.

The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the

operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme**.**

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)
(5-4 vote)

*[**Background:** Arkansas enacted term limits for Members of the U.S. Congress who are elected by Arkansas residents. The Supreme Court declared those term limits unconstitutional because they interfered with the structure of the federal government. Justice Stevens wrote the opinion for the Court, which Justices Kennedy, Souter, Ginsburg, and Breyer joined. Justice Kennedy wrote an interesting concurrence that gets quoted more often than the majority opinion. Justice Thomas dissented, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia.]*

Justice STEVENS wrote the opinion for the Court:

The Constitution sets forth qualifications for membership in the Congress of the United States. Article I, § 2, cl. 2, which applies to the House of Representatives, provides:

> No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Article I, § 3, cl. 3, which applies to the Senate, similarly provides:

> No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

Today's cases present a challenge to an amendment to the Arkansas State Constitution that prohibits the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate has already served three terms in the House of Representatives or two terms in the Senate. The Arkansas Supreme Court held that the amendment violates the Federal Constitution. We agree. Allowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States. If the qualifications set forth in the text of the Constitution are to be changed, that text must be amended.

Justice KENNEDY, concurring:

Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

The political identity of the entire people of the Union is reinforced by the proposition, which I take to be beyond dispute, that, though limited as to its objects, the National Government is, and must be, controlled by the people without collateral interference by the States.

McCulloch affirmed this proposition when the Court rejected the suggestion that States could interfere with federal powers. The States have no power, reserved or otherwise, over the exercise of federal authority within its proper sphere. That the States may not invade the sphere of federal sovereignty is as incontestable, in my view, as the corollary proposition that the Federal Government must be held within

the boundaries of its own power when it intrudes upon matters reserved to the States. See *United States v. Lopez* (1995).

It is maintained by our dissenting colleagues that the State of Arkansas seeks nothing more than to grant its people surer control over the National Government, a control, it is said, that will be enhanced by the law at issue here. The arguments for term limitations (or ballot restrictions having the same effect) are not lacking in force; but the issue, as all of us must acknowledge, is not the efficacy of those measures but whether they have a legitimate source, given their origin in the enactments of a single State. There can be no doubt, if we are to respect the republican origins of the Nation and preserve its federal character, that there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere. Because the Arkansas enactment intrudes upon this federal domain, it exceeds the boundaries of the Constitution.

Trump v. Anderson, 601 U.S. 100 (2024)
(unanimous in relevant part)

*[**Background:** Colorado removed candidate Trump from the ballot for the 2024 presidential election, based on the state's conclusion that he was disqualified from running because he engaged in an insurrection. The Supreme Court held that Colorado's action was impermissible. The bottom line was unanimous, although there was disagreement among the Justices about the reasoning. The Court issued a "per curiam opinion"—meaning an unsigned opinion of the Court—that Chief Justice Roberts, and Justices Thomas, Alito, Gorsuch, and Kavanaugh joined, and Justice Barrett joined in part. Justice Barrett wrote a concurrence. Justice Sotomayor wrote a concurrence that Justices Kagan and Jackson joined.]*

Per curiam:

A group of Colorado voters contends that Section 3 of the Fourteenth Amendment to the Constitution prohibits former President Donald J. Trump, who seeks the Presidential nomination of the Republican Party in this year's election, from becoming President again. The Colorado Supreme Court agreed with that contention. It ordered the Colorado secretary of state to exclude the former President from the Republican

primary ballot in the State and to disregard any write-in votes that Colorado voters might cast for him.

Former President Trump challenges that decision on several grounds. Because the Constitution makes Congress, rather than the States, responsible for enforcing Section 3 against federal officeholders and candidates, we reverse.

Section 3 of the Fourteenth Amendment provides:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

According to the respondents, Section 3 applies to the former President because after taking the Presidential oath in 2017, he intentionally incited the breaching of the Capitol on January 6 in order to retain power. They claim that he is therefore not a qualified candidate, and that as a result, the Colorado secretary of state may not place him on the primary ballot.

After a five-day trial, the state District Court found that former President Trump had "engaged in insurrection" within the meaning of Section 3, but nonetheless denied the respondents' petition. The court held that Section 3 did not apply because the Presidency, which Section 3 does not mention by name, is not an "office ... under the United States" and the President is not an "officer of the United States" within the meaning of that provision. The Colorado Supreme Court reversed in part and affirmed in part by a 4 to 3 vote. The Colorado Supreme Court accordingly ordered Secretary Griswold not to "list President Trump's name on the 2024 presidential primary ballot" or "count any write-in votes cast for him."

This case raises the question whether the States, in addition to Congress, may enforce Section 3. We conclude that States may disqualify persons holding or attempting to hold *state* office. But States have no power under the Constitution to enforce Section 3 with respect to *federal* offices, especially the Presidency.

The States enjoy sovereign power to prescribe the qualifications of their own officers and the manner of their election. Such power over governance, however, does not

extend to *federal* officeholders and candidates. Because federal officers "owe their existence and functions to the united voice of the whole, not of a portion, of the people," powers over their election and qualifications must be specifically "delegated to, rather than reserved by, the States." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803–804 (1995).

State enforcement of Section 3 with respect to *the Presidency* would raise heightened concerns. In the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. But state-by-state resolution of the question whether Section 3 bars a particular candidate for President from serving would be quite unlikely to yield a uniform answer consistent with the basic principle that "the President ... represent[s] all the voters in the Nation."

Conflicting state outcomes concerning the same candidate could result not just from differing views of the merits, but from variations in state law governing the proceedings that are necessary to make Section 3 disqualification determinations. The result could well be that a single candidate would be declared ineligible in some States, but not others, based on the same conduct. The "patchwork" that would likely result from state enforcement would "sever the direct link that the Framers found so critical between the National Government and the people of the United States" as a whole. *U.S. Term Limits*. In a Presidential election, the impact of the votes cast in each State is affected by the votes cast—or, in this case, the votes not allowed to be cast—for the various candidates in other States. Nothing in the Constitution requires that we endure such chaos—arriving at any time or different times, up to and perhaps beyond the Inauguration.

E. TENTH AMENDMENT AND ELEVENTH AMENDMENT PROTECTIONS FOR STATES

1. Introduction

The cases you just read hold that state governments cannot regulate the federal government or its programs and activities. We now shift gears to ask: Is there a symmetrical prohibition on federal regulation of state governments? No! The federal government can do things to states that states cannot do to the federal government.

But, as we shall see, the Tenth Amendment and the Eleventh Amendment provide certain protections for states.

Whenever you confront the question whether a law enacted by Congress properly regulates a state government (or state officials), you should ask two distinct issues. The first is: Does the federal law fall within one of Congress's enumerated powers (such as its commerce power)? The answer must be "yes" for the law to be constitutional, regardless of whether the law is directed at private parties or states. But a second issue arises when Congress regulates states: Are the states immune (exempt) from this federal regulation simply because they are states, rather than private actors? That second question is often described as a **Tenth Amendment** question, but you should be aware that the text of the Tenth Amendment does not provide meaningful guidance. The Tenth Amendment simply says: "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." That language doesn't tell you which powers are delegated to the federal government. But the Supreme Court has said the Tenth Amendment stands for the structural principle that states are important under our federalist system and there are limits to what Congress can do to states.

Let's start with two things that Congress *can* do to states. Imagine an activity that Congress has the power to regulate when it's done by private parties. For example, the commerce power allows Congress to require employers to pay a minimum wage. Now consider the second question: What can Congress do to states?

First, as we learned before, **Congress can preempt state law**. In my example, that means Congress not only can require private employers to pay a minimum wage; Congress also can stop states from imposing a higher minimum wage for private employers located in their states. Preemption is common and does not violate the Tenth Amendment.

Second, **Congress can regulate state activities** that are analogous to the private activities that Congress is regulating. Using my example, Congress can require *state* employers to pay their employees the federal minimum wage, just as Congress can require *private* employers to pay their employees the federal minimum wage. The commerce power lets Congress regulate an employer's wages, and the Tenth Amendment does not give states a special immunity from such federal regulation. As you will see when you read *Garcia* (1985), the Supreme Court's doctrine was once different. The Court's earlier decision in *National League of Cities* (1976) held that the Tenth Amendment made states immune from federal regulation in areas of

"traditional governmental functions." But that test turned out to be very difficult to implement and the Supreme Court overruled it in *Garcia*.

Nonetheless, the Tenth Amendment puts an important limit on Congress's power to regulate states that is known as the **anti-commandeering rule**. Under the anti-commandeering rule, Congress cannot compel states to enact laws or compel state officials to enforce federal laws. The excerpt from *Printz* (1997) sets out the anti-commandeering rule.

Here is another concrete example to help illustrate the difference between federal preemption of state law (which is constitutional), federal regulation of state activities (which is constitutional), and federal commandeering of state officials (which is unconstitutional). Federal law requires employers to pay overtime for hours worked over 40 per week. That overtime-pay requirement is within Congress's commerce power. Imagine that a state, unhappy that labor costs are driving up the price of coffee, prohibits *private* coffee shops located in the state from paying overtime. Federal law would preempt that state law, meaning private coffee shops must keep paying overtime. As explained above, preemption does not violate the Tenth Amendment.

Now imagine a coffee shop that's located in a state government building and staffed by employees on the state payroll. Federal law can require the state to pay its workers overtime, in the same way that federal law can require private employers to pay their workers overtime. That's an example of federal regulation of state activities (which is constitutional). Under *Garcia* (1985) and a more recent case that we'll read, *Condon* (2000), the Tenth Amendment does not prevent Congress from regulating state activities under generally applicable federal laws that also regulate analogous private activities.

Now imagine that Congress enacts a law that requires *state cops* to inspect and fine *private* coffee shops that aren't paying overtime as federal law requires. That would be unconstitutional commandeering. The anti-commandeering rule was announced in *New York v. United States*, 505 U.S. 144 (1992), and expanded a bit in *Printz v. United States*, 521 U.S. 898 (1997). Under these cases, if Congress wants federal law to be enforced against private actors, it has to rely on federal officials (like the FBI) to do the work. Congress **can't "dragoon" state officials** into enforcing federal law against private actors.

The anti-commandeering rule is important because the opposite rule would vastly increase the powers of Congress. Instead of having to rely on the roughly two million federal civilian employees to enforce federal law, Congress would be able require the

roughly 20 million state and local employees to enforce federal law. The Supreme Court has said "no" to that. Instead, if Congress wants help from state or local officials in enforcing federal law, Congress typically needs to make their help a condition on federal funds (remember the Spending Power cases?). In other words, Congress must put its money where its mouth is, which puts a check on federal power.

Note: The principles just described in this introduction apply to *local governments* (cities and counties) as well as state governments. But as you'll see when we turn to point 4, that's not true of state sovereign immunity, which is an immunity from being sued that local governments do not enjoy.

2. No state immunity from federal regulation (Tenth Amendment)

As explained above, the Tenth Amendment does not prevent Congress from regulating state activities alongside private activities. That is the holding of *Garcia* (1985), which overruled the Supreme Court's contrary approach in *National League of Cities* (1976).

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)
(5-4 vote)

*[**Background:** The Fair Labor Standards Act (FLSA), which was first enacted in 1938, requires many types of employers to pay the federal minimum wage and overtime. **Darby (1942)** held that the FLSA's regulation of private employers was within Congress's commerce power—a holding that remains good law today.*

At the time that Darby was issued, the FLSA generally did not cover state employers. Over time, however, Congress amended the FLSA to make various types of state employers—such as state-run hospitals and state-run transportation authorities—subject to that law's requirements. At first, the Court upheld the FLSA's application to state employers. But in National League of Cities (1976), the Court held that the Tenth Amendment did not allow Congress to regulate state activities in areas of "traditional governmental functions."

A big problem with that holding was that National League of Cities did not offer a clear definition of a "traditional governmental function." The lower courts reached inconsistent results in a slew of cases. So, in Garcia (1985), the Court overruled National League of Cities and held that Congress can regulate state activities in the same way that it regulates analogous private activities. In other words, the Tenth Amendment does not prohibit Congress from regulating state activities. That holding is still good law, as you will see when you read the excerpt from Condon (2000).

Justice Blackmun (who was the swing vote in National League of Cities) switched sides and wrote the opinion for the Court in Garcia, which was joined by Justices Brennan, White, Marshall, and Stevens. Justices O'Connor, Powell, and Rehnquist wrote dissents, joined by Chief Justice Burger.]

Justice BLACKMUN wrote the opinion for the Court:

The San Antonio Metropolitan Transit Authority (SAMTA) is a public mass-transit authority organized on a countywide basis. SAMTA currently is the major provider of transportation in the San Antonio metropolitan area; between 1978 and 1980 alone, its vehicles traveled over 26 million route miles and carried over 63 million passengers.

Appellees have not argued that SAMTA is immune from regulation under the Fair Labor Standards Act (FLSA) on the ground that it is a local transit system engaged in intrastate commercial activity. In a practical sense, SAMTA's operations might well be characterized as "local." Nonetheless, it long has been settled that Congress' authority under the Commerce Clause extends to intrastate economic activities that affect interstate commerce. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111, 125 (1942); *United States v. Darby*, 312 U.S. 100 (1941). Were SAMTA a privately owned and operated enterprise, it could not credibly argue that Congress exceeded the bounds of its Commerce Clause powers in prescribing minimum wages and overtime rates for SAMTA's employees.

Any constitutional exemption from the requirements of the FLSA therefore must rest on SAMTA's status as a governmental entity rather than on the "local" nature of its operations.

We revisit in these cases an issue raised in *National League of Cities v. Usery*, 426 U.S. 833 (1976). In that litigation, this Court, by a sharply divided vote, ruled that the Commerce Clause does not empower Congress to enforce the minimum-wage and overtime provisions of the FLSA against the States "in areas of traditional

governmental functions." Although *National League of Cities* supplied some examples of "traditional governmental functions," it did not offer a general explanation of how a "traditional" function is to be distinguished from a "nontraditional" one. Since then, federal and state courts have struggled with the task, thus imposed, of identifying a traditional function for purposes of state immunity under the Commerce Clause.

In the present cases, a Federal District Court concluded that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under *National League of Cities*, is exempt from the obligations imposed by the FLSA. Faced with the identical question, three Federal Courts of Appeals and one state appellate court have reached the opposite conclusion. After initial argument, the cases were restored to our calendar for reargument, and the parties were requested to brief and argue the following additional question: "Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), should be reconsidered?" Reargument followed in due course.

Our examination of this "function" standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also inconsistent with established principles of federalism. That case, accordingly, is overruled.

The essence of our federal system is that, within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be. Any rule of state immunity that looks to the "traditional" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. The States cannot serve as laboratories for social and economic experiment, see *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands.

We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional."

The Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government

itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power. The effectiveness of the federal political process in preserving the States' interests is apparent. On the one hand, the States have been able to direct a substantial proportion of federal revenues into their own treasuries in the form of general and program-specific grants in aid. Moreover, the States have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause. For example, the Federal Power Act, the National Labor Relations Act, the Labor-Management Reporting and Disclosure Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, and the Sherman Act all contain express or implied exemptions for States and their subdivisions. The fact that some federal statutes such as the FLSA extend general obligations to the States cannot obscure the extent to which the political position of the States in the federal system has served to minimize the burdens that the States bear under the Commerce Clause.

Justice O'CONNOR wrote a dissent, which Justices Powell and Rehnquist joined:

The Court today surveys the battle scene of federalism and sounds a retreat. I would prefer to hold the field and, at the very least, render a little aid to the wounded. If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States.

Due to the emergence of an integrated and industrialized national economy, this Court has been required to examine and review a breathtaking expansion of the powers of Congress. In doing so the Court correctly perceived that the Framers of our Constitution intended Congress to have sufficient power to address national problems. But the Framers were not single-minded. Just as surely as the Framers envisioned a National Government capable of solving national problems, they also envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States. In the 18th century these intentions did not conflict because technology had not yet converted every local problem into a national one. A conflict has now emerged, and the Court today retreats rather than reconcile the Constitution's dual concerns for federalism and an effective commerce power.

The Framers perceived the interstate commerce power to be important but limited, and expected that it would be used primarily if not exclusively to remove interstate tariffs and to regulate maritime affairs and large-scale mercantile enterprise. This perception of a narrow commerce power is important not because it suggests that the commerce power should be as narrowly construed today. Rather, it explains why the Framers could believe the Constitution assured significant state authority even as it bestowed a range of powers, including the commerce power, on the Congress. In an era when interstate commerce represented a tiny fraction of economic activity and most goods and services were produced and consumed close to home, the interstate commerce power left a broad range of activities beyond the reach of Congress.

In the decades since ratification of the Constitution, interstate economic activity has steadily expanded. Industrialization, coupled with advances in transportation and communications, has created a national economy in which virtually every activity occurring within the borders of a State plays a part. This Court has been increasingly generous in its interpretation of the commerce power of Congress, primarily to assure that the National Government would be able to deal with national economic problems.

The Court today rejects *National League of Cities* and washes its hands of all efforts to protect the States. With the abandonment of *National League of Cities*, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint. The proper resolution, I suggest, lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States. It has been difficult for this Court to craft bright lines defining the scope of the state autonomy. Regardless of the difficulty, it is and will remain the duty of this Court to reconcile these concerns in the final instance. I would not shirk the duty acknowledged by *National League of Cities* and its progeny, and I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility.

---

3. State immunity from federal commandeering (Tenth Amendment)

In the dissent that you just read, Justice Sandra Day O'Connor—who formerly had served as the first woman leader of the Arizona state senate and cared a lot about state powers—vowed that the Supreme Court would again take up its responsibility

to protect state governments from federal overreaching. She got that chance in *New York v. United States*, 505 U.S. 144 (1992), where, writing for the Court, she announced the anti-commandeering rule: "The Federal Government may not compel the States to enact or administer a federal regulatory program."

The *New York* opinion is confusing so I have not included it here. Oversimplifying a lot, the federal statute in that case required states to enact laws to deal with radioactive waste that private industries were generating. The Supreme Court held that this federal law was unconstitutional commandeering of state legislatures. In essence, the Supreme Court said (and I'm loosely paraphrasing here): "If Congress wants to deal with the problem of radioactive waste, Congress can enact a law that directly regulates the private companies that generate such waste. But Congress can't *compel states to enact state laws* to deal with a problem."

Writing for the Supreme Court in *Printz* (1997), Justice Scalia reaffirmed and extended the anti-commandeering rule.

Printz v. United States, 521 U.S. 898 (1997)
(5-4 vote)

*[**Background:** The federal Gun Control Act of 1968 made it unlawful for various categories of people—such as those who were convicted of a felony—to buy a gun. But lots of ex-felons were buying guns anyway. In 1993, Congress passed the Brady Handgun Violence Prevention Act (Brady Act) to improve the enforcement of the Gun Control Act's restrictions. Under the Brady Act, eventually private gun dealers would be required to check a national database to make sure the person buying a gun wasn't legally prohibited from doing so. But it was going to take a few years to develop that national database.*

In the meanwhile, the interim provision of the Brady Act that was at issue in this case required gun dealers to contact state or local law enforcement officials, who were required under the Brady Act to check their own existing state database to see if the person who was trying to buy gun was prohibited from doing so by federal law. The Supreme Court invalidated that interim Brady Act provision. Applying the anti-commandeering rule, the Court held that Congress can't compel state and local officials to enforce federal law. Justice Scalia wrote the opinion for the Court, which Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas joined.

Justice Souter wrote the principal dissent, which Justices Stevens, Ginsburg, and Breyer joined.]

Justice SCALIA wrote the opinion for the Court:

The question presented is whether certain interim provisions of the Brady Handgun Violence Prevention Act (Brady Act), commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers, violate the Constitution.

I

The Gun Control Act of 1968 (GCA), 18 U.S.C. § 921 et seq., establishes a detailed federal scheme governing the distribution of firearms. It prohibits firearms dealers from transferring handguns to any person under 21, not resident in the dealer's State, or prohibited by state or local law from purchasing or possessing firearms, § 922(b). It also forbids possession of a firearm by, and transfer of a firearm to, convicted felons, fugitives from justice, unlawful users of controlled substances, persons adjudicated as mentally defective or committed to mental institutions, aliens unlawfully present in the United States, persons dishonorably discharged from the Armed Forces, persons who have renounced their citizenship, and persons who have been subjected to certain restraining orders or been convicted of a misdemeanor offense involving domestic violence. §§ 922(d) and (g).

In 1993, Congress amended the GCA by enacting the Brady Act. The Act requires the Attorney General to establish a national instant background-check system by November 30, 1998, and immediately puts in place certain interim provisions until that system becomes operative. Under the interim provisions, a firearms dealer who proposes to transfer a handgun must first: (1) receive from the transferee a statement (the Brady Form) containing the name, address, and date of birth of the proposed transferee along with a sworn statement that the transferee is not among any of the classes of prohibited purchasers, (2) verify the identity of the transferee by examining an identification document; and (3) provide the "chief law enforcement officer" (CLEO) of the transferee's residence with notice of the contents (and a copy) of the Brady Form. With some exceptions, the dealer must then wait five business days before consummating the sale, unless the CLEO earlier notifies the dealer that he has no reason to believe the transfer would be illegal.

When a CLEO receives the required notice of a proposed transfer from the firearms dealer, the CLEO must "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national

system designated by the Attorney General." The Act does not require the CLEO to take any particular action if he determines that a pending transaction would be unlawful; he may notify the firearms dealer to that effect, but is not required to do so. If, however, the CLEO notifies a gun dealer that a prospective purchaser is ineligible to receive a handgun, he must, upon request, provide the would-be purchaser with a written statement of the reasons for that determination. § 922(s)(6)(C). Under a separate provision of the GCA, any person who "knowingly violates [the section of the GCA amended by the Brady Act] shall be fined under this title, imprisoned for not more than 1 year, or both."

Petitioners Jay Printz and Richard Mack, the CLEOs for Ravalli County, Montana, and Graham County, Arizona, respectively, filed separate actions challenging the constitutionality of the Brady Act's interim provisions. In each case, the District Court held that the provision requiring CLEOs to perform background checks was unconstitutional. A divided panel of the Court of Appeals for the Ninth Circuit reversed, finding none of the Brady Act's interim provisions to be unconstitutional. We granted certiorari.

II

From the description set forth above, it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme. Regulated firearms dealers are required to forward Brady Forms not to a federal officer or employee, but to the CLEOs, whose obligation to accept those forms is implicit in the duty imposed upon them to make "reasonable efforts" within five days to determine whether the sales reflected in the forms are lawful.

Petitioners here [Sheriff Printz and Sheriff Mack] object to being pressed into federal service, and contend that congressional action compelling state officers to execute federal laws is unconstitutional. Because there is no constitutional text speaking to this precise question, the answer to the CLEOs' challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court. We treat those three sources, in that order, in this and the next two sections of this opinion.

[**Note:** The Court here discussed the historical evidence presented by each side. The Court accepted the Sheriffs' contention that "compelled enlistment of state executive

officers for the administration of federal programs is, until very recent years at least, unprecedented."]

III

We turn next to consideration of the structure of the Constitution.

The Constitution established a system of dual sovereignty. Although the States surrendered many of their powers to the new Federal Government, they retained a residuary and inviolable sovereignty. This is reflected throughout the Constitution's text. [The Court gives various examples here.] Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he 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."

The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict. The Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, "the only proper objects of government," The Federalist No. 15, at 109. We have set forth the historical record in more detail elsewhere, see *New York v. United States*, 505 U.S. 144, 161–166 (1992), and need not repeat it here. It suffices to repeat the conclusion: "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.*, at 166.

The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other"—"a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (KENNEDY, J., concurring). The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens.

This separation of the two spheres is one of the Constitution's structural protections of liberty. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal

Government will reduce the risk of tyranny and abuse from either front. The power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.

IV

Finally, and most conclusively in the present litigation, we turn to the prior jurisprudence of this Court.

At issue in *New York v. United States*, 505 U.S. 144 (1992), were the so-called "take title" provisions of the Low–Level Radioactive Waste Policy Amendments Act of 1985, which required States either to enact legislation providing for the disposal of radioactive waste generated within their borders, or to take title to, and possession of, the waste—effectively requiring the States either to legislate pursuant to Congress's directions, or to implement an administrative solution. We concluded that Congress could constitutionally require the States to do neither. "The Federal Government," we held, "may not compel the States to enact or administer a federal regulatory program." *Id.* at 188.

The Government contends that *New York* is distinguishable on the following ground: Unlike the "take title" provisions invalidated there, the background-check provision of the Brady Act does not require state legislative or executive officials to make policy, but instead issues a final directive to state CLEOs. Even assuming that the Brady Act leaves no "policymaking" discretion with the States, we fail to see how that improves rather than worsens the intrusion upon state sovereignty. It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. It is no more compatible with this independence and autonomy that their officers be "dragooned" into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws. As we concluded categorically in *New York*: "The Federal Government may not compel the States to enact *or administer* a federal regulatory program."

Justice O'CONNOR, concurring:

Our precedent and our Nation's historical practices support the Court's holding today. The Brady Act violates the Tenth Amendment to the extent it forces States and local law enforcement officers to perform background checks on prospective handgun owners and to accept Brady Forms from firearms dealers.

Our holding, of course, does not spell the end of the objectives of the Brady Act. States and chief law enforcement officers may voluntarily continue to participate in

the federal program. Congress is also free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs. See, e.g., 23 U.S.C. § 402 (conditioning States' receipt of federal funds for highway safety program on compliance with federal requirements). The provisions invalidated here, however, which directly compel state officials to administer a federal regulatory program, fail to adhere to the design and structure of our constitutional scheme.

Reno v. Condon, 528 U.S. 141 (2000)
(unanimous)

*[**Background:** The federal Driver's Privacy Protection Act (DPPA) prohibits states from disclosing the personal information that states receive when people apply for driver's licenses, to register cars. The Act contains exceptions that allow disclosures to certain private parties, but prohibits such private parties from redisclosing the information. South Carolina challenged the DPPA's restrictions, arguing that the Act violates the anti-commandeering rule. The Supreme Court disagreed and upheld the Act in a unanimous opinion.]*

Chief Justice REHNQUIST wrote the opinion for the unanimous Court:

The Driver's Privacy Protection Act of 1994 (DPPA or Act) regulates the disclosure of personal information contained in the records of state motor vehicle departments (DMVs). We hold that in enacting this statute Congress did not run afoul of the federalism principles enunciated in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997).

Following the DPPA's enactment, South Carolina and its Attorney General, respondent Condon, filed this suit, alleging that the DPPA violates the Tenth Amendment. The District Court concluded that the Act is incompatible with the principles of federalism inherent in the Constitution's division of power between the States and the Federal Government. The Court of Appeals for the Fourth Circuit affirmed, concluding that the Act violates constitutional principles of federalism. We granted certiorari, and now reverse.

The United States asserts that the DPPA is a proper exercise of Congress' authority to regulate interstate commerce under the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3.2 The United States bases its Commerce Clause argument on the fact that the personal, identifying information that the DPPA regulates is a "thin[g] in interstate commerce," and that the sale or release of that information in interstate commerce is therefore a proper subject of congressional regulation. *United States v. Lopez*, 514 U.S. 549 (1995). We agree with the United States' contention. The motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring. Because drivers' information is, in this context, an article of commerce, its sale or release into the interstate stream of business is sufficient to support congressional regulation. We therefore need not address the Government's alternative argument that the States' individual, intrastate activities in gathering, maintaining, and distributing drivers' personal information have a sufficiently substantial impact on interstate commerce to create a constitutional base for federal legislation.

But the fact that drivers' personal information is, in the context of this case, an article in interstate commerce does not conclusively resolve the constitutionality of the DPPA. In *New York* and *Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment. In *New York*, Congress commandeered the state legislative process by requiring a state legislature to enact a particular kind of law. We said: "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." In *Printz*, we invalidated a provision of the Brady Act which commanded "state and local enforcement officers to conduct background checks on prospective handgun purchasers." We said:

> "We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."

South Carolina emphasizes that the DPPA requires the State's employees to learn and apply the Act's substantive restrictions, and notes that these activities will consume the employees' time and thus the State's resources. We agree with South Carolina's assertion that the DPPA's provisions will require time and effort on the part of state employees, but reject the State's argument that the DPPA violates the principles laid down in either *New York* or *Printz*. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.

The DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*.

---

4. State sovereign immunity (Eleventh Amendment)

Principles of **state sovereign immunity** give state governments immunity from being sued, subject to a dizzying array of rules and exceptions. This doctrine is also known as **Eleventh Amendment immunity**. However, as with the Tenth Amendment, the Supreme Court's doctrine can't easily be derived from the Eleventh Amendment's text. Instead, the Supreme Court has treated the Eleventh Amendment as reflecting the Framers' original understanding of the limits on when a state can be sued.

The excerpt below from *Alden* (1997) is not a comprehensive description of state sovereign immunity rules and exceptions. It is meant to give you an overview of how state sovereign immunity works and some historical background.

Alden v. Maine, 527 U.S. 706 (1999)
(5-4 vote)

*[**Background:** In this case, state employees sued Maine in state court for overtime pay they claimed they were owed under federal law. The Supreme Court held that their lawsuit was barred by principles of state sovereign immunity.]*

Justice Kennedy wrote the opinion for the Court, which Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas joined. Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer.

Justice KENNEDY wrote the opinion for the Court:

The federal system established by our Constitution preserves the sovereign status of the States. The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity. When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent. Although the American people rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.

Nonetheless, this Court held, just five years after the Constitution was adopted, that Article III authorized a private citizen of another State to sue the State of Georgia without its consent. *Chisholm v. Georgia*, 2 Dall. 419 (1793). The States responded with outrage to the decision. Georgia's House of Representatives passed a bill providing that anyone attempting to enforce the *Chisholm* decision would be "guilty of felony and shall suffer death, without benefit of clergy, by being hanged." The swiftness and near unanimity with which the Eleventh Amendment was adopted showed that just about everybody in Congress agreed the Supreme Court had misread the Constitution. As a consequence, we have looked to history and experience, and the established order of things, rather than adhering to the mere letter of the Eleventh Amendment, in determining the scope of the States' constitutional immunity from suit.

Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States. It is indisputable that, at the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits for money damages. Even today, an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could

create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design. The potential national power would pose a severe and notorious danger to the States and their resources.

In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts [as well as in federal courts], an immunity beyond the congressional power to abrogate [that is, override] by Article I legislation.

The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. Sovereign immunity does not bar all judicial review of state compliance with the Constitution and valid federal law. Rather, certain limits are implicit in the constitutional principle of state sovereign immunity.

The first of these limits is that sovereign immunity bars suits only in the absence of consent. Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits. Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits. Cf. *South Dakota v. Dole*, 483 U.S. 203 (1987). [In other words, Congress can in some circumstances make a state's waiver of sovereign immunity a condition of federal funds.]

The States have consented, moreover, to some suits pursuant to the plan of the Convention or to subsequent constitutional Amendments. In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government.

We have held also that in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power.

Sovereign immunity bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation [that is, a local government].

Nor does sovereign immunity bar all suits against state officers. It does not bar actions against state officers for injunctive or declaratory relief to obtain their compliance with federal law. [**Note:** This principle is called the *Ex parte Young* doctrine.]

Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally.

Thus, the principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States. Established rules provide ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause.

F. TRANSLATING FEDERALISM

During the Rehnquist Court's federalism revolution, Professor Lawrence Lessig wrote an insightful article called *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125. I have paraphrased some of Lessig's key points here:

Lessig explained that at the time of the Framing of the Constitution, there was no apparent tension between giving Congress the power to regulate interstate commerce, on the one hand, and the Framers' belief that Congress would have quite limited power when compared to the states, on the other hand. Over time, however, the real world changed dramatically. Industrialization and advances in transportation and communication meant that lots of local activities were having a substantial impact on interstate commerce. By the 1940s, the Supreme Court was upholding Congress's power to regulate a slew of activities that would have been unimaginable to the Framers.

Lessig argued that the Supreme Court has attempted to keep the spirit of federalism alive by "translating" the federalism values that underlie the Constitution into modern doctrines. Some such efforts have been successful, while others were widely regarded as failures. The failures generally occurred when the Supreme Court announced a vague standard rather than a bright-line rule. A paradigmatic example of a vague standard was the test that the Supreme Court announced in *National League of Cities*, which held that Congress could not regulate state activities in areas of "traditional government functions." That test proved to be unworkable: Lower courts couldn't figure out which functions counted as traditional, and they reached inconsistent results in similar cases. So, in *Garcia*, the Court overruled *National*

League of Cities, with Justice Blackman—who had provided the fifth vote in the *National League of Cities* case—changing his mind.

Lessig argued that the Supreme Court was right to overrule *National League of Cities*. He explained that inconsistency in the law is never a good thing. It is especially problematic in constitutional law because it creates the perception that unelected federal judges and Justices are striking down laws enacted by democratically accountable legislatures on the basis of the judges' and Justices' policy preferences, rather than neutral legal principles. Lessig explained that when the Supreme Court translates original constitutional values into modern doctrines, the Court should aim for bright-line rules that lower courts can easily apply, to avoid eroding the Judiciary's legitimacy.

Lessig offered the anti-commandeering rule as a nice example of a bright-line rule that protects federalism values. I agree with his assessment. The anti-commandeering rule does something important: it avoids the dramatic increase in federal power that would occur if Congress could enlist the 20 million state and local employees to enforce federal law, rather than having to rely on the two million federal civilian employees to do so. And the rule is fairly easy to apply.

Although Lessig wrote *Translating Federalism* before the Supreme Court decided *Alden* and other modern state sovereign immunity cases, I see those cases as another nice example of a successful effort to translate federalism values into contemporary doctrine. The sovereign immunity rules and exceptions that the Supreme Court has announced provide important protections for state treasuries—without giving states a blank check to ignore federal law—and, like the anti-commandeering rule, they are fairly easy to apply.

CHAPTER 3. SEPARATION OF POWERS

A. INTRODUCTION

In Chapter 2, we studied federalism which, colloquially, might be described as the separation of powers between the federal government and the state governments. But in practice, the phrase **separation of powers** is always used to refer to the division of powers among the three branches of the federal government: the **Legislative Branch** (Congress), the **Executive Branch** (the President and the vast bureaucracy of federal agencies), and the **Judicial Branch** (the Supreme Court and the lower federal courts).

In this chapter, we will study the separation of powers. We will give particular attention to the allocation of powers between the **political branches**: Congress and the Executive Branch. Navigating that relationship is complicated because powers are often shared or overlapping, and the distinctions among powers can be fuzzy. For example, the Constitution gives Congress the power to **make laws** and gives the Executive Branch the power to **execute (carry out) those laws**, but the execution of federal law often involves policymaking that can look a lot like lawmaking.

In deciding separation-of-powers cases, the Supreme Court perceives its role as keeping the political branches in their proper lanes. A key theme of the Court's separation-of-powers cases is the tradeoff between **efficiency** and **tyranny**. On the one hand, the Constitution is designed to allow the political branches to address real-world problems effectively, including problems that the Framers could not have foreseen. That means the political branches need enough power and flexibility to be able to address emerging problems. On the other hand, the Framers worried about the threat to individual liberty that the concentration of power can pose. A too powerful President might have struck the Framers as a lot like the King they had just fought in the revolutionary war.

B. PROCEDURAL CONSTRAINTS ON LAWMAKING

We begin with two older Supreme Court cases that enforced procedural constraints on Congress's lawmaking power. Those procedural constraints are found in Article I, section 7, which you should read now. The **bicameralism requirement** means that a bill (that is, a proposed law) must pass both chambers of Congress (the House of Representative and the Senate) before it can become a law. The **presentment requirement** means the bill then must be presented to the President for his signature or veto (which Congress can override by a two-thirds vote in both chambers). In the two cases that we are about to read, the Supreme Court took a strict view of those procedural requirements and made clear that Congress cannot deviate from them. In *INS v. Chadha* (1983), the Supreme Court held that Congress cannot authorize one of its chambers to veto Executive Branch action. In *Clinton v. New York* (1998), the Supreme Court held that Congress cannot authorize the President to veto subparts of a bill, as opposed to the bill as a whole.

INS v. Chadha, 462 U.S. 919 (1983)
(7-2 vote)

*[**Background:** The Immigration and Nationality Act of 1952 authorized the Attorney General to suspend the deportation of certain aliens who are otherwise deportable. The Act required the Attorney General to report his reasons for such a suspension to Congress. But in the provision at issue in this case, the Act further provided that, if "either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien."]*

The Attorney General suspended the deportation of Jagdish Chadha, but the House of Representatives passed a disapproval resolution that had the effect of "vetoing" the INS's decision and requiring Chadha's deportation. In this 7-2 decision, the Supreme Court held that the one-House veto authorized by the Immigration and Nationality Act was unconstitutional.

Before addressing the merits, the Supreme Court rejected the argument that Chadha's challenge presented a nonjusticiable political question. Turning to the merits, the Supreme Court held that the one-House veto violated both Article I's

bicameralism requirement—that is, the requirement that a law pass both chambers of Congress—and Article I's presentment requirement—that is, the requirement that a law be presented to the President for signature or veto.]

Chief Justice Burger wrote the opinion of the Court. Justice Powell concurred in the judgment on other grounds. Justices White and Rehnquist dissented.

Chief Justice BURGER wrote the opinion for the Court:

The Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two thirds of both Houses of Congress to overrule a veto. The prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.

The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive, and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

When the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action. There are but four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto:

> (a) The House of Representatives alone was given the power to initiate impeachments. Art. I, § 2, cl. 6;
>
> (b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, § 3, cl. 5;

> (c) The Senate alone was given final unreviewable power to approve or to disapprove presidential appointments. Art. II, § 2, cl. 2;
>
> (d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, § 2, cl. 2.

Clearly, when the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms. These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important and binding one-House acts provided for in the Constitution. These exceptions are narrow, explicit, and separately justified; none of them authorize the action challenged here. On the contrary, they provide further support for the conclusion that Congressional authority is not to be implied and for the conclusion that the veto provided for in § 244(c)(2) [of the Immigration and Nationality Act] is not authorized by the constitutional design of the powers of the Legislative Branch.

The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President.

The veto authorized by § 244(c)(2) doubtless has been in many respects a convenient shortcut; the "sharing" with the Executive by Congress of its authority over aliens in this manner is, on its face, an appealing compromise. In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency. The records of the Convention and debates in the States preceding ratification underscore the common desire to define and limit the exercise of the newly created federal powers affecting the states and the people. There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

Justice WHITE, dissenting:

Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a “legislative veto.” For this reason, the Court's decision is of surpassing importance.

The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson’s choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the executive branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role. Accordingly, over the past five decades, the legislative veto has been placed in nearly 200 statutes. The device is known in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment and the economy.

If the legislative veto were as plainly unconstitutional as the Court strives to suggest, its broad ruling today would be more comprehensible. But, the constitutionality of the legislative veto is anything but clearcut. The issue divides scholars, courts, attorneys general, and the two other branches of the National Government. If the veto devices so flagrantly disregarded the requirements of Article I as the Court today suggests, I find it incomprehensible that Congress, whose members are bound by oath to uphold

the Constitution, would have placed these mechanisms in nearly 200 separate laws over a period of 50 years.

There is no question that a bill does not become a law until it is approved by both the House and the Senate, and presented to the President. That does not, however, answer the constitutional question before us. The power to exercise a legislative veto is not the power to write new law without bicameral approval or presidential consideration. The veto must be authorized by statute and may only negative what an Executive department or independent agency has proposed. On its face, the legislative veto no more allows one House of Congress to make law than does the presidential veto confer such power upon the President.

Clinton v. New York, 524 U.S. 417 (1998)
(6-2 vote)

*[**Background:** The Line Item Veto Act of 1996 authorized the President to "cancel" specific spending and revenue items contained in any bill or joint resolution "that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States." The Act provided that, if the President wished to exercise this cancellation authority, he must submit a special message to Congress within five calendar days after enactment of the law containing the cancelled item. The Act required the President to make certain findings before exercising his cancellation authority and to notify Congress of the reasons for the cancellation. The Act also provided for expedited legislative consideration of a "disapproval bill" that, if enacted, would render the disapproved cancellations null and void.*

Several Members of Congress challenged the constitutionality of the Line Item Veto Act but, in Raines v. Byrd, 521 U.S. 811 (1997), the Supreme Court held that they did not have the type of concrete injury necessary to establish standing. After President Clinton exercised his authority to cancel certain spending and tax provisions, the injured parties brought suit and, in this case, the Supreme Court held that the cancellation authority (aka line-item veto) was unconstitutional.]

Justice Stevens wrote the opinion for the Court, which Chief Justice Rehnquist and Justices Kennedy, Souter, Thomas, and Ginsburg joined. There were several

concurring opinions. Judge Breyer dissented, joined in part by Justices O'Connor and Scalia.

Justice STEVENS wrote the opinion for the Court:

In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each. "[R]epeal of statutes, no less than enactment, must conform with Article I." *INS v. Chadha*, 462 U.S. 919, 954 (1983). There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.

There are important differences between the President's "return" of a bill [i.e., veto] pursuant to Article I, § 7, and the exercise of the President's cancellation authority pursuant to the Line Item Veto Act. The constitutional return takes place *before* the bill becomes law; the statutory cancellation occurs *after* the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part.

The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only "be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Chadha*, 462 U.S. at 951. Our first President understood the text of the Presentment Clause as requiring that he either "approve all the parts of a Bill, or reject it in toto." What has emerged from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the "finely wrought" procedure that the Framers designed.

We express no opinion about the wisdom of the procedures authorized by the Line Item Veto Act. Many members of both major political parties who have served in the Legislative and the Executive Branches have long advocated the enactment of such procedures for the purpose of ensuring greater fiscal accountability in Washington. The text of the Act was itself the product of much debate and deliberation in both Houses of Congress and that precise text was signed into law by the President. We do not lightly conclude that their action was unauthorized by the Constitution. We have, however, twice had full argument and briefing on the question and have concluded that our duty is clear. If there is to be a new procedure in which the President will play a different role in determining the final text of what may "become a law," such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution.

Justice BREYER wrote a dissent, which Justices O'Connor and Scalia joined in part:

The Act before us represents a legislative effort to provide the President with the power to give effect to some, but not to all, of the expenditure and revenue-diminishing provisions contained in a single massive appropriations bill. And this objective is constitutionally proper.

When our Nation was founded, Congress could easily have provided the President with this kind of power. In that time period, our population was less than 4 million, federal employees numbered fewer than 5,000, annual federal budget outlays totaled approximately $4 million, and the entire operative text of Congress' first general appropriations law read as follows: [The Court here quotes the one-paragraph law.] At that time, a Congress, wishing to give a President the power to select among appropriations, could simply have embodied each appropriation in a separate bill, each bill subject to a separate Presidential veto.

Today, however, our population is about 250 million, see U.S. Dept. of Commerce, Census Bureau, the annual federal budget is $1.5 trillion, and a typical budget appropriations bill may have a dozen titles, hundreds of sections, and spread across more than 500 pages of the Statutes at Large. Congress cannot divide such a bill into thousands, or tens of thousands, of separate appropriations bills, each one of which the President would have to sign, or to veto, separately. Thus, the question is whether the Constitution permits Congress to choose a particular novel means to achieve this same, constitutionally legitimate, end.

The Court believes that the Act violates the literal text of the Constitution. A simple syllogism captures its basic reasoning:

> Major Premise: The Constitution sets forth an exclusive method for enacting, repealing, or amending laws.
>
> Minor Premise: The Act authorizes the President to "repeal or amend" laws in a different way, namely by announcing a cancellation of a portion of a previously enacted law.
>
> Conclusion: The Act is inconsistent with the Constitution.

I find this syllogism unconvincing, however, because its Minor Premise is faulty. When the President "canceled" the two appropriation measures now before us, he did not repeal any law nor did he amend any law. He simply followed the law, leaving the statutes, as they are literally written, intact. Because one cannot say that the

President's exercise of the power the Act grants is, literally speaking, a "repeal" or "amendment," the fact that the Act's procedures differ from the Constitution's exclusive procedures for enacting (or repealing) legislation is beside the point.

C. THE DIVISION OF LAWMAKING AND EXECUTIVE POWER

1. Introduction

In part B above, we looked at *procedural constraints* that the Constitution imposes on Congress's power to make laws. Now, we turn to ways that the Constitution divides *substantive responsibilities* between Congress and the President. Here is an overview:

(a) *Congress's legislative powers*. Article I, section 1 says: "**All legislative Powers herein granted shall be vested in a Congress of the United States**, which shall consist of a Senate and House of Representatives." Legislative power is the power to make laws.

This grant of authority means two key things. First, **Congress alone** has the power to **make laws**. Second, if Congress wants to accomplish something, Congress needs to pass a law. That's true even when Congress is spending money, taxing, coining money, creating a national bank or a new federal agency, etc. (The Constitution gives Congress a few powers that are not lawmaking—such as the Senate's power to confirm the people the President picks for certain jobs—but we won't worry about those powers yet.)

(b) *The President's executive power*. Article II, section 1 says: **"The executive Power shall be vested in a President of the United States of America."** The executive power is the power to **carry out** (aka execute) the laws that Congress makes. The President not only has the *power* to execute the laws but also the *duty* to do so: The **Take Care Clause** in Article II, section 3 says the President "shall take care that the laws be faithfully executed."

Does the President have to execute the laws all by himself? Of course not! The Framers knew that the President would need helpers, so the Constitution allows Congress to establish **agencies**—run by **officers**—to help the President implement the laws. For example, Congress passed laws that created the Department of Health and Human Services (HHS), the Department of Labor, and the Department of Homeland Security. These laws sometimes create subagencies within the larger agency: for instance, the Food and Drug Administration (FDA) is part of HHS.

In the laws creating these agencies, Congress sets out the powers that it is giving to an agency, such as giving the FDA authority to decide if a new drug is safe and effective. The laws also specify who will head the agency or subagency, such as the "Secretary of Health and Human Services" or the "FDA Commissioner." But the laws do not identify the actual humans who will occupy those positions. The power to pick the actual humans is known as the **appointment power**, and the power to fire them is known as the **removal power**.

Collectively, the President, the agencies, and the people who work there are the **Executive Branch**. Just as the Framers never imagined how much power Congress eventually would have relative to the states, the Framers never imagined how gigantic the Executive Branch would become. Today, the Executive Branch has more than 2 million civilian employees.

(c) *Overview of Supreme Court doctrines*. The big picture that I set out above makes the distinction between legislative power and executive power sound simple. The reality is more complex, as you will see in the cases.

First, the line between making law and executing law is fuzzy. In theory, making law = making policy and executing law = implementing the policies that are embodied in the laws. In reality, executing law involves a ton of policymaking by the President and the agencies. However, the Supreme Court's doctrines put some limits on the amount of power that Congress can hand off to the Executive Branch.

The Supreme Court cases applying the **nondelegation doctrine**, which is at issue in *Gundy* (2019) and *Consumers' Research* (2025), say that Congress cannot simply hand off (aka delegate) its lawmaking power to the Executive Branch. But those cases also recognize that, for practical reasons, the laws that Congress enacts address problems at a high level of generality and give the Executive Branch lots of discretion to fill in the details. Agencies often set out such details in regulations (aka rules) that look a lot like laws. Such regulations often involve policy calls that are made by the President or the agency that issued the rule. Under the nondelegation

doctrine, Congress must provide **an intelligible principle** to guide the President or agency in the exercise of such discretion. As you'll see in the cases, that test is easy to satisfy.

Second, it can be hard to figure out how much power Congress *intended* to give the President or an agency. Many real-world disputes are about *whether* Congress authorized the President or agency to take the challenged action, such as imposing large tariffs or canceling a huge amount of student debt. These disputes raise questions of *statutory interpretation*, that is, questions about what the words of the statute mean. But as you will see, background constitutional concerns can affect the way the Court interprets a statute. In a series of recent cases including *Alabama Association of Realtors* (2021), *Job Creators* (2022), *Biden v. Missouri* (2022), *West Virginia* (2023), and *Nebraska* (2023), the Supreme Court announced a new rule of statutory interpretation called the **major questions doctrine**. The Supreme Court said that if the President or an agency is doing something with **vast economic or political significance**, the Court wants to see **specific statutory text** that authorizes that action. Without such specific authorization, the Court will interpret the statute as not giving the President or agency the power to do the challenged action.

Third, the President's duty to execute federal law is not absolute. The longstanding principle known as **enforcement discretion** allows the President and the agencies to set priorities in deciding how to implement federal laws. The's a strong practical reason for that principle: the Executive Branch's money and personnel are far too limited to implement and enforce every federal law to the hilt. The *Texas* (2023) case illustrates the inevitable need to set enforcement priorities. But an important question remains: Can a President simply refuse to enforce a law that he does not like? The Supreme Court has not directly confronted the issue, but it has strongly hinted that such a blanket refusal would violate the Take Care Clause.

There is a related question about spending federal funds. As the *Nebraska* (2023) and the *CFPB* (2024) cases illustrate, Congress has the **power of purse**, that is, the power to decide how federal money should be spent. That power comes not only from the **Spending Clause** in Article I, section 8 (which you learned about in chapter 2), but also from the **Appropriations Clause** in Article I, section 9, which says: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The Appropriations Clause means that the President and agencies are not allowed to spend federal money unless Congress passed a law that allows the spending. But what about the opposite: Can the President refuse to spend money that Congress has appropriated? Such a refusal is called **impoundment**, and the

Impoundment Control Act of 1974 puts limits on the President's ability to refuse to spend appropriated funds.

2. The nondelegation doctrine

As just explained, the Constitution gives Congress alone the power to enact laws. The two cases excerpted below apply the Supreme Court's **nondelegation doctrine**. Under this doctrine, Congress cannot simply hand off (aka delegate) its lawmaking power to the Executive Branch. But the Supreme Court has long recognized that Congress often legislates at a high level of generality. The Court has said that Congress can give the Executive Branch discretion to fill in the details. Under the Supreme Court's test, such delegations are constitutional as long as Congress provides an **intelligible principle** to guide the agency. That test is not demanding. The Court has said it is satisfied as long as Congress has set out the **general policy** that the agency must pursue and the **boundaries** of the delegated authority. The Court has not invalidated a statute on nondelegation doctrine grounds since 1935. A few current Justices want to put more teeth into this doctrine, but there do not seem to be five votes to do so.

Gundy v. United States, 588 U.S. 128 (2019)
(4-4 vote with Justice Kavanaugh recused)

*[**Background:** This excerpt introduces the intelligible-principle test that Supreme Court uses to analyze nondelegation claims. The next excerpt applies that test.]*

Justice KAGAN wrote the opinion for four Justices:

The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. This case requires us to decide whether 34 U.S.C. § 20913(d), enacted as part of the Sex Offender Registration and Notification Act (SORNA), violates that doctrine. We hold it does not.

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." Accompanying that assignment of power to Congress is a bar on its further delegation. Congress, this Court explained early on, may not transfer to another branch powers which are strictly and exclusively legislative. But the Constitution does not deny to the Congress the necessary

resources of flexibility and practicality that enable it to perform its functions. Congress may obtain the assistance of its coordinate Branches—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws. In our increasingly complex society, replete with ever changing and more technical problems, this Court has understood that Congress simply cannot do its job absent an ability to delegate power under broad general directives. So we have held, time and again, that a statutory delegation is constitutional as long as Congress "lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

The constitutional question is thus whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. Or in a related formulation, the Court has stated that a delegation is permissible if Congress has made clear to the delegee the general policy he must pursue and the boundaries of his authority. Those standards, the Court has made clear, are not demanding. We have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.

Only twice in this country's history (and that in a single year) have we found a delegation excessive—in each case because "Congress had failed to articulate any policy or standard" to confine discretion. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). By contrast, we have over and over upheld even very broad delegations. Here is a sample: We have approved delegations to various agencies to regulate in the "public interest." We have sustained authorizations for agencies to set "fair and equitable" prices and "just and reasonable" rates. We more recently affirmed a delegation to an agency to issue whatever air quality standards are "requisite to protect the public health." And so forth.

In that context, the delegation in SORNA easily passes muster (as all eleven circuit courts to have considered the question found). Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs. Among the judgments often left to executive officials are ones involving feasibility. In fact, standards of that kind are ubiquitous in the U.S. Code. See, e.g., 12 U.S.C. § 1701z–2(a) (providing that the Secretary of Housing and Urban Development "shall require, to the greatest extent feasible, the employment of new and improved technologies, methods, and materials in housing construction under HUD programs"); 47 U.S.C. § 903(d)(1) (providing that "the Secretary of Commerce

shall promote efficient and cost-effective use of the spectrum to the maximum extent feasible" in "assigning frequencies for mobile radio services"). In those delegations, Congress gives its delegee the flexibility to deal with real-world constraints in carrying out his charge. So too in SORNA. It is wisdom and humility alike that this Court has always upheld such "necessities of government." *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting).

FCC v. Consumers' Research, 145 S. Ct. 2482 (2025)
(6-3 vote)

*[**Background**: The federal statute in this case directs the Federal Communications Commission (FCC) to collect money from telecommunications companies to fund a program known as universal service, which helps make telecommunications (phone, internet, etc.) affordable everywhere in the country. The trade organization Consumers' Research, which represents telecommunications companies, challenged that part of the statute, arguing (as relevant here) that the statute gave the FCC too much discretion and thus violated the nondelegation doctrine. The Supreme Court rejected that argument.]*

Justice Kagan wrote the opinion for the Court, which Chief Justice Roberts and Justices Sotomayor, Kavanaugh, Barrett, and Jackson joined. Justice Gorsuch dissented, joined by Justices Thomas and Alito.

Justice KAGAN wrote the opinion for the Court:

Nearly a century ago, Congress charged the then-new Federal Communications Commission (FCC or Commission) with making communications services available, at affordable prices, to all Americans. That objective became known as "universal service." Some decades on, near the turn of the 21st century, Congress reaffirmed its commitment to universal service while providing new and more detailed instructions to the FCC about how to achieve it. Under the amended statutory plan, the FCC would use required payments, called contributions, from telecommunications companies to subsidize basic communications services for consumers in certain underserved communities—particularly, rural and low-income areas.

The question in this case is whether the universal-service scheme—more particularly, its contribution mechanism—violates the Constitution's nondelegation doctrine. We

hold that no impermissible transfer of authority has occurred. Under our nondelegation precedents, Congress sufficiently guided and constrained the discretion that it lodged with the FCC to implement the universal-service contribution scheme.

II.

Article I of the Constitution provides that "all legislative Powers herein granted shall be vested in a Congress of the United States." § 1. Accompanying that assignment of power to Congress is a bar on its further delegation: Legislative power, we have held, belongs to the legislative branch, and to no other. See *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 472 (2001). At the same time, we have recognized that Congress may "seek assistance" from its coordinate branches to secure the "effect intended by its acts of legislation." *J.W. Hampton, Jr., & Co. v. United States*, 276 U. S. 394, 406 (1928). And in particular, Congress may "vest discretion" in executive agencies to implement and apply the laws it has enacted—for example, by deciding on "the details of their execution." *Ibid*.

To distinguish between the permissible and the impermissible in this sphere, we have long asked whether Congress has set out an "intelligible principle" to guide what it has given the agency to do. *J. W. Hampton*, 276 U.S., at 409. Under that test, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U. S., at 475. The "guidance" needed is greater, we have explained, when an agency action will "affect the entire national economy" than when it addresses a narrow, technical issue (e.g., the definition of "country grain elevators"). *Ibid.* But in examining a statute for the requisite intelligible principle, we have generally assessed whether Congress has made clear both "the general policy" that the agency must pursue and "the boundaries of [its] delegated authority." *American Power & Light Co. v. SEC*, 329 U. S. 90, 105 (1946). And similarly, we have asked if Congress has provided sufficient standards to enable both "the courts and the public [to] ascertain whether the agency" has followed the law. *OPP Cotton Mills, Inc. v. Administrator of Wage and Hour Div., Dept. of Labor*, 312 U. S. 126, 144 (1941). If Congress has done so—as we have almost always found—then we will not disturb its grant of authority.

The question is whether Section 254 of the Communications Act adequately guides the FCC in requiring contributions from carriers—whether it expresses the "general policy" the FCC must pursue in setting contribution amounts, as well as the "boundaries" it cannot cross. Here, that inquiry into the nature of the FCC's discretion involves what turn out to be two closely related questions. First, how much money can the FCC raise through contributions? And second, on what things can it spend

those funds? We consider each in turn, and find that Congress answered both. Congress, that is, imposed ascertainable and meaningful guideposts for the FCC to follow when carrying out its delegated function of collecting and spending contributions from carriers.

The statute directs the FCC to collect the amount that is “sufficient” to support the universal-service programs Congress has told it to implement. The word “sufficient” sets a floor and a ceiling. That means, of course, that the FCC cannot raise less than is adequate or necessary to finance the universal-service programs Congress wants. But it also means that the FCC cannot raise more than that amount. If you told a friend to order a “sufficient” amount of food for five people and 500 boxes of pizza showed up at your house, you would not think he had followed instructions. The Commission’s mandate is to raise what it takes to pay for universal-service programs; if the Commission raises much beyond, as if it raises much below, it violates the statute.

To say that much, though, takes us only halfway, because it raises the question: Sufficient for what? If Section 254’s universal-service program is itself indeterminate—so that the FCC can turn it into anything the FCC wants—then the “sufficiency” ceiling will do no serious work. The FCC could operate—and collect contributions “sufficient” for—either the most barebones or the most extravagant program. But if Congress has given appropriate guidance about the nature and content of universal service, then that plus the “sufficiency” ceiling will defeat this challenge to the contribution system. For Congress will have provided intelligible principles to guide the FCC as it raises funds.

Section 254 provides the FCC with determinate standards for operating the universal-service program. The statute makes clear whom the program is intended to serve: those in rural and other high-cost areas (with a special nod to rural hospitals), low-income consumers, and schools and libraries. And in provisions defining universal service and stating the program's core principles, the statute provides specific criteria for which services those statutory beneficiaries should receive. The conditions, each alone and together, have bite, creating a bounded program. Section 254 instructs the Commission to provide to an identified set of recipients a defined sort of benefit—widely used, generally affordable, and essential telecommunications services.

The proof is in the pudding: Each of the four programs the FCC now operates under Section 254 reflects Congress’s choices about universal service’s scope and content. And maybe surprisingly (given what we are used to when it comes to government programs), they have done so at roughly constant inflation-adjusted dollars. That is

because Congress made clear the parameters of the programs, and the FCC has operated within them.

In a sense, each of the arguments Consumers' Research and the dissent make about Section 254 suffers from the same flaw. At every turn, they read Section 254 extravagantly, the better to create a constitutional problem. All in all, the arguments do not show proper respect for a coordinate branch of Government. Statutes should be read, if possible, to comport with the Constitution, not to contradict it. See, e.g., *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

Commentary: In the last paragraph of the excerpt, Justice Kagan relied on an important principle known as **constitutional avoidance**: If a statute can reasonably be interpreted in a way that avoids a constitutional problem, courts are supposed to adopt that interpretation. As Justice Kagan noted, doing so "shows respect for a coordinate Branch of government"—the Legislative Branch—because it allows the Court to uphold, rather than strike down, an Act of Congress. The principle of constitutional avoidance comes up in many contexts and applies to state laws as well as federal laws. It's sometimes called the *Ashwander* principle because it is derived from Justice Brandeis's concurring opinion in *Ashwander* (1936).

3. Delegations from Congress to the Executive Branch

If you scroll through the news, you'll see that the President and federal agencies often do things that are important and controversial, such as imposing large tariffs on foreign imports, forgiving large amounts of student debt, halting federal grants, and restricting immigration. Disputes can arise about whether the President or agency had the authority to take a particular action.

Imagine that you are the lawyer asked to defend the President or agency. What are the potential sources of authority? Sometimes, the Constitution gives a power directly to the President. For example, Article II gives the President the power to pardon people for federal crimes. There is no need for Congress to pass a law that gives the President the pardon power.

But far more often, the power of the President or a federal agency to take an action comes from a statute that Congress enacts. In the *Youngstown* opinion that's excerpted below, Justice Robert Jackson's concurrence set out a famous three-part

framework for evaluating the legality of actions by the President. He said that the President's power is at its greatest when Congress has authorized the challenged action; that the President's power is at its lowest when Congress has prohibited the challenged action (meaning the President's authority must come directly from the Constitution); and that there is a middle area in which Congress has neither authorized nor prohibited the challenged action. The Supreme Court cites Justice Jackson's three-part framework quite often. You'll understand it better after you see it applied in a series of cases, including the ones we'll read in Chapter 4 about foreign affairs.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)
(6-3 vote)

*[**Background:** This case is famous for both historical and legal reasons. In 1952, during the Korean War, a labor strike threatened to shut down the nation's steel mills. President Truman, worried that steel was essential to make weapons for the war, directed the Secretary of Commerce to take over the steel mills and keep them running. Steel mill owners sued, and the Supreme Court held that the President had no authority to seize the steel mills. President Truman conceded that there was no statute giving him that power, and the Court rejected his argument that he could seize the steel mills under his Article II war powers without the need for statutory authorization. Justice Black wrote the opinion for the Court, but as explained above, Justice Robert Jackson's concurrence is the famous opinion that still gets quoted all the time. Chief Justice Vinson and Justices Reed and Minton dissented because they believed that Congress had authorized the challenged action.]*

Justice BLACK wrote the opinion for the Court:

We are asked to decide whether President Truman was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills.

On April 4, 1952, the steel workers union gave notice of a nation-wide strike called to begin at 12:01 a.m. April 9. The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel. Reciting these considerations for his action, the

President, a few hours before the strike was to begin, issued Executive Order No. 10340, which directed the Secretary of Commerce to take possession of most of the steel mills and keep them running. The Secretary called upon the presidents of the various seized companies to serve as operating managers for the United States. They were directed to carry on their activities in accordance with regulations and directions of the Secretary. The next morning the President sent a message to Congress reporting his action. Congress has taken no action.

Obeying the Secretary's orders under protest, the companies brought proceedings against him in the District Court. Their complaints charged that the seizure was not authorized by an act of Congress or by any constitutional provisions.

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied.

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.

Justice Robert JACKSON concurred in the judgment:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of

twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

Commentary: Most of the time, the President and federal agencies argue that their actions were authorized by Congress (paragraph 1 in Justice Jackson's framework). They point to particular words in a statute, and the dispute focuses on whether that statutory text actually authorized the challenged action.

The **major questions doctrine** comes into play if the President or an agency does something especially significant. Under this doctrine—which the Supreme Court announced in a series of recent cases—the Supreme Court will not interpret *general* language in a statute to authorize the President or agency to resolve a *major policy question*, which the Court has described as involving questions of *vast economic or political significance*. What exactly does that mean? And how specific must the statutory text be? We don't yet know because this doctrine is new and evolving. That said, the cases excerpted below should give you a feel for the doctrine.

Alabama Association of Realtors v. HHS, 141 S. Ct. 2485 (2021)
(6-3 vote)

*[**Background:** This case involved an "eviction moratorium" that the CDC issued during the pandemic. To reduce the spread of COVID-19, the CDC temporarily prohibited landlords from evicting people for failing to pay rent. Landlords challenged the CDC's power to do that, and the Supreme Court agreed. Applying the principle that later became known as the major questions doctrine, the Court concluded that the CDC did not have statutory authority to issue the eviction moratorium. The Court's opinion was issued per curiam, meaning unsigned. Justice Breyer dissented, joined by Justices Sotomayor and Kagan.]*

Per curiam:

The Director of the Centers for Disease Control and Prevention (CDC) has imposed a nationwide moratorium on evictions of any tenants who live in a county that is

experiencing substantial or high levels of COVID–19 transmission and who make certain declarations of financial need. We hold that the CDC has exceeded its statutory authority. It would be one thing if Congress had specifically authorized the action that the CDC has taken. But that has not happened. Instead, the CDC has imposed a nationwide moratorium on evictions in reliance on a decades-old statute that authorizes it to implement measures like fumigation and pest extermination. It strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts.

The CDC relied on § 361(a) of the Public Health Service Act for authority to promulgate and extend the eviction moratorium. See 42 U.S.C. § 264(a). That provision states:

> "The Surgeon General, with the approval of the [Secretary of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary."

Originally passed in 1944, this statutory provision has rarely been invoked—and never before to justify an eviction moratorium. Regulations under this authority have generally been limited to quarantining infected individuals and prohibiting the import or sale of animals known to transmit disease. See, *e.g.*, 40 Fed. Reg. 22543 (1975) (banning small turtles known to be carriers of salmonella).

The Government contends that the first sentence of § 361(a) gives the CDC broad authority to take whatever measures it deems necessary to control the spread of COVID–19, including issuing the moratorium. But the second sentence informs the grant of authority by illustrating the kinds of measures that could be necessary: inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of contaminated animals and articles. Reading both sentences together, rather than the first in isolation, it is a stretch to maintain that § 361(a) gives the CDC the authority to impose this eviction moratorium.

Even if the text were ambiguous, the sheer scope of the CDC's claimed authority

under § 361(a) would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance. That is exactly the kind of power that the CDC claims here. At least 80% of the country, including between 6 and 17 million tenants at risk of eviction, falls within the moratorium. While the parties dispute the financial burden on landlords, Congress has provided nearly $50 billion in emergency rental assistance—a reasonable proxy of the moratorium's economic impact.

Indeed, the Government's reading of § 361(a) would give the CDC a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside the CDC's reach, and the Government has identified no limit in § 361(a) beyond the requirement that the CDC deem a measure "necessary." Could the CDC, for example, mandate free grocery delivery to the homes of the sick or vulnerable? Require manufacturers to provide free computers to enable people to work from home? Order telecommunications companies to provide free high-speed Internet service to facilitate remote work? Section 361(a) is a wafer-thin reed on which to rest such sweeping power.

Job Creators Network v. Department of Labor, 142 S. Ct. 661 (2022)
(6-3 vote)

*[**Background:** This case challenged a Department of Labor rule requiring most employers to ensure that their workers were vaccinated against COVID-19 (subject to medical and religious exemptions). The Court issued a per curiam opinion holding that the agency lacked statutory authority to impose that requirement. Justice Gorsuch concurred, joined by Justice Alito. Justice Breyer dissented, joined by Justices Sotomayor and Kagan.]*

Per curiam:

The Secretary of Labor, acting through the Occupational Safety and Health Administration (OSHA), recently enacted a vaccine mandate for much of the Nation's work force. The mandate, which employers must enforce, applies to roughly 84 million workers, covering virtually all employers with at least 100 employees. It requires that covered workers receive a COVID–19 vaccine, and it pre-empts contrary state laws. The only exception is for workers who obtain a medical test each

week at their own expense and on their own time, and also wear a mask each workday. OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID–19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here.

The Secretary lacked authority to impose the mandate. Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided. The Secretary has ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense. This is no everyday exercise of federal power. It is instead a significant encroachment into the lives—and health—of a vast number of employees. "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 141 S.Ct. 2485, 2489 (2021) (per curiam). There can be little doubt that OSHA's mandate qualifies as an exercise of such authority.

That is not to say OSHA lacks authority to regulate *occupation-specific* risks related to COVID–19. Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID–19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID–19 that all face. OSHA's indiscriminate approach fails to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an "occupational safety or health standard." 29 U.S.C. § 655(b).

Justice GORSUCH concurred, joined by Justices Thomas and Alito:

The central question we face today is: Who decides? No one doubts that the COVID–19 pandemic has posed challenges for every American. Or that our state, local, and national governments all have roles to play in combating the disease. The only question is whether an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people. Or whether, as 27 States before us submit, that work belongs to state and local governments across the country and the people's elected representatives in Congress. This Court is not a public health authority. But it is charged with resolving

disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land.

OSHA claims the power to force 84 million Americans to receive a vaccine or undergo regular testing. By any measure, that is a claim of power to resolve a question of vast national significance. Yet Congress has nowhere clearly assigned so much power to OSHA.

Why does the major questions doctrine matter? It ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.

In this respect, the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials. Sometimes lawmakers may be tempted to delegate power to agencies to reduce the degree to which they will be held accountable for unpopular actions. But the Constitution imposes some boundaries here. If Congress could hand off all its legislative powers to unelected agency officials, it "would dash the whole scheme" of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives.

Whichever the doctrine, the point is the same. Both serve to prevent "government by bureaucracy supplanting government by the people." A. Scalia, *A Note on the Benzene Case, American Enterprise Institute*, J. on Govt. & Soc., July–Aug. 1980, p. 27.

Commentary: Do you understand how Justice Gorsuch's concurrence connected the nondelegation doctrine to the major questions doctrine? In his view, the nondelegation doctrine prohibits Congress from handing off to the Executive Branch the power to resolve major questions. Under the major questions doctrine, courts are supposed to assume that Congress did not intend to hand off to the Executive Branch the power to decide major questions, unless the statutory text is quite specific about that. In other words, the major questions doctrine tells courts how to interpret

vague or ambiguous statutes. Justice Gorsuch sees the doctrine as one aspect of the general canon of constitutional avoidance. But other Justices see it differently.

Biden v. Missouri, 142 S. Ct. 647 (2022)
(5-4 vote)

*[**Background:** On the same day that it issued the OSHA vaccine decision above, the Supreme Court upheld (by a 5-4 vote) the rule issued by the Secretary of Health & Human Services requiring that workers in federally funded healthcare facilities be vaccinated against COVID-19. The Court issued a per curiam decision. Justice Thomas dissented, joined by Justices Alito, Gorsuch, and Barrett. When you write your case summary, try to explain why this case and the OSHA case came out opposite ways.]*

Per curiam:

The Medicare program provides health insurance to individuals 65 and older, as well as those with specified disabilities. The Medicaid program does the same for those with low incomes. Both Medicare and Medicaid are administered by the Secretary of Health and Human Services, who has general statutory authority to promulgate regulations "as may be necessary to the efficient administration of the functions with which [he] is charged." 42 U.S.C. § 1302(a).

One such function—perhaps the most basic, given the Department's core mission—is to ensure that the healthcare providers who care for Medicare and Medicaid patients protect their patients' health and safety. Such providers include hospitals, nursing homes, ambulatory surgical centers, hospices, rehabilitation facilities, and more. To that end, Congress authorized the Secretary to promulgate, as a condition of a facility's participation in the programs, such "requirements as he finds necessary in the interest of the health and safety of individuals who are furnished services in the institution." 42 U.S.C. § 1395x(e)(9) (hospitals); see, e.g., §§ 1395x(cc)(2)(J) (outpatient rehabilitation facilities), 1395i–3(d)(4)(B) (skilled nursing facilities), 1395k(a)(2)(F) (i) (ambulatory surgical centers); see also §§ 1396r(d)(4)(B), 1396d(l)(1), 1396d(o) (corresponding provisions in Medicaid Act).

Relying on these authorities, the Secretary has established long lists of detailed conditions with which facilities must comply to be eligible to receive Medicare and Medicaid funds. Such conditions have long included a requirement that certain providers maintain and enforce an "infection prevention and control program

designed ... to help prevent the development and transmission of communicable diseases and infections." § 483.80 (long-term care facilities); see, e.g., §§ 482.42(a) (hospitals).

The Secretary issued the rule at issue here after finding that vaccination of healthcare workers against COVID–19 was "necessary for the health and safety of individuals to whom care and services are furnished." In many facilities, 35% or more of staff remain unvaccinated, and those staff, the Secretary explained, pose a serious threat to the health and safety of patients. That determination was based on data showing that the COVID–19 virus can spread rapidly among healthcare workers and from them to patients, and that such spread is more likely when healthcare workers are unvaccinated. He also explained that, because Medicare and Medicaid patients are often elderly, disabled, or otherwise in poor health, transmission of COVID–19 to such patients is particularly dangerous. In addition to the threat posed by infacility transmission itself, the Secretary also found that fear of exposure to the virus from unvaccinated health care staff can lead patients to themselves forgo seeking medically necessary care, creating a further risk to patient health and safety. He further noted that staffing shortages caused by COVID–19-related exposures or illness has disrupted patient care.

The rule thus fits neatly within the language of the statute. After all, ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm. It would be the very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with COVID–19.

Of course the vaccine mandate goes further than what the Secretary has done in the past to implement infection control. But he has never had to address an infection problem of this scale and scope before. And his response is not a surprising one. Vaccination requirements are a common feature of the provision of healthcare in America: Healthcare workers around the country are ordinarily required to be vaccinated for diseases such as hepatitis B, influenza, and measles, mumps, and rubella. As the Secretary explained, these pre-existing state requirements are a major reason the agency has not previously adopted vaccine mandates as a condition of participation.

All this is perhaps why healthcare workers and public-health organizations overwhelmingly support the Secretary's rule. See Brief for American Medical Assn. et al. as Amici Curiae; Brief for American Public Health Assn. et al. as Amici Curiae; Brief for Secretaries of Health and Human Services et al. as Amici Curiae. Indeed,

their support suggests that a vaccination requirement under these circumstances is a straightforward and predictable example of the "health and safety" regulations that Congress has authorized the Secretary to impose. The challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred upon it. At the same time, such unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have.

West Virginia v. EPA, 142 S. Ct. 2587 (2022)
(6-3 vote)

*[**Background:** This case challenged an EPA action known as the Clean Power Plan. That plan required power plants that generate energy from coal or gas to transform themselves over time into plants that generate energy from solar, wind, or other clean power sources (a transformation referred to as "generation shifting"). Applying the major questions doctrine, Chief Justice Roberts wrote the opinion for the Court that held that Congress had not authorized the Clean Power Plan.]*

Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined that opinion. Justice Gorsuch wrote a concurrence that Justice Alito joined. Justice Kagan wrote a dissent that Justices Breyer and Sotomayor joined.

Chief Justice ROBERTS wrote the opinion for the Court:

Precedent teaches that there are extraordinary cases in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority. Under this body of law, known as the major questions doctrine, given both separation of powers principles and a practical understanding of legislative intent, the agency must point to clear congressional authorization for the authority it claims.

This is a major questions case. The Obama-era White House stated that the Clean Power Plan would "drive a[n] ... aggressive transformation in the domestic energy industry." White House Fact Sheet. EPA's own modeling concluded that the rule would entail billions of dollars in compliance costs (to be paid in the form of higher

energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors. EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule 3–22, 3–30, 3–33, 6–24, 6–25 (2015). The Energy Information Administration reached similar conclusions, projecting that the rule would cause retail electricity prices to remain persistently 10% higher in many States, and would reduce GDP by at least a trillion 2009 dollars by 2040. Dept. of Energy, Analysis of the Impacts of the Clean Power Plan 21, 63–64 (May 2015).

Given these circumstances, there is every reason to hesitate before concluding that Congress meant to confer on EPA the authority it claims under Section 111(d). We find it highly unlikely that Congress would leave to agency discretion the decision of how much coal- based generation there should be over the coming decades. The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself. The importance of the issue, along with the fact that the same basic scheme EPA adopted has been the subject of an earnest and profound debate across the country, makes the oblique form of the claimed delegation all the more suspect.

To overcome that skepticism, the Government must—under the major questions doctrine—point to clear congressional authorization to regulate in that manner. All the Government can offer, however, is the Agency's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction." 42 U.S.C. § 7411(a)(1). Such a vague statutory grant is not close to the sort of clear authorization required by our precedents.

Justice KAGAN dissented, joined by Justices Breyer and Sotomayor:

Today, the Court strips the EPA of the power Congress gave it to respond to "the most pressing environmental challenge of our time." *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007). Climate change's causes and dangers are no longer subject to serious doubt.

It is not surprising that Congress has always delegated, and continues to do so—including on important policy issues. As this Court has recognized, it is often unreasonable and impracticable for Congress to do anything else. In all times, but ever more in our increasingly complex society, the Legislature simply cannot do its job absent an ability to delegate power under broad general directives. Consider just two reasons why.

First, Members of Congress often don't know enough—and know they don't know enough—to regulate sensibly on an issue. Of course, Members can and do provide overall direction. But then they rely, as all of us rely in our daily lives, on people with greater expertise and experience. Those people are found in agencies. Congress looks to them to make specific judgments about how to achieve its more general objectives.

Second and relatedly, Members of Congress often can't know enough—and again, know they can't—to keep regulatory schemes working across time. Congress usually can't predict the future—can't anticipate changing circumstances and the way they will affect varied regulatory techniques. Nor can Congress (realistically) keep track of and respond to fast-flowing developments as they occur.

Over time, the administrative delegations Congress has made have helped to build a modern Nation. Congress wanted fewer workers killed in industrial accidents. It wanted to prevent plane crashes, and reduce the deadliness of car wrecks. It wanted to ensure that consumer products didn't catch fire. It wanted to stop the routine adulteration of food and improve the safety and efficacy of medications. And it wanted cleaner air and water. If an American could go back in time, she might be astonished by how much progress has occurred in all those areas. It didn't happen through legislation alone. It happened because Congress gave broad-ranging powers to administrative agencies, and those agencies then filled in—rule by rule by rule—Congress's policy outlines.

This Court has historically known enough not to get in the way. Courts should be modest. Today, the Court is not. The subject matter of the regulation here makes the Court's intervention all the more troubling. Whatever else this Court may know about, it does not have a clue about how to address climate change. And let's say the obvious: The stakes here are high. Yet the Court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions. The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening. Respectfully, I dissent.

---

4. Congress's power of the purse

The next two cases illustrate the important point that Congress has the power of the purse, that is, the power to decide when and how to spend federal funds. That power is derived from both the Spending Clause in Article I, section 8 and the

Appropriations Clause in Article I, section 9. In *Biden v. Nebraska* (2023), the Supreme Court rejected the federal government's argument that the major questions doctrine should apply only to "regulatory" actions and not to agency actions that involve federal spending. In *CFPB* (2024), the Supreme Court held that Congress has broad latitude in deciding how to structure its appropriations.

Biden v. Nebraska, 143 S. Ct. 2355 (2023)
(6-3 vote)

*[**Background:** This case challenged an action by the Department of Education that extinguished hundreds of billions of dollars of student debt on federal loans. The Court, applying the major questions doctrine, held that Congress had not authorized the agency to cancel debts on that scale.]*

Chief Justice Roberts wrote the opinion of the Court, which Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined. Justice Kagan dissented, joined by Justices Sotomayor and Jackson.

Chief Justice ROBERTS wrote the opinion for the Court:

To ensure that Americans could keep up with increasing international competition, Congress authorized the first federal student loans in 1958. Outstanding federal student loans now total $1.6 trillion extended to 43 million borrowers. Last year, the Secretary of Education established the first comprehensive student loan forgiveness program, invoking the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) for authority to do so. The Secretary's plan canceled roughly $430 billion of federal student loan balances, completely erasing the debts of 20 million borrowers and lowering the median amount owed by the other 23 million from $29,400 to $13,600. Six States sued, arguing that the HEROES Act does not authorize the loan cancellation plan. We agree.

The Secretary asserts that the HEROES Act grants him the authority to cancel $430 billion of student loan principal. It does not. We hold today that the Act allows the Secretary to "waive or modify" existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, not to rewrite that statute from the ground up. Prior "modifications" issued under the Act implemented only minor changes, most of which were procedural. Examples include reducing the number of tax forms borrowers are required to file, extending time periods in which

borrowers must take certain actions, and allowing oral rather than written authorizations.

The Secretary's new "modifications" of these provisions were not "moderate" or "minor." Instead, they created a novel and fundamentally different loan forgiveness program. The Secretary's plan has "modified" the cited provisions only in the same sense that "the French Revolution 'modified' the status of the French nobility"—it has abolished them and supplanted them with a new regime entirely.

The economic and political significance of the Secretary's action is staggering by any measure. A budget model issued by the Wharton School of the University of Pennsylvania estimates that the program will cost taxpayers between $469 billion and $519 billion, depending on the total number of borrowers ultimately covered. That is ten times the "economic impact" that we found significant in concluding that an eviction moratorium implemented by the Centers for Disease Control and Prevention triggered analysis under the major questions doctrine. It amounts to nearly one-third of the Government's $1.7 trillion in annual discretionary spending.

Rather than dispute the extent of that impact, the dissent chooses to mount a frontal assault on what it styles "the Court's made-up major questions doctrine." But its attempt to relitigate *West Virginia* is misplaced. The Secretary, for his part, acknowledges that *West Virginia* is the law. But he objects that its principles apply only in cases concerning "agency actions involving the power to regulate, not the provision of government benefits." In the Government's view, "there are fewer reasons to be concerned" in cases involving benefits, which do not impose "profound burdens" on individual rights or cause "regulatory effects that might prompt a note of caution in other contexts involving exercises of emergency powers."

This Court has never drawn the line the Secretary suggests—and for good reason. Among Congress's most important authorities is its control of the purse. U.S. Const., Art. I, § 9, cl. 7. It would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations.

CFPB v. Community Financial Services Ass'n, 601 U.S. 416 (2024)
(7-2 vote)

*[**Background:** Companies regulated by the CFPB challenged Congress's unusual mechanism for funding that agency. The Supreme Court rejected the challenge, explaining that Congress has broad discretion to decide how to structure its appropriations.]*

Justice Thomas wrote the opinion of the Court, which Chief Justice Roberts and Justices Sotomayor, Kagan, Kavanaugh, Barrett, and Jackson joined. Justice Alito dissented, joined by Justice Gorsuch.

Justice THOMAS wrote the opinion for the Court:

Our Constitution gives Congress control over the public fisc, but it specifies that its control must be exercised in a specific manner. The Appropriations Clause commands that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, § 9, cl. 7. For most federal agencies, Congress provides funding on an annual basis. This annual process forces them to regularly implore Congress to fund their operations for the next year. The Consumer Financial Protection Bureau is different. The Bureau does not have to petition for funds each year. Instead, Congress authorized the Bureau to draw from the Federal Reserve System the amount its Director deems reasonably necessary to carry out the Bureau's duties, subject only to an inflation-adjusted cap. In this case, we must decide the narrow question whether this funding mechanism complies with the Appropriations Clause. We hold that it does.

Under the Appropriations Clause, an appropriation is simply a law that authorizes expenditures from a specified source of public money for designated purposes. The statute that provides the Bureau's funding meets these requirements. We therefore conclude that the Bureau's funding mechanism does not violate the Appropriations Clause.

The associations suggest that the Bureau's funding statute is not a valid appropriation because it is not time limited. But, the Constitution's text suggests that, at least in some circumstances, Congress can make standing appropriations. The Constitution expressly provides that "no Appropriation of Money" to support an army "shall be for a longer Term than two Years." Art. I, § 8, cl. 12. The Framers did not explicitly limit the duration of appropriations for other purposes.

5. The President's duty and discretion to enforce federal laws

Article II, section 3 gives the President both the **power** and the **duty** to "take care that the laws be faithfully executed." That clause is known as the **Take Care Clause**. Although it may sound like the President has an absolute duty to enforce federal laws, practical realities mean that the President and federal agencies cannot enforce every federal law to the max. The Executive Branch has limited resources and must set enforcement priorities. Thus, it is long accepted that the Executive Branch has a lot of **enforcement discretion**. That said, the Supreme Court has hinted that the President cannot simply ignore—that is, refuse to enforce or implement—federal statutes that the President doesn't like. If this issue gets teed up for the Supreme Court, the Court may well say that such a refusal violates the President's duty under the Take Care Clause.

United States v. Texas, 599 U.S. 670 (2023)
(8-1 vote)

*[**Background:** Oversimplifying a bit, a federal immigration statute provides that the Department of Homeland Security (DHS) "shall take into custody any alien who" is removable for specified criminal or national-security reasons. In 2021, after President Biden took office, DHS issued new guidelines for immigration enforcement. The guidelines prioritized the arrest and removal from the United States of certain noncitizens, such as suspected terrorists or dangerous criminals. Texas and Louisiana sued DHS, arguing that the federal statute requires DHS to arrest more criminal noncitizens pending their removal.*

The Supreme Court held that the States lack standing. The excerpt below is from the part of the opinion that explains that the Executive Branch has a lot of discretion in setting enforcement priorities. But you should also keep an eye out for the distinction that the Court makes between setting enforcement priorities and wholly abandoning the enforcement of a federal law. That distinction is relevant both to regulatory statutes (like immigration laws) and federal spending statutes.]

Justice Kavanaugh wrote the opinion for the Court, which Chief Justice Roberts and Justices Sotomayor, Kagan, and Jackson joined. Justice Gorsuch concurred, joined by Justices Thomas and Barrett. Justice Alito dissented.

Justice KAVANAUGH wrote the opinion for the Court:

Lawsuits alleging that the Executive Branch has made an insufficient number of arrests or brought an insufficient number of prosecutions run up against the Executive's Article II authority to enforce federal law. Article II of the Constitution assigns the "executive Power" to the President and provides that the President "shall take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 1, cl. 1; § 3. Under Article II, the Executive Branch possesses authority to decide how to prioritize and how aggressively to pursue legal actions against defendants who violate the law. The Executive Branch—not the Judiciary—makes arrests and prosecutes offenses on behalf of the United States.

That principle of enforcement discretion over arrests and prosecutions extends to the immigration context, where this Court has stressed that the Executive's enforcement discretion implicates not only normal domestic law enforcement priorities but also foreign-policy objectives. In line with those principles, this Court has declared that the Executive Branch also retains discretion over whether to remove a noncitizen from the United States.

In addition to the Article II problems raised by judicial review of the Executive Branch's arrest and prosecution policies, courts generally lack meaningful standards for assessing the propriety of enforcement choices in this area. After all, the Executive Branch must prioritize its enforcement efforts. That is because the Executive Branch (i) invariably lacks the resources to arrest and prosecute every violator of every law and (ii) must constantly react and adjust to the ever-shifting public-safety and public-welfare needs of the American people.

This case illustrates the point. The Executive Branch does not possess the resources necessary to arrest or remove all of the noncitizens covered by the statutory provisions at issue here. That reality is not an anomaly—it is a constant. For the last 27 years since these statutory provisions were enacted in their current form, all five Presidential administrations have determined that resource constraints necessitated prioritization in making immigration arrests.

In light of inevitable resource constraints and regularly changing public-safety and public-welfare needs, the Executive Branch must balance many factors when devising arrest and prosecution policies. That complicated balancing process in turn leaves courts without meaningful standards for assessing those policies. This Court

has consistently recognized that federal courts are generally not the proper forum for resolving claims that the Executive Branch should make more arrests or bring more prosecutions.

All of those considerations help explain why federal courts have not traditionally entertained lawsuits of this kind. By concluding that Texas and Louisiana lack standing here, we abide by and reinforce the proper role of the Federal Judiciary under Article III. The States' novel standing argument, if accepted, would entail expansive judicial direction of the Department's arrest policies. If the Court green-lighted this suit, we could anticipate complaints in future years about alleged Executive Branch under-enforcement of any similarly worded laws—whether they be drug laws, gun laws, obstruction of justice laws, or the like. We decline to start the Federal Judiciary down that uncharted path. Our constitutional system of separation of powers contemplates a more restricted role for Article III courts.

In holding that Texas and Louisiana lack standing, we do not suggest that federal courts may never entertain cases involving the Executive Branch's alleged failure to make more arrests or bring more prosecutions. The Court has adjudicated selective-prosecution claims under the Equal Protection Clause. In those cases, however, a party typically seeks to prevent his or her own prosecution, not to mandate additional prosecutions against *other* possible defendants.

The standing calculus also might change if the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions. Finally, a challenge to an Executive Branch policy that involves both the Executive Branch's arrest or prosecution priorities and the Executive Branch's provision of legal benefits or legal status could lead to a different standing analysis. That is because the challenged policy might implicate more than simply the Executive's traditional enforcement discretion. Cf. *Department of Homeland Security v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1906-07 (2020) (benefits such as work authorization and Medicare eligibility accompanied by non-enforcement meant that the policy was "more than simply a non-enforcement policy").

---

6. The related question of impoundment

The *Texas* case that we just read involved a *regulatory* power: Congress's power to regulate immigration. The Supreme Court hinted that if a President flat out refuses to enforce a regulatory statute, that refusal might be a basis for a suit alleging that the President violated his duty to enforce the law under the Take Care Clause

Related but distinct issues arise if the President refuses to *spend funds* that Congress has appropriated. Such a refusal is called the **impoundment** of the funds. In 1974, Congress was frustrated with President Nixon's refusal to spend appropriated funds and enacted the Impoundment Control Act of 1974, 2 U.S.C. §§ 681-688. That statute sets up a way for a President to propose and Congress to consider changes in the funding that existing laws provide. In short, the President sends a "special message" to Congress asking Congress to rescind the relevant appropriation. For the next 45 days, any bill accepting the President's proposal gets considered by Congress on an expedited basis. If no such bill is passed, the Impoundment Control Act expressly authorizes the Comptroller General (who is an officer in the Legislative Branch) to bring a lawsuit challenging the President's impoundment. Before bringing such a lawsuit, the Comptroller General must send a report to Congress saying that the President is unlawfully withholding funds. After a specified amount of time passes, the Comptroller General may bring a civil action under the Impoundment Control Act to compel the Executive to spend the funds at issue.

In late September 2025, in a case involving President Trump's refusal to spend $4 billion in foreign aid funds that Congress had appropriated, the Supreme Court issued an emergency stay order that tentatively concluded that the Impoundment Control Act implicitly prohibits the *beneficiaries* of appropriations—that is, the people or entities that are supposed to get the federal funds—from bringing a suit to challenge the impoundment. See *Department of State v. AIDS Vaccine Advocacy Coalition*, No. 25A269, 2025 WL 2740571 (Sept. 26, 2025). The majority tentatively concluded that the Comptroller General alone can bring such a suit. Justice Kagan wrote a dissent, which Justices Sotomayor and Jackson joined.

We don't yet know whether the Supreme Court down the road will adhere to the view that the majority tentatively expressed in the *AIDS Vaccine Advocacy Coalition* stay order. But if the Court does adhere to that view, that will mean impoundment will rarely be challenged in a lawsuit. The Comptroller General is unlikely to sue, and that's especially true when the same political party controls the Presidency and Congress.

D. THE PRESIDENT'S POWERS TO APPOINT AND REMOVE FEDERAL OFFICERS

1. Introduction

The readings about separation of powers can be difficult, so I'm starting with a recap of the principles that we learned in part C above. There, we focused on **substantive limits on Executive Branch action**. Article I gives Congress the power to make the laws, and Article II gives the President the power to execute those laws, with the help of an alphabet soup of federal agencies. In general, that means the President and agencies must identify a federal statute that gives them the authority to take a particular action. (We're ignoring for now powers that Article II gives directly to the President.) Congress often legislates at a high level of generality. Executive Branch agencies then issue a slew of rules (aka regulations) that fill in the details. The Supreme Court's **nondelegation doctrine** requires Congress to provide an **intelligible principle** to guide the agency, but under current law that test is easy to satisfy. The Supreme Court's **major questions doctrine** is much harder to satisfy: if an agency wants to issue a rule that addresses a matter of vast economic or political significance—such as requiring the nation's power plants to transform from burning fossil fuels to using clean sources of power, or canceling $500 billion in student debt—the agency needs to identify specific statutory text that gives it the authority to do such a thing.

What if the President or an agency does **not** want to implement or enforce a law that Congress enacted? On the one hand, the Executive Branch has lots of **enforcement discretion**, which means the President and agencies can set priorities about how to enforce federal laws. On the other hand, it may violate the **Take Care Clause** if the President refuses to implement or enforce federal laws, simply because the President does not like those laws. As we saw, there are additional wrinkles if the President refuses to spend funds that Congress appropriated.

Now in part D, we turn to the powers that the Constitution gives the President to **appoint** and **remove** (aka fire) people who work in the Executive Branch. The removal issue is a hot topic because President Trump fired various high-ranking officials despite federal statutes that purported to restrict his ability to do so.

Why are fights about the appointment and removal powers so important? On the one hand, the appointment and removal powers are the primary ways that the President controls the rest of the sprawling Executive Branch. The idea is that if the President picks the officers who head federal agencies and can fire them at will (that is, whenever he wants, without giving a reason) these officers will be accountable to the President, who—as the elected head of the Executive Branch—is accountable to the people of the United States. On the other hand, Congress sometimes has "good government" reasons for giving removal protections to certain officers. For example, Congress wants the officials to make decisions that are fair and protect the long-term interests of the United States, rather than influenced by political pressure from above.

2. The power to appoint federal officers

We'll start with the power of appointment. You may be familiar with the way Supreme Court Justices and other federal judges are picked. The President nominates a person, who can only serve if the Senate votes to confirm (approve) the President's pick. That procedure is required by the Appointments Clause, which is in Article II, section 2, clause 2 of the Constitution.

The Appointments Clause also addresses how certain people who work in the Executive Branch are picked. Our focus is on these people because the Supreme Court's cases often involve disputes about them. Article II, section 1, clause 1 vests the executive power in a single person: the President. It says: "The executive power shall be vested in a President of the United States of America." That clause is known as the **Executive Vesting Clause**. And as you learned in part C, the **Take Care Clause** in Article II, section 3, clause 3 says that the President "shall take care that the laws be faithfully executed."

The Framers knew that the President would need help in executing federal laws. Under the Supreme Court's cases, the helpers fall into three categories. The helpers with the most power are known as **principal officers**. They include (among others) people who head the various Executive Branch departments, such as the Department of Health and Human Services, the Department of the Treasury, and the Department of Defense. Below them are **inferior officers**. Everyone else who works in the Executive Branch is categorized as an **employee** (sometimes referred to as a "mere employee" or a "lowly employee," which included me when I worked at the Department of Justice!). As you may remember from the federalism chapter, the

Executive Branch started out tiny but grew over time. There are now thousands of officers in the Executive Branch and more than two million civilian employees.

The Appointments Clause sets out the procedures for appointing **principal officers** and **inferior officers**. The text is hard to follow, so I'm telling you the bottom line after the quote:

> The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

This text does not use the term "principal officers," which is the shorthand the Supreme Court uses to describe officers who are above "inferior officers." **Principal officers** must be nominated by the President and confirmed by the Senate. **Inferior officers** can be appointed in any of one of four different ways: (1) the same way as principal officers (nominated by the President and confirmed by the Senate); (2) by the President alone; (3) by a court of law; or (4) by the head of a department. The Appointments Clause does not address how **employees** in the Executive Branch get picked, and the Supreme Court has said that the Constitution "cares not a whit" about who appoints employees.

The disputes in Supreme Court cases are usually about whether a particular official should be categorized as a principal officer, an inferior officer, or an employee. The *Arthrex* (2021) and *Braidwood* (2025) cases excerpted below addressed the distinction between a principal officer and an inferior officer. *Lucia* (2018) addressed the distinction between an officer and an employee. As you read the excerpts, you should look for the tests that the Supreme Court uses to decide who falls in each category and include them in your case outlines, along with your notes about how the Court applied the test.

United States v. Arthrex, Inc., 594 U.S. 1 (2021)
(5-4 vote in relevant part)

*[**Background:** Federal law allows people to ask the Patent and Trademark Office to revoke patents it previously issued. Under the statutory provision that was at issue in this case, such disputes were decided by federal officers in the PTO who were called Administrative Patent Judges (APJs). Don't be confused by the fact that their title includes the word "Judges": there was no dispute that APJs are part of the Executive Branch.*

*The Appointments Clause issue arose because Congress said in the statute that APJs should be appointed by the Secretary of Commerce, who is the head of a department. The Supreme Court thus had to decide whether APJs were **principal officers**—which would mean that their appointments violated the Appointments Clause—**or inferior officers**, which would mean that their appointments complied with the Appointments Clause. The Court held that APJs are principal officers and that their appointments therefore violated the Appointments Clause.*

Although there were splintered opinions, Chief Justice Roberts wrote for the Court in the part that is excerpted below. Justice Thomas dissented, joined by Justices Breyer, Sotomayor, and Kagan.]

Chief Justice ROBERTS wrote the opinion for the Court in this part:

Under the Constitution, "the executive Power" is vested in the President, who has the responsibility to "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; § 3. The Appointments Clause provides that he may be assisted in carrying out that responsibility by officers nominated by him and confirmed by the Senate, as well as by other officers not appointed in that manner but whose work, we have held, must be directed and supervised by an officer who has been. Art. II, § 2, cl. 2.

The Framers recognized, of course, that no single person could fulfill that responsibility alone, and expected that the President would rely on subordinate officers for assistance. Today, thousands of officers wield executive power on behalf of the President in the name of the United States. That power acquires its legitimacy and accountability to the public through a clear and effective chain of command down from the President, on whom all the people vote.

Assigning the nomination power to the President guarantees accountability for the appointees' actions because the "blame of a bad nomination would fall upon the president singly and absolutely." The Federalist No. 77, p. 517 (J. Cooke ed. 1961) (A. Hamilton). The Appointments Clause adds a degree of accountability in the Senate, which shares in the public blame for both the making of a bad appointment and the rejection of a good one.

Only the President, with the advice and consent of the Senate, can appoint noninferior officers, called "principal" officers as shorthand in our cases. The default manner of appointment for inferior officers is also nomination by the President and confirmation by the Senate. But the Framers foresaw that when offices became numerous, and sudden removals necessary, this mode might be inconvenient. Reflecting this concern for administrative convenience, the Appointments Clause permits Congress to dispense with joint appointment, but only for inferior officers. Congress may vest the appointment of such officers "in the President alone, in the Courts of Law, or in the Heads of Departments."

Congress provided that APJs would be appointed as inferior officers, by the Secretary of Commerce as head of a department. The question presented is whether the nature of their responsibilities is consistent with their method of appointment. As an initial matter, no party disputes that APJs are officers—not lesser functionaries such as employees or contractors—because they exercise significant authority pursuant to the laws of the United States. See *Lucia v. SEC*, 138 S. Ct. 2044, 2052-2054 (2018).

Whether one is an "inferior" officer [as opposed to a principal officer] depends on whether he has a superior other than the President. An inferior officer must be directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.

APJs have the power to render a final decision on behalf of the United States without any such review by their nominal superior or any other principal officer in the Executive Branch. Nor are APJs meaningfully controlled by the threat of removal from federal service entirely, because the Secretary can fire them after a decision only "for such cause as will promote the efficiency of the service," 5 U.S.C. § 7513(a). In all the ways that matter to the parties who appear [them], the buck stops with the APJs. [The Court thus held that the appointment of APJs by the Secretary of Commerce was unconstitutional.]

Kennedy v. Braidwood Management, Inc., 145 S. Ct. 2427 (2025)
(6-3 vote)

*[**Background:** This case arose out of the Obamacare provision that requires insurance companies to cover, without copays or deductibles, preventive services that are recommended by various panels of experts. The panel at issue in this case is called the U.S. Preventive Services Task Force, whose members are researchers, professors, and practicing physicians with expertise across a wide range of medical specialties. The panel gives letter ratings (such as "A" or "B") to different preventive services based on its conclusions about whether the service provides a net benefit for public health. For example, mammograms and statins have an "A" rating because the Task Force was confident that they provide a net public health benefit. The constitutional question in this case was whether Task Force members were appointed in the manner that the Appointments Clause requires. The Supreme Court agreed with the government that Task Force members are **inferior officers** who were properly appointed by the head of their Department (the Secretary of Health and Human Services), **rather than principal officers** who must be nominated by the President and confirmed by the Senate.]*

Justice Kavanaugh wrote the opinion for the Court, which Chief Justice Roberts and Justices Sotomayor, Kagan, Barrett, and Jackson joined. Justice Thomas dissented, joined by Justices Alito and Gorsuch.

Justice KAVANAUGH wrote the opinion for the Court:

This case concerns the Appointments Clause in Article II of the Constitution. The U.S. Preventive Services Task Force, an entity within the Department of Health and Human Services, issues public recommendations about preventive healthcare services—for example, cancer and diabetes screenings. Before 2010, the Task Force's recommendations were purely advisory. But the Affordable Care Act of 2010 now mandates that health insurers cover some of the recommended services at no cost to the insured.

The Secretary of Health and Human Services appointed the 16 current members of the Task Force. The question in this case is whether appointment of Task Force members by the Secretary is consistent with the Appointments Clause in Article II. That question turns on whether the Task Force members are principal officers or inferior officers. Principal officers must be nominated by the President and confirmed

by the Senate. That process can be lengthy and therefore can hinder the Executive Branch's ability to promptly fill offices—and thus also impede the President's ability to execute the laws through his subordinate executive officers. By contrast, inferior executive officers may be directly appointed by the President or by the head of a department, such as by the Secretary of HHS—a more efficient and expeditious process.

The Executive Branch under both President Trump and President Biden has argued that the Preventive Services Task Force members are inferior officers and therefore may be appointed by the Secretary of HHS. We agree. The Task Force members are removable at will by the Secretary of HHS, and their recommendations are reviewable by the Secretary before they take effect. So Task Force members are supervised and directed by the Secretary, who in turn answers to the President, preserving the chain of command in Article II. See *Edmond v. United States*, 520 U. S. 651, 663 (1997). Therefore, under Article II and this Court's precedents, the Task Force members are inferior officers. As a result, appointment of Task Force members by the Secretary of HHS is consistent with the Appointments Clause.

I.

A.

Preventive services can help people avoid acute illness, identify and treat chronic conditions, prevent cancer or lead to earlier detection, and improve health. HHS, Issue Brief—Access to Preventive Services Without Cost-Sharing: Evidence From the Affordable Care Act 1 (Jan. 2022). A wide range of individuals and organizations rely on the Task Force's preventive-services recommendations. They include health care systems, professional societies, employers, Congress and other policy-makers, governmental public health agencies," and those directly delivering clinical services, such as primary care professionals.

The Task Force develops recommendations through a standardized process. It selects a topic to study, reviews the relevant scientific evidence, formulates a draft recommendation statement, takes public comments, and then votes on the final recommendation.

The Task Force uses a letter grading system for its recommendations. It assigns an "A" grade to services with a high certainty of substantial net benefit and a "B" grade to services with at least a moderate certainty of a moderate net benefit. It also issues "C" and "D" grades to services with little to no net benefit, and an "I" grade to services for which the current evidence is "insufficient" to assess the balance of benefits and

harms. The Task Force can vote to change the grade that was assigned in a previous recommendation.

The Task Force has given an “A” or “B” rating to more than 40 preventive services. Those services include screenings to detect lung, breast, cervical, and colorectal cancer; risk-reducing medications for women at high risk of breast cancer; nicotine patches for adults trying to quit smoking; statin medications to reduce the risk of heart disease and stroke; physical therapy to help the elderly avoid falls; and diabetes screenings.

For many years after its initial creation in 1984 and codification in 1999, the Task Force’s recommendations were purely advisory. That changed in 2010 when Congress passed and President Obama signed the Affordable Care Act. 124 Stat. 119. That Act requires most health insurers and group health plans to cover certain preventive services without cost sharing—that is, without imposing copayments, deductibles, or other charges on patients.

Rather than set forth a fixed list, the Act tied coverage for preventive services to the recommendations of several entities within the Federal Government, including the Preventive Services Task Force. Specifically, the Act mandates no-cost coverage of “evidence-based items or services that have in effect a rating of ‘A’ or ‘B’ in the current recommendations” of the Task Force. § 300gg–13(a)(1).

After the Task Force makes an “A” or “B” recommendation, the insurance coverage requirements for that preventive service do not take effect immediately. Rather, the law directs the Secretary of HHS to “establish a minimum interval,” not less than one year, between when an “A” or “B” recommendation is issued by the Task Force and when insurers must cover the recommended service without cost sharing. § 300gg–13(b). During that interval, the Secretary can review the Task Force’s recommendation and block it from going into effect. The Affordable Care Act also amended the statute governing the Task Force to describe the Task Force as “independent” and to provide that the members of the Task Force and their recommendations “shall be independent and, to the extent practicable, not subject to political pressure.” §§ 299b–4(a)(1), (6).

The question in this case is whether the Task Force members were appointed in a manner consistent with the Appointments Clause in Article II of the Constitution. § 2,

cl. 2. In Braidwood's view, Task Force members are principal officers who must be appointed by the President "with the Advice and Consent of the Senate." Ibid.

II.

A.

The Appointments Clause in Article II of the Constitution specifies how "Officers of the United States," as distinct from employees, must be appointed. § 2, cl. 2. An officer exercises "'significant authority pursuant to the laws of the United States'" *Lucia v. SEC*, 585 U. S. 237, 245 (2018). An employee, by contrast, does not exercise significant governmental authority. See ibid.

The text of the Appointments Clause "very clearly divides all its officers into two classes": principal officers and inferior officers. *United States v. Germaine*, 99 U. S. 508, 509 (1879). Here, all agree that the Preventive Services Task Force members are officers. The question is whether they are principal or inferior.

Principal officers must be appointed by the President "with the Advice and Consent of the Senate." Art. II, § 2, cl. 2. The constitutionally mandated joint participation of the President and Senate in the appointments process is designed to promote "a judicious choice" for "filling the offices of the Union." The Federalist No. 76, p. 455 (C. Rossiter ed. 1961) (A. Hamilton). The President and the Senate are accountable "for both the making of a bad appointment and the rejection of a good one." *Edmond v. United States*, 520 U. S. 651, 660 (1997).

Inferior officers may also be appointed via Presidential nomination and Senate confirmation. See Art. II, § 2, cl. 2. The Framers, though, recognized that requiring all officers of the Federal Government to run the gauntlet of Presidential nomination and Senate confirmation would prove administratively unworkable as offices became "numerous" and "sudden removals" and prompt replacements became "necessary." *Germaine*, 99 U. S., at 510. So on one of the last days of the Constitutional Convention—September 15, 1787—they authorized an additional and streamlined method of appointment for inferior officers. Specifically, Congress may "by Law vest" appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, § 2, cl. 2. Congress therefore may provide that inferior executive officers be unilaterally appointed by the President or a Head of Department.

The Appointments Clause is "more than a matter of 'etiquette or protocol'"—it is "among the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U. S., at 659. The Appointments Clause ensures that the President or his

subordinate Heads of Departments play a central role in selecting the officers within the Executive Branch who will assist in exercising the "executive Power." Art. II, § 1, cl. 1. The Clause thereby helps protect the independence of the Executive Branch and maintain the Constitution's separation of powers.

How does a court determine whether an executive officer is principal (and must be appointed by the President with the advice and consent of the Senate) or inferior (and may be appointed by the President or Head of Department alone)?

Principal officers in the Executive Branch encompass at least the Heads of Departments, who report directly to the President. Examples include the Secretary of State, Secretary of the Treasury, Secretary of Defense, and Attorney General.

Inferior officers are most readily defined by their relationship to principal officers. "Generally speaking," whether "one is an 'inferior' officer depends on whether he has a superior" other than the President, *Edmond*, 520 U. S., at 662, and how much power the officer "exercises free from control by a superior," *United States v. Arthrex, Inc.*, 594 U. S. 1, 17 (2021). In *Edmond v. United States*, the Court summarized the governing principle: Inferior officers are those "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." 520 U. S., at 663.

B.

We conclude that Task Force members are inferior officers because their work is directed and supervised by the Secretary of HHS, a principal officer. The Secretary's ability to direct and supervise the Task Force derives from two main sources: the Secretary's authority to remove Task Force members at will; and the Secretary's authority to review and block the Task Force's recommendations before they can take effect.

This Court has said that the authority to remove an officer at will is a powerful tool for control. The reason is straightforward: Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.

The Secretary of HHS has the power to appoint (and has appointed) the Task Force members. And no statute restricts removal of Task Force members. Therefore, there can be no doubt that the Secretary may remove Task Force members at will. The Secretary's authority to remove Task Force members at will in turn enables him to

supervise and direct them. When a Task Force member makes a decision that the Secretary disagrees with, the Secretary may remove that member.

In addition, the Secretary can block a Task Force recommendation from taking effect by combining his at-will removal authority with his authority to determine when Task Force recommendations become binding. To explain: The Affordable Care Act expressly affords the Secretary the power to "establish a minimum interval" between when the Task Force issues an "A" or "B" recommendation and when insurers must cover the recommended service without cost sharing. Congress specified that the minimum interval shall not be less than 1 year, leaving the Secretary with discretion to set a longer minimum interval. So during the minimum 1-year period after the Task Force makes a recommendation before it becomes binding, the Secretary can request that the Task Force reconsider or withdraw a recommendation that he disfavors. He has plenty of time to remove and replace Task Force members who refuse. And he can then request that the reconstituted Task Force modify or rescind the recommendation. Therefore, in this statutory scheme, the Secretary can use his at-will removal power to stop any preventive-services recommendation contrary to his judgment from taking effect.

The Secretary also has statutory power to directly review and block Task Force recommendations before they take effect. That power confirms that the Task Force members are inferior officers. The Secretary retains ultimate responsibility over whether Task Force recommendations become final decisions that mandate no-cost coverage by health insurers.

Taken together, those complementary review authorities ensure that the Task Force members have no power to render a final decision on behalf of the United States unless permitted to do so by the Secretary of HHS. To be clear, to supervise and direct for purposes of the Appointments Clause, the Secretary "need not review every decision." *Arthrex*, 594 U. S., at 27. Rather, "what matters is that" the Secretary "have the *discretion* to review decisions rendered by" the Task Force. Ibid. (emphasis added). Under the statutory provisions described above, the Secretary possesses that authority.

Commentary: A central theme of this book is the difference between legal principles and policies. The *Braidwood* case is a nice illustration of that distinction. The Supreme Court accepted the legal argument that was first made during the Biden Administration and reiterated during the second Trump Administration: The HHS Secretary has the power to choose, supervise, and fire members of the U.S.

Preventive Services Task Force, which means that their appointments were constitutional. That legal ruling has significant policy consequences. It means that whoever is serving as the HHS Secretary—whether that be Xavier Becerra during the Biden Administration or RFK Jr. in the second Trump Administration—has the power to decide which preventive services must be covered by insurance companies without cost to the insured. There have been criticisms of RFK Jr. for firing members of a similar panel of experts, the Advisory Committee on Immunizations. But whatever you may think of RFK Jr.'s *policy* views about vaccines, you should understand from *Braidwood* that his authority to fire these inferior officers is the *legal* reason that this statutory scheme is constitutional.

Lucia v. SEC, 585 U.S. 237 (2018)
(6-3 vote)

*[**Background:** The constitutional question in this case was whether the Administrative Law Judges (ALJs) who work in the Securities and Exchange Commission are **officers** or **mere employees**. The Supreme Court held that the SEC's ALJs are inferior officers, which meant that their appointment violated the Appointments Clause.]*

Justice Kagan wrote the opinion for the Court, which Chief Justice Roberts and Justices Kennedy, Thomas, Alito, and Gorsuch joined. Justices Breyer, Ginsburg, and Sotomayor dissented.

Justice KAGAN wrote the opinion for the Court:

The sole question here is whether the SEC's ALJs are "Officers of the United States" or simply employees of the Federal Government. The Appointments Clause prescribes the exclusive means of appointing "Officers." Only the President, a court of law, or a head of department can do so. See Art. II, § 2, cl. 2.3 And as all parties agree, none of those actors appointed the ALJ at issue here. So if the SEC's ALJs are constitutional officers, Lucia raises a valid Appointments Clause claim. The only way to defeat his position is to show that those ALJs are not officers at all, but instead non-officer employees—part of the broad swath of "lesser functionaries" in the Government's workforce. For if that is true, the Appointments Clause cares not a whit about who named them.

Two decisions set out this Court's basic framework for distinguishing between officers and employees. *Germaine* held that "civil surgeons" (doctors hired to perform various

physical exams) were mere employees because their duties were “occasional or temporary” rather than “continuing and permanent.” Stressing “ideas of tenure and duration,” the Court there made clear that an individual must occupy a “continuing” position established by law to qualify as an officer. *Buckley* then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they “exercised significant authority pursuant to the laws of the United States.” The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.

Both the amicus and the Government urge us to elaborate on *Buckley*’s “significant authority” test, but another of our precedents makes that project unnecessary. Maybe one day we will see a need to refine or enhance the test *Buckley* set out so concisely. But that day is not this one, because in *Freytag v. Commissioner*, 501 U.S. 868 (1991), we applied the unadorned “significant authority” test to adjudicative officials who are near-carbon copies of the Commission's ALJs. As we now explain, our analysis there necessarily decides this case.

The officials at issue in *Freytag* were the “special trial judges” (STJs) of the United States Tax Court. The authority of those judges depended on the significance of the tax dispute before them. In “comparatively narrow and minor matters,” they could both hear and definitively resolve a case for the Tax Court. In more major matters, they could preside over the hearing, but could not issue the final decision; instead, they were to “prepare proposed findings and an opinion” for a regular Tax Court judge to consider. The proceeding challenged in *Freytag* was a major one, involving $1.5 billion in alleged tax deficiencies. After conducting a 14–week trial, the STJ drafted a proposed decision in favor of the Government. A regular judge then adopted the STJ’s work as the opinion of the Tax Court. The losing parties argued on appeal that the STJ was not constitutionally appointed.

This Court held that the Tax Court’s STJs are officers, not mere employees. Citing *Germaine*, the Court first found that STJs hold a continuing office established by law. The Court then considered, as *Buckley* demands, the “significance” of the “authority” STJs wield. In addressing that issue, the Government had argued that STJs are employees, rather than officers, in all cases (like the one at issue) in which they could not “enter a final decision.” But the Court thought the Government's focus on finality “ignore[d] the significance of the duties and discretion that STJs possess.” Describing the responsibilities involved in presiding over adversarial hearings, the Court said: STJs “take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders.” And the Court observed that “in the course of carrying out these important functions, the STJs exercise significant

discretion." That fact meant they were officers, even when their decisions were not final.

Freytag says everything necessary to decide this case. The SEC's ALJs exercise the same "significant discretion" when carrying out the same "important functions" as STJs do. Both sets of officials have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges. First, the Commission's ALJs (like the Tax Court's STJs) take testimony. Second, the ALJs (like STJs) conduct trials. Third, the ALJs (like STJs) rule on the admissibility of evidence. And fourth, the ALJs (like STJs) have the power to enforce compliance with discovery orders. In particular, they may punish all contemptuous conduct, including violations of those orders, by means as severe as excluding the offender from the hearing. So point for point—straight from *Freytag*'s list—the Commission's ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries.

And at the close of those proceedings, ALJs issue decisions much like that in *Freytag*—except with potentially more independent effect. As the *Freytag* Court recounted, STJs "prepare proposed findings and an opinion" adjudicating charges and assessing tax liabilities. Similarly, the Commission's ALJs issue decisions containing factual findings, legal conclusions, and appropriate remedies. And when the SEC declines review (and issues an order saying so), the ALJ's decision itself becomes final and is deemed the action of the Commission. That last-word capacity makes this an a fortiori case: If the Tax Court's STJs are officers, as *Freytag* held, then the Commission's ALJs must be too.

Commentary: Here's an interesting procedural note. Ordinarily, the Department of Justice will make all reasonable arguments to defend a federal statute against a constitutional challenge. In other words, DOJ generally won't throw an Act of Congress under the bus simply because of doubts about its constitutionality. But a longstanding exception to that DOJ practice is when the claim is that the federal statute infringes on the power of the President/Executive Branch. In those circumstances, DOJ will decide for itself whether it thinks the statute is constitutional and tell the Supreme Court (or lower courts) what it thinks. For example, in the *Lucia* case that you just read, DOJ took the position in the Supreme Court that the challenged provisions of the federal statutes were unconstitutional infringements on Executive Branch power. So, the Supreme Court assigned outside lawyers (referred to as amicus curiae) the task of defending those provisions.

3. The power to remove federal officers

We now turn to the President's power to **remove** (that is, fire) Executive Branch officers. The Constitution does not *explicitly* refer to the removal power—that is, you won't find a "Removal Clause" in the Constitution—but the Supreme Court has long treated the President's power to remove Executive Branch officers as implicit in the President's Article II role as the head of the Executive Branch. The idea is that Article II vests in the President alone the power to execute federal laws. Although the President can have helpers, the buck is supposed to stop with him. And the power to fire subordinates is the way to ensure that the buck stops there: subordinates are likely to do what the President wants if he can remove them from office.

Who creates these helper positions? Congress does. For example, Congress passed a law that created the Department of Defense, assigned it powers and duties, and specified that it would be run by an officer called the Secretary of Defense. Typically, such laws do not restrict the President's ability to fire such officers. That means the President can fire the officers *at will*, without having to give any reason. For example, the President can fire the Attorney General, the Secretary of Defense, and the Secretary of the Treasury at will. The Supreme Court sometimes says that such officials "serve at the pleasure of the President."

Most statutes do not restrict the President's power to fire principal officers. But in dozens of statutes enacted over a century, Congress provided that the officers who head certain agencies get to stay in their jobs for a specified term (such as 7 years) and put limits on the President's ability to fire them. In describing those limits, these statutes use different formulations—such as by saying that the officers can be removed only "for inefficiency, neglect of duty, or malfeasance in office" —but the phrase *for cause* is the shorthand for all such limits. These agencies have long been referred to as *independent agencies* because the removal protections made their officers somewhat independent of the President's control.

Is it constitutional for Congress to restrict the President's removal power in this way? For a long time, the answer seemed to be "yes," at least for some agencies. But under an important decision that the Supreme Court issued in 2026, the answer now is generally "no." In *Trump v. Slaughter*, 146 S. Ct. __ (2026), the Court overruled *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which had upheld the provision of the Federal Trade Commission Act that said FTC members could be removed only for cause. The *Slaughter* decision very likely means that similar removal protections for officers of dozens of other agencies—including the Federal Communications Commission (FCC), the Securities and Exchange Commission

(SEC), the National Labor Relations Board (NLRB), the Federal Elections Commission (FEC), and the Consumer Product Safety Commission (CPSC)—are unconstitutional and that the President therefore can fire their officers whenever he wants to do so.

The *Slaughter* decision is thus a major shift of power to the President. But as you will see, the Court carved out a narrow exception for members of the Federal Reserve Board in *Trump v. Cook*, 146 S. Ct. __ (2026), which the Court issued on the same day as the *Slaughter* decision.

Trump v. Slaughter, 146 S. Ct. __ (2026)
(6-3 vote)

*[**Background:** In 1914, Congress enacted the Federal Trade Commission Act, which created the Federal Trade Commission (FTC). Under the statute, the FTC's central mission is to prevent business practices that are anticompetitive, unfair, or deceptive. In the 1914 Act, Congress specified that the FTC would be headed by five Commissioners, no more than three of whom can be from the same political party. The statute specified that each Commissioner would serve for seven years and may be removed by the President only "for inefficiency, neglect of duty, or malfeasance in office." In other words, Congress limited the President's ability to remove FTC Commissioners, who can be removed only for cause.*

Ninety years ago, in 1935, the Supreme Court upheld that removal protection when it decided Humphrey's Executor. But in recent decisions, the Court declined to extend Humphrey's Executor and signaled that it had doubts about the reasoning of that case. Then, early in his second Term, President Trump fired the two Democratic FTC Commissioners, including Rebecca Slaughter. He did not claim that he was firing them for a cause allowed under the statute. Instead, he told them their "continued service on the FTC was inconsistent with his Administration's priorities" and that they were removed "pursuant to his authority under Article II of the Constitution." Slaughter challenged her removal and, when this case got to the Supreme Court, President Trump asked the Court to overrule Humphrey's Executor, which it did. The

Court declared that "the President may remove his subordinates at will." That broad holding is a major expansion of presidential power.]

Chief Justice Roberts wrote the opinion for the Court, which Justices Alito, Gorsuch, Kavanaugh, Barratt, and Thomas joined. Justice Sotomayor dissented, joined by Justices Kagan and Jackson.

Chief Justice ROBERTS wrote the opinion for the Court:

Nearly 250 years ago, the Framers decided to vest "the executive Power" in one person—"a President of the United States of America." Art. II, § 1, cl. 1. The choice was not made lightly. Within living memory were the "long train of abuses and usurpations" of a King who reigned as "a Tyrant." Declaration of Independence ¶¶2, 30. Indeed, several delegates to the Constitutional Convention pushed for a multimember council instead of "unity in the Executive magistracy," which they feared would serve as "the foetus of monarchy." 1 Records of the Federal Convention of 1787, p. 66 (M. Farrand ed. 1911) (Farrand's Records) (Edmund Randolph). But unity won out.

With just one President in charge, there would be no doubt "on whom the blame or the punishment of a pernicious measure ... ought really to fall." The Federalist No. 70, pp. 423–424, 428 (C. Rossiter ed. 1961) (Alexander Hamilton).

Today we confront one of several regulatory agencies that deviate from this model of Presidential supervision—the Federal Trade Commission (FTC). Since its creation in 1914, the FTC has accumulated vast rulemaking, enforcement, and adjudicatory powers under more than 80 statutes. Not only does it promulgate rules that carry the force of law, but it also enforces those rules against private parties, collecting civil penalties in the billions of dollars. Its powers, however, do not belong to the President or his appointees alone; they instead belong to five Commissioners, each of whom serves for seven years and may be removed by the President only "for inefficiency, neglect of duty, or malfeasance in office." 38 Stat. 718, 15 U.S.C. § 41.

We hold that such protection from removal is contrary to the separation of powers enshrined in the Constitution.

II.

B

What text, history, and structure settle, our precedent confirms—the President may remove his subordinates at will.

Our landmark decision came 100 years ago in *Myers v. United States*, 272 U.S. 52 (1926). That case arose from an unlikely source—a dispute over management of the post office in Portland, Oregon. Under an 1876 statute, the President had to receive the "advice and consent of the Senate" not only to appoint postmasters but also to remove them. For reasons that are now lost to history, President Wilson fired Portland's postmaster, Frank Myers, and did so without the Senate's consent. Myers sued for backpay.

In a scholarly opinion, Chief Justice Taft rejected Myers's suit and reaffirmed the President's power to fire his subordinates at will. That power arose, he wrote for the Court, from the Constitution's text, history, and structure. "The vesting of the executive power in the President was essentially a grant of the power to execute the laws," Chief Justice Taft explained. "As he is charged specifically to take care that the laws be faithfully executed, the reasonable implication," he continued, "was that as part of his executive power" he must be able to "remove those for whom he cannot continue to be responsible."

While *Myers* was perhaps our best word on the subject, it was not our last.

Just nine years after *Myers*, we handed down *Humphrey's Executor*, 295 U.S. 602 (1935). The case arose out of President Roosevelt's decision to fire one of President Hoover's appointees to the Federal Trade Commission, William Humphrey, two years into Humphrey's seven-year term. Humphrey lauded Hoover "as the foremost figure of the world," a man who fought back against "the demagogue, the fanatic, the reformer, and the fool." On the Commission, Humphrey sought to do the same. He often spoke to the press and described the FTC variously as "a publicity bureau" used "to spread Socialistic propaganda," a "bureaucracy gone insane," and "an instrument of oppression and disturbance and injury," Roosevelt saw matters differently, and requested Humphrey's resignation. Humphrey refused, so Roosevelt fired him in a one-line letter that did not specify a cause for his removal—seemingly contrary to a statute permitting removal of Commissioners only for "inefficiency, neglect of duty, or malfeasance in office." Humphrey died soon thereafter, and the executor of his estate sued for backpay.

The Court ruled unanimously against the President. Justice Sutherland, writing for the Court, explained that there are some presidentially appointed officials who exercise "no part of the executive power." And for those officials, "the decision in the *Myers* case cannot be accepted as controlling." The Court held that William Humphrey was one such official. That was because the FTC's duties were very

limited—they were "neither political nor executive, but predominantly quasi-judicial and quasi-legislative."

From the start, *Humphrey*'s was tethered to a highly circumscribed and almost fictional view of the FTC's role. *Humphrey*'s by its terms applied only to agencies that occupy "no place in the executive department" and exercise "no part of the executive power." Soon enough, we recognized that *Humphrey*'s flunked even its own test. "It is hard to dispute that the powers of the FTC," even "at the time of *Humphrey's Executor*," we explained in 1988, "would at the present time be considered 'executive,' at least to some degree." *Morrison v. Olson*, 487 U.S. 654, 690, n.28 (1988).

Fast forward another few decades, and *Humphrey*'s premises had been further undermined. In two cases, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), and *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020), we reiterated *Myers*'s rule that the President must be able to "remove those for whom he cannot continue to be responsible." In both cases, we refused to extend *Humphrey*'s to a new situation.

Humphrey's framework, in short, has not withstood the test of time. All that is left of *Humphrey*'s is its observation that an agency that "exercises no part of the executive power" need not fall within the rule of Presidential removal. If anything more is left of *Humphrey*'s, we overrule it.

Slaughter argues that Congress has relied upon *Humphrey*'s to create agencies that are insulated from presidential control. That is precisely the problem. Congress may well have relied on *Humphrey*'s in taking more power for itself, but that is hardly one of the legitimate reliance interests that our precedents contemplate.

III

With these principles in mind, this is not a close case. The FTC's for-cause removal provision violates the separation of powers. In its present form, the FTC enforces and administers some 80 statutes, which cover almost every facet of our Nation's economy. The tasks it undertakes are "the very essence of 'execution' of the law"—precisely the President's constitutional role.

First, the FTC has the power to promulgate substantive rules that carry the force of law. In the consumer-protection realm, for instance, the FTC is tasked with giving content to the startlingly abstract idea of "acts or practices which are unfair or deceptive." The power to flesh out such statutory regimes—and to do so through

discretionary actions, largely outside the remit of courts—is executive through and through.

Second, the FTC not only investigates businesses to ensure they comply with its statutes and rules, but enforces those statutes and rules through in-house adjudications. Indeed, it may even place the onus on a private party to comply with its orders—on pain of monetary penalties—before the case reaches the courts. This power, too, is executive.

And *third*, the FTC files civil suits on behalf of the United States in federal court. It may select its remedies freely—from injunctions, to civil penalties, to any relief "necessary to redress injury to consumers," including the "refund of money or return of property," As we have said many times, the "discretionary power to seek judicial relief " lies at the very core of executive authority.

The FTC unquestionably exercises executive power, and must therefore be controlled by the Chief Executive, in whom such power is vested. It follows, then, that Slaughter served as the President's subordinate at the FTC—and that the President was entitled to cut her tenure short.

Because the FTC's activities fall well within the heartland of executive power, we have no occasion today to define the bounds of what such power entails. As our precedents recognize, not all offices created by Congress necessarily come with executive or even sovereign power attached. To suggest otherwise would come as a surprise to, among other congressionally chartered entities, the Boy Scouts of America, 112 Stat. 1325, the Society of American Florists and Ornamental Horticulturalists, ch. 876, 31 Stat. 1453, and Georgetown University, ch. 70, 6 Stat. 152.

Relatedly, we have left open the possibility that some functions traditionally handled outside the Executive Branch may not be encompassed by *Myers*'s general rule. Indeed, Myers itself placed "the greatest weight" on the early Congresses' (and early Presidents') "contemporaneous legislative exposition" of the Executive's constitutional role. And one example we have given of an entity that may have such a unique role is the Federal Reserve, to the extent that it follows in the distinct historical tradition of the First and Second Banks of the United States—both of which influenced monetary policy and neither of which were subject to plenary Presidential control. Our prior cases do not necessarily implicate the constitutionality of such arrangements. Our opinion today should not be read to do so either.

Nor do we determine the fate of officials not before us. In particular, as the Solicitor General recognized at argument, the permissibility of tenure protections for the judges of "non-Article III courts," such as the Tax Court and the Court of Federal Claims, is not "presented" or "briefed" in this case and poses a "different set of questions." Tr. of Oral Arg. 15, 28. We leave those questions for another day. All we do today is recognize what has been clear for a century—that those who fall within the President's "general administrative control" must be removable by the President at will. *Myers*, 272 U.S. at 135.

IV

When it comes to its own proposal for how precisely *Humphrey*'s should work in practice, the dissent says very little. Slaughter, for her part, is left with the vague argument that we should police Congress's decisions for "reasonableness." "If Congress reasonably decides that the President should be able to remove some duly appointed officers only for certain causes and through certain processes," she argues, the courts should respect that decision, and require that the President "discharge his obligations under the Take Care Clause by going through those processes when warranted." Brief for Respondent 25.

That supposed limiting principle is neither limiting nor much of a principle. On Slaughter's view (and presumably the dissent's), Congress could commandeer the Environmental Protection Agency, the Department of Commerce, the Department of Education, the Department of Health and Human Services, most (if not at all) of the Department of Justice, and a number of other agencies besides. Indeed, it is not clear to us why Congress would need to allow the President any say in firings. If it is so "critical" for an agency "to have independence and to act with impartiality free from the suspicion of partisan direction," Brief for Respondent 22, then why should the President have a role at all?

The answer is that these officers exercise the *President*'s power, not their own, and thus must be *responsible* to him. We do not allow intrusions on Article I nor on Article III. We see no reason to allow intrusions on Article II either.

Justice SOTOMAYOR dissented, joined by Justices Kagan and Jackson:

This case should have begun and ended with this Court's unanimous decision from almost a century ago: *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). *Humphrey*'s addressed the very statute at issue here, which allows the President to remove FTC Commissioners only "for inefficiency, neglect of duty, or malfeasance in

office," and upheld its constitutionality against the very same challenge levied in this case.

Today's decision addresses one of the oldest, most vigorously debated questions in constitutional law. Fifty years before *Humphrey*'s was decided, Congress and the President began to reach a settled answer to that question, at least as to multimember agencies like the FTC. In 1887, as the railroads grew in strength across the American economy, Congress responded by creating the Interstate Commerce Commission (ICC), a powerful new agency with five Commissioners, appointed by the President by and with the consent of the Senate, who were removable only "for inefficiency, neglect of duty, or malfeasance in office." Three years later, Congress established the nine-member Board of General Appraisers to regulate American customs and granted it the same form of removal protection. See A. Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. Rich. L. Rev. 691, 694–695 (2018) (describing this Board as "one of the most powerful entities within the federal government" at the time). The Federal Reserve Board followed with similar removal protections in 1913. The next year, Congress created the FTC with removal protections aimed at ensuring "a continuous policy," "free from the effect of ... changing [White House] incumbency."

From here, many more for-cause removal provisions followed. Today, dozens of agencies are headed by commissioners or board members removable only for cause. Congress, moreover, has taken this action with the active participation of Presidents across the ideological spectrum. Even if *Humphrey*'s had never been decided, this longstanding practice, jointly undertaken by Congresses and Presidents, should be entitled to significant weight.

The majority has very little support in text, history, or precedent. What it does have is a theory. As the majority sees things, "the buck stops" with the President, who holds all executive power and thus can be blamed or held responsible for all executive conduct. To ensure that the President can carry out his job and remain responsible for all exercises of executive power, the majority says, his inferiors must "remain accountable to him." The only way for that accountability to exist, according to the majority, is for "those officers to be removable by the President" at will, for any reason or no reason at all.

Responsiveness and responsibility are certainly valuable, but they are not the only values countenanced by our Constitution. Others are the continuity and stability of Government, and the impartiality and fair administration of justice. Depending on the situation, one value or another may be more or less important. Today, the majority

places accountability to the President above all else. Yet the accountability prized by the majority is not an unalloyed good. From the start, Americans distrusted the arbitrary authority that could result from a broad removal power.

Agencies like the FTC enjoy some measure of independence by virtue of removal protections, but they also remain accountable in other ways. No one can seriously doubt, for instance, that the FTC's priorities shifted between the Bush, Obama, Trump, and Biden administrations. In no way, then, does the FTC's structure, in purpose or effect, do away completely with Presidential influence. Instead, Congress's design (approved by many Presidents over decades) balances that influence with other values equally cognizable under the Constitution. The majority's rigid, inflexible rule goes badly astray by declaring one side of this balance constitutionally irrelevant.

Commentary: The *Slaughter* opinion left open the question whether Congress has permissibly given removal protections for the judges of "non-Article III courts," such as the Tax Court and the Court of Federal Claims. But the Court did not explain how it would analyze such questions. There undoubtedly will be new litigation on these issues.

By contrast, the same day that the Court decided *Slaughter*, it did resolve the important question whether the removal protections for members of the Federal Reserve Board are constitutional. As you will see in the excerpt below, the Court said "yes." As a result, the agency that sets national monetary policy remains somewhat independent of the President.

Trump v. Cook, 146 S. Ct. __ (2026)
(5-4 vote)

*[**Background:** Many commentators anticipated that the Supreme Court was poised to overrule Humphrey's Executor but speculated that the Court might carve out a narrow exception for "the Fed"—the agency that sets the nation's monetary policy. By statute, members of the Board of Governors of the Federal Reserve System serve 14-year terms and may be removed only "for cause." In August 2025, President Trump fired Federal Reserve Board Member Lisa Cook, claiming that he had cause to remove her. Lisa Cook challenged that decision, and much of this litigation focused on the meaning of "cause" and other questions of statutory interpretation. But in the*

part of the opinion excerpted here, the Supreme Court ruled that the statute's removal protection was constitutional despite the general rule that it set out in Slaughter. The Court relied on historical evidence about the Fed's predecessors—the First and Second Banks of the United States, which you read about in McCulloch v. Maryland (1803).]

Chief Justice ROBERTS wrote the opinion for the Court, joined by Justices Sotomayor, Kagan, Kavanaugh, and Jackson. Separate dissents were written by Justice Thomas, Justice Alito (joined by Justice Gorsuch), and Justice Barrett.

Chief Justice ROBERTS wrote the opinion for the Court:

In 1791, at Hamilton's urging, the First Congress chartered a bank that came to be known as the First Bank of the United States, with a degree of independence from the Congress that gave it life. The First Bank would be owned in part by the Federal Government, but run by directors accountable only to private stockholders. To Hamilton, that was key. "To attach full confidence to an institution of this nature," he wrote, "it appears to be an essential ingredient in its structure, that it shall be under a private not a public Direction," one that could resist "the temptations of momentary exigencies." Report on a National Bank 331.

Although the charter for the First Bank was allowed to expire in 1811, it took only five years for Congress to reverse course. As Chief Justice Marshall remarked in our Court's first major decision on the breadth of the Federal Government's enumerated powers, "a short experience of the embarrassments to which the refusal to revive the First Bank exposed the government"—severe financial instability following the War of 1812—"convinced those who were most prejudiced against the measure of its necessity." *McCulloch v. Maryland*, 4 Wheat. 316, 402 (1819). That necessity led to the Second Bank of the United States—encouraged even by President Madison, previously an ardent foe. Like its predecessors, the Second Bank was not to be controlled by the Federal Government that brought it into existence. Of its 25 directors, only five were appointed (and removable) by the President. The remaining 20 were appointed by and accountable only to private stockholders.

The Second Bank's independence, however, was to prove its downfall. Unlike James Madison, Andrew Jackson had not and would not change his mind on the wisdom of

a national bank, at least one he could not control. So in 1832, when Congress passed a bill to extend the Second Bank's charter, it met with Jackson's veto.

It would take almost 80 years before Congress would try again, and only after an era of ruinous financial panics—the ones of 1837, 1857, 1873, 1893, and 1907. A bipartisan congressional commission eventually recommended the creation of a central bank.

What emerged from these debates is today's central bank—called the Federal Reserve System—first created in 1913, and then restructured in 1933 and 1935. At its base sit 12 independent but affiliated banks, one for each region, with their own responsibility in local affairs. These regional banks, called Federal Reserve Banks, are privately owned (and operated) by the commercial banks of the area. Above those banks are two national bodies, the Federal Open Market Committee and the Board of Governors. The former sets monetary policy nationwide. And the latter supervises the system from the national point of view, with an eye to the economy's long run growth. It consists of seven members, appointed by the President and confirmed by the Senate. Like the directors of its three predecessors, however, the Federal Reserve's Governors do not serve at the President's pleasure—they instead serve staggered 14-year terms, and may be removed only "for cause."

Justice THOMAS declares the statute "unconstitutional," an infringement on the President's power to "remove his subordinates at will." We disagree, as did the founders of our Government and framers of our Constitution when they were actively participating in public affairs. They knew from experience (and Hamilton reminded them) of the calamities that could arise from even the suspicion of political manipulation of monetary policy. So when they established the First Bank of the United States, they guaranteed its independence from Presidential control. Their successors did the same for the Second Bank. The Federal Reserve follows in this lineage.

It is true, of course, that the Federal Reserve is more powerful than its predecessors, managing a vastly more complex economy in a vastly more complex world. What matters is that the Federal Reserve remains consistent with the principles that underpin the First and Second Banks—namely, that monetary policy should not be subject to political interference. In our view, the Federal Reserve maintains the balance struck by the founding generation under modern circumstances.

E. EXECUTIVE PRIVILEGE

This part and Part F address certain privileges and immunities that the President enjoys. These privileges and immunities are not explicit in the Constitution. Instead, the Supreme Court has reasoned that they are necessary to protect the President from threats and distractions that could prevent the President from carrying out his powers.

Executive privilege protects certain **information**. It prevents the President and his aides from having to disclose their **official** communications. The basic idea is that the President can't do his job unless he can have **candid exchanges of ideas** with aides. Frank communications—whether oral or written—would be chilled if they might later have to be revealed. So the Supreme Court has said that such communications are privileged. In practice, that usually means that neither the President nor his aides can be compelled to produce their written memos about official matters, nor are they usually required to testify about official matters.

Executive privilege can implicate separation-of-powers issues in two different ways. Sometimes, Congress is the entity that is demanding information from the President, which can lead to a clash between the political branches. And if such information is demanded by someone else (such as a state or private party), the demand that the President produce information can produce a clash between the President and the Judiciary.

Presidential communications about official matters are **presumptively privileged**. In practice that privilege is extremely difficult to overcome. The lower courts often accept the government's claim that it should not be required to produce information that is protected by executive privilege. The privilege is **not absolute**, however, as the Supreme Court explained in *United States v. Nixon*, 418 U.S. 683 (1974), which is the famous case involving the tape recordings of President Nixon's conversations with top aides in the Oval Office. There, the Supreme Court held that President Nixon's interest in maintaining the confidentiality of the tape recordings was outweighed by the Special Prosecutor's demonstrated, specific need for the tapes as part of his criminal investigation into the burglary of the Democratic National Committee headquarters at the Watergate hotel. (Note that President Nixon was not the target of the Special Prosecutor's investigation, although it ended up leading to his resignation.)

As explained above, the theory behind executive privilege is that it is necessary to enable candid discussions or other communications between the President and his advisors. That reasoning doesn't apply if the information at issue pertains only to the President's personal conduct. And as you will see in the excerpt below from *Trump v. Vance* (2020), the Supreme Court has thus held that executive privilege does **not** protect a President's **personal (aka private) records**. Only official records are protected.

Trump v. Vance, 591 U.S. 786 (2020)
(7-2 vote)

*[**Background:** In 2019, the New York County District Attorney's Office served a subpoena duces tecum on Mazars USA, LLP, the personal accounting firm of President Donald J. Trump, for tax returns and other financial records relating to the President's businesses. The records were sought because a state grand jury was investigating potential violations of state criminal law. The Supreme Court rejected President Trump's attempt to block Mazars from turning over the records. The Court emphasized that these were private records rather than official records. And it rejected his argument that a privilege was needed to prevent state and local officials from harassing Presidents and distracting them from their official duties. The Court explained that it had rejected an analogous argument in Clinton v. Jones, 520 U.S. 681 (1997), where the plaintiff was seeking damages based on a claim that President Clinton had sexually harassed her while he was the Arkansas Governor. On the same day that it issued this decision in Trump v. Vance, the Supreme Court issued a similar decision in Trump v. Mazars, 591 U.S. 848 (2020), rejecting President Trump's argument that he should have a privilege to withhold his personal tax and financial records from committees of Congress.]*

Chief Justice Roberts wrote the opinion of the Court, which Justices Ginsburg, Breyer, Sotomayor, and Kagan joined. Justice Kavanaugh agreed with the bottom line but not the reasoning. Justices Thomas and Alito dissented.

Chief Justice ROBERTS wrote the opinion of the Court:

Beginning with Thomas Jefferson and carrying on through Bill Clinton, Presidents have uniformly testified or produced documents in criminal proceedings when called upon by federal courts. Here we are confronted for the first time with a subpoena issued to the President by a local grand jury operating under the supervision of a *state* court.

In the President's view, that distinction makes all the difference. He argues that the Supremacy Clause gives a sitting President absolute immunity from state criminal subpoenas because compliance with those subpoenas would categorically impair a President's performance of his Article II functions.

The President's primary contention is that complying with state criminal subpoenas would necessarily divert the Chief Executive from his duties. He grounds that concern in *Nixon v. Fitzgerald*, 447 U.S. 731, 749 (1982), which recognized a President's "absolute immunity from damages liability predicated on his official acts." But *Fitzgerald* did not hold that distraction was sufficient to confer absolute immunity. Indeed, we expressly rejected immunity based on distraction alone 15 years later in *Clinton v. Jones*, 520 U.S. 681 (1997). There, President Clinton argued that the risk of being distracted by the need to participate in litigation entitled a sitting President to absolute immunity from civil liability, not just for official acts, as in *Fitzgerald*, but for private conduct as well. We disagreed with that rationale, explaining that the dominant concern in *Fitzgerald* was not mere distraction but the distortion of the Executive's decisionmaking process with respect to official acts that would stem from worry as to the possibility of damages.

The President and the Solicitor General warn that subjecting Presidents to state criminal subpoenas will make them easily identifiable targets for harassment. They caution that, while federal prosecutors are accountable to and removable by the President, the 2,300 district attorneys in this country are responsive to local constituencies, local interests, and local prejudices, and might use criminal process to register their dissatisfaction with the President. What is more, we are told, the state courts supervising local grand juries may not exhibit the same respect that federal courts show to the President as a coordinate branch of Government.

We recognize, as does the district attorney, that harassing subpoenas could, under certain circumstances, threaten the independence or effectiveness of the Executive. And while we cannot ignore the possibility that state prosecutors may have political motivations, the law already seeks to protect against the predicted abuse. Grand juries are prohibited from engaging in arbitrary fishing expeditions and initiating investigations out of malice or an intent to harass. And, in the event of such harassment, a President would be entitled to the protection of federal courts. In addition, the Executive can argue that compliance with a particular subpoena would impede his constitutional duties.

F. THE PRESIDENT'S IMMUNITIES FROM CIVIL SUIT AND CRIMINAL PROSECUTION

In this part, we examine the President's **immunities from civil suit and criminal prosecution**. Like executive privilege, these immunities are not explicit in the Constitution. Instead, the Supreme Court has found them to be implicit in the Constitution, because they are necessary to enable the President to carry out official responsibilities. Whereas executive privilege prevents the disclosure of information, these immunities protect the President from being sued or criminally prosecuted in certain situations.

Although executive privilege and the President's immunities are distinct topics—and you don't want to mix them up—the Supreme Court's immunity decisions draw on principles from its executive privilege cases, and vice versa. Like the executive privilege cases, the immunity cases distinguish between proceedings that involve a President's **personal conduct** as opposed to the President's **official acts**, as explained below.

In *Clinton v. Jones*, 520 U.S. 681 (1997), the Supreme Court held that President Clinton was not immune from a civil suit alleging that he had sexually harassed the plaintiff before taking office. The Court emphasized that the case arose out of Bill Clinton's personal conduct rather than out of his official conduct as President.

By contrast, in *Nixon v. Fitzgerald*, 447 U.S. 731 (1982), the Supreme Court held that President Nixon had absolute immunity from civil damages liability for official acts that he took while President. In that case, the plaintiff was a terminated Air Force employee who claimed that President Nixon had unlawfully fired him. The Court reasoned that allowing civil suits against the President based on the President's official conduct would chill the President in his exercise of his constitutional duties. The Court extended that reasoning in the *Trump v. United States*, 144 S. Ct. 2312 (2024) case that is excerpted below. There, the Supreme Court held that a former President has broad immunity from criminal prosecution for official acts taken while President. The Court reasoned that the threat of criminal prosecution would have an even greater chilling effect on the President's official conduct than the threat of civil liability that was at issue in *Nixon v. Fitzgerald*.

Trump v. United States, 144 S. Ct. 2312 (2024)
(6-3 vote)

*[**Background:** This case arose out of the federal criminal indictment against (then) former President Trump for conduct related to the 2020 election and the events of January 6. Everyone agreed that a sitting President cannot be criminally prosecuted while in office. As explained below in Part G, impeachment is the tool to remove a sitting President from office.*

Everyone also agreed that a former President can be criminally prosecuted for private acts.

In this case, the Supreme Court held that a former President is immune from criminal prosecution for official acts taken while President unless the government shows that the prosecution would pose no dangers of intrusion on the authority and functions of the Executive Branch. The dissenting Justices argued that the majority spelled the end of democracy by giving the green light to future Presidents to abuse their massive official power. In the immediate aftermath of this decision, many people celebrated Trump's immunity from criminal prosecution, and many others despaired. But in general, legal principles announced by the Supreme Court are meant to transcend the heat of the moment. As you reflect on the immunity case, think charitably—as well as critically—about the reasoning on each side.]

Chief Justice Roberts wrote the opinion for the Court, which Justices Thomas, Alito, Gorsuch, and Kavanaugh joined in full and Justice Barrett joined in part. Justice Sotomayor wrote the principal dissent, which Justices Kagan and Jackson joined.

Chief Justice ROBERTS wrote the opinion for the Court:

This case concerns the federal indictment of a former President of the United States for conduct alleged to involve official acts during his tenure in office. We consider the scope of a President's immunity from criminal prosecution.

I

From January 2017 until January 2021, Donald J. Trump served as President of the United States. On August 1, 2023, a federal grand jury indicted him on four counts for conduct that occurred during his Presidency following the November 2020 election. The indictment alleged that after losing that election, Trump conspired to overturn it

by spreading knowingly false claims of election fraud to obstruct the collecting, counting, and certifying of the election results.

According to the indictment, Trump advanced his goal through five primary means. First, he and his co-conspirators "used knowingly false claims of election fraud to get state legislators and election officials to ... change electoral votes for Trump's opponent, Joseph R. Biden, Jr., to electoral votes for Trump." Second, Trump and his co-conspirators "organized fraudulent slates of electors in seven targeted states" and "caused these fraudulent electors to transmit their false certificates to the Vice President and other government officials to be counted at the certification proceeding on January 6." Third, Trump and his co-conspirators attempted to use the Justice Department "to conduct sham election crime investigations and to send a letter to the targeted states that falsely claimed that the Justice Department had identified significant concerns that may have impacted the election outcome." Fourth, Trump and his co-conspirators attempted to persuade "the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." And when that failed, on the morning of January 6, they "repeated knowingly false claims of election fraud to gathered supporters, falsely told them that the Vice President had the authority to and might alter the election results, and directed them to the Capitol to obstruct the certification proceeding." Fifth, when "a large and angry crowd ... violently attacked the Capitol and halted the proceeding," Trump and his co-conspirators "exploited the disruption by redoubling efforts to levy false claims of election fraud and convince Members of Congress to further delay the certification."

II

The parties before us do not dispute that a former President can be subject to criminal prosecution for unofficial acts committed while in office. They also agree that some of the conduct described in the indictment includes actions taken by Trump in his unofficial capacity. They disagree, however, about whether a former President can be prosecuted for his official actions. We conclude that under our constitutional structure of separated powers, the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office. At least with respect to the President's exercise of his core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is also entitled to immunity. At the current stage of proceedings in this case, however, we need not and do not decide whether that immunity must be absolute, or instead whether a presumptive immunity is sufficient.

A

Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." § 1, cl. 1. The President's duties are of "unrivaled gravity and breadth." *Trump v. Vance*, 591 U.S. 786, 800 (2020). They include, for instance, commanding the Armed Forces of the United States; granting reprieves and pardons for offenses against the United States; and appointing public ministers and consuls, the Justices of this Court, and Officers of the United States. See § 2. He also has important foreign relations responsibilities: making treaties, appointing ambassadors, recognizing foreign governments, meeting foreign leaders, overseeing international diplomacy and intelligence gathering, and managing matters related to terrorism, trade, and immigration. See §§ 2, 3. Domestically, he must "take Care that the Laws be faithfully executed," § 3, and he bears responsibility for the actions of the many departments and agencies within the Executive Branch. He also plays a role in lawmaking by recommending to Congress the measures he thinks wise and signing or vetoing the bills Congress passes. See Art. I, § 7, cl. 2; Art. II, §3.

No matter the context, the President's authority to act necessarily "stem[s] either from an act of Congress or from the Constitution itself." *Youngstown*, 343 U.S. at 585. The Constitution [itself], for example, vests the "Power to Grant Reprieves and Pardons for Offences against the United States" in the President. Art. II, § 2, cl. 1. "The President's power to remove—and thus supervise—those who wield executive power on his behalf [also] follows from the text of Article II. The power to control recognition determinations of foreign countries is likewise an exclusive power of the President. *Zivotofsky v. Kerry*, 576 U.S. 1, 32 (2015).

An Act of Congress may not criminalize the President's actions within his exclusive constitutional power. Neither may the courts adjudicate a criminal prosecution that examines such Presidential actions. We thus conclude that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority.

B

But of course not all of the President's official acts fall within his [exclusive] authority. The reasons that justify the President's absolute immunity from criminal prosecution for acts within the scope of his exclusive authority do not extend to conduct in areas where his authority is shared with Congress.

In *Nixon v. Fitzgerald*, we concluded that the President must be absolutely immune from damages liability for acts within the outer perimeter of his official responsibility." By contrast, when a subpoena issued to President Nixon to produce certain tape

recordings and documents relating to his conversations with aides and advisers, we held that a presumptive privilege protects Presidential communications.

Criminally prosecuting a President for official conduct undoubtedly poses a far greater threat of intrusion on the authority and functions of the Executive Branch than simply seeking evidence in his possession. The danger is akin to, indeed greater than, what led us to recognize absolute Presidential immunity from civil damages liability. Potential criminal liability, and the peculiar public opprobrium that attaches to criminal proceedings, are plainly more likely to distort Presidential decisionmaking than the potential payment of civil damages. The hesitation to execute the duties of his office fearlessly and fairly that might result when a President is making decisions under a pall of potential prosecution raises unique risks to the effective functioning of government.

We must, however, recognize the countervailing interests at stake. Federal criminal laws seek to redress a wrong to the public as a whole, not just a wrong to the individual. The President, charged with enforcing federal criminal laws, is not above them.

Taking into account these competing considerations, we conclude that the separation of powers principles explicated in our precedent necessitate at least a presumptive immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility. Such an immunity is required to safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution. Indeed, if presumptive protection for the President is necessary to enable the effective discharge of his powers when a prosecutor merely seeks evidence of his official papers and communications, it is certainly necessary when the prosecutor seeks to charge, try, and imprison the President himself for his official actions. At a minimum, the President must therefore be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose no dangers of intrusion on the authority and functions of the Executive Branch.

As for a President's unofficial acts, there is no immunity. The principles we set out in *Clinton v. Jones* confirm as much. When Paula Jones brought a civil lawsuit against then-President Bill Clinton for acts he allegedly committed prior to his Presidency, we rejected his argument that he enjoyed temporary immunity from the lawsuit while serving as President.

III

Distinguishing the President's official actions from his unofficial ones can be difficult. In dividing official from unofficial conduct, courts may not inquire into the President's motives. Nor may courts deem an action unofficial merely because it allegedly violates a generally applicable law. With these principles in mind, we turn to the conduct alleged in the indictment. [The Court proceeds to analyze the indictment's various allegations.]

The dissents' positions in the end boil down to ignoring the Constitution's separation of powers and the Court's precedent and instead fear mongering on the basis of extreme hypotheticals about a future where the President "feels empowered to violate federal criminal law." The dissents overlook the more likely prospect of an Executive Branch that cannibalizes itself, with each successive President free to prosecute his predecessors, yet unable to boldly and fearlessly carry out his duties for fear that he may be next. Without immunity, such types of prosecutions of ex-Presidents could quickly become routine. The enfeebling of the Presidency and our Government that would result from such a cycle of factional strife is exactly what the Framers intended to avoid.

Justice SOTOMAYOR dissented, joined by Justices Kagan and Jackson:

Today's decision to grant former Presidents criminal immunity reshapes the institution of the Presidency. It makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law.

There is a twisted irony in saying, as the majority does, that the person charged with "tak[ing] Care that the Laws be faithfully executed" can break them with impunity. Let the President violate the law, let him exploit the trappings of his office for personal gain, let him use his official power for evil ends. The majority's single-minded fixation on the President's need for boldness and dispatch ignores the countervailing need for accountability and restraint. The Framers were not so single-minded.

Never in the history of our Republic has a President had reason to believe that he would be immune from criminal prosecution if he used the trappings of his office to violate the criminal law. Moving forward, however, all former Presidents will be cloaked in such immunity. If the occupant of that office misuses official power for personal gain, the criminal law that the rest of us must abide will not provide a backstop. With fear for our democracy, I dissent.

Commentary: Although executive privilege and the President's immunities from suit and prosecution are not explicit in the Constitution, the Constitution does provide an *explicit* privilege and immunity for *Members of Congress*. Article I, section 6, clause 1, which is known as the **Speech or Debate Clause**, says that Senators and Representatives generally shall "be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." The Supreme Court has interpreted that clause broadly in ways that go beyond its literal terms. For example, the Court has held that the clause gives Members of Congress and their aides absolute immunity from criminal prosecutions or civil suits arising out of acts taken in the legislative sphere. And even when absolute immunity is unavailable, the clause prohibits the introduction of evidence of legislative acts for use against a Member and protects Members from having to testify about protected acts.

G. IMPEACHMENT AND CONGRESSIONAL OVERSIGHT

I close this chapter with some important checks on the President: Congress's impeachment power and its power to oversee the Executive Branch.

Although the President enjoys many privileges and immunities, the President does not have an absolute right to serve out his term of office. The Constitution expressly gives Congress the power of **impeachment**, which is the tool to remove a sitting President (and other Executive Branch officers and members of the Judiciary) from office. Article II, section 4 provides: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The Constitution gives the House of Representatives alone the power to initiate impeachment. To do so, the House must approve (by simple majority vote) the charges that are the basis for impeachment. Art. I, § 2, cl. 6. After the House sends these charges to the Senate, the Senate conducts a trial on the charges. If two-thirds of the Senate vote to convict, the official is removed from office. Art. I, § 3, cl. 5.

Impeachment is a political check—rather than a judicial check—on the President and other Executive Branch officials. The scope of the "high crimes and misdemeanors" that can be the basis for impeachment is not defined in the Constitution. Instead, it is up to the House and Senate to decide whether the conduct at issue is reason to

impeach or convict. Even for the high crime of “treason,” impeachment is discretionary rather than mandatory.

In addition to impeachment, Congress has the power under **section 3 of the Fourteenth Amendment** to disqualify candidates for certain federal offices if the candidate previously engaged in an insurrection while holding certain offices. But there is a dispute about whether such offices include the Presidency, and the Supreme Court did not resolve that dispute in *Trump v. Anderson*, 601 U.S. 100 (2024), when the Court held that *states* cannot enforce section 3 against candidates for *federal* office. (You may remember that we read an excerpt from that case in Chapter 2, when we studied federalism.)

Congress also has **oversight powers** that it can use to obtain information from the President, other Executive Branch officials, and private parties (such as by issuing subpoenas and holding hearings). The Constitution does not explicitly give Congress these oversight powers, but the Supreme Court has found them implicit in Congress’s express powers because congressional investigations are means of accomplishing Congress’s expressly granted powers. There is very little law about the scope of Congress’s power to require the President to give Congress information. As the Supreme Court explained in *Trump v. Mazars USA, LLP*, 591 U.S. 848 (2020), from the time of George Washington’s presidency until the *Mazars* case, disputes over congressional demands for the President’s information were resolved by the political branches—without involving the Supreme Court. In resolving the *Mazars* dispute, the Supreme Court for the first time provided some guidance about the permissible scope of congressional inquiries directed towards the President. In developing that guidance (the details of which I have omitted), the Court was explicitly balancing Congress’s legitimate interests in obtaining such information against the President’s unique role.

CHAPTER 4. FOREIGN AFFAIRS

A. INTRODUCTION

In the book so far, we have focused on government powers over **domestic affairs**, meaning things that happen within the United States. In this chapter, we turn to government powers over **foreign affairs**, meaning the relationship between the United States and other countries. Of course, things that happen within the U.S. often affect our relationship with other countries (e.g., the treatment of immigrants affects our relationship with their country of origin). Likewise, our relationship with other countries often affects things that happen in the U.S. (e.g., tariffs on imported goods raise domestic prices). But for big picture purposes, it's helpful to think about domestic affairs and foreign affairs as raising distinct constitutional issues.

We will examine foreign affairs issues from two different perspectives: a federalism perspective and a separation-of-powers perspective. Before we do, here is an overview of the key foreign affairs powers.

1. Congress's foreign affairs powers

Article I, section 8 gives Congress the powers to "regulate commerce with foreign nations," to "declare war," to "provide for the common defense," to "raise and support armies," and to "provide and maintain a navy." Congress also has the power to regulate immigration, a power that the Supreme Court has derived from other foreign affairs powers including Congress's power to regulate naturalization. And as you know, Congress can use its spending power to accomplish all sorts of goals that promote the general welfare, which can include foreign aid and other spending related to foreign affairs. Indeed, more than half of the one trillion dollars that Congress appropriates each year is devoted to defense and foreign affairs. In addition, the Constitution also makes two of the President's foreign affairs powers—making treaties and appointing diplomats—dependent on Senate approval.

2. The President's foreign affairs powers

Article II explicitly gives the President the powers to serve as "commander in chief of the army and navy" and the powers to make treaties and appoint ambassadors with the Senate's consent. In addition, the Supreme Court has derived various implied powers from these express ones, including the power to recognize foreign governments, to conduct diplomacy, and to enter into executive agreements with other countries. And of course, the President's general power to execute federal law means that Congress can give the President lots of additional responsibilities over foreign affairs. For example, the International Emergency Economic Powers Act (1977) authorizes the President to impose economic sanctions on foreign entities. Various statutes authorize the President to impose tariffs on imports and to negotiate trade agreements with other countries.

3. The difference between federal statutes, treaties, and executive agreements

What is the difference between federal statutes, treaties, and executive agreements? As you know, a federal statute must pass both chambers of Congress (the bicameralism requirement) and be presented to the President for his signature or veto (the presentment requirement).

A treaty is an agreement with one or more foreign countries that is negotiated by the President (often through the President's delegate, such as the Secretary of State) and approved by a two-thirds vote of the Senate. A treaty can either be self-executing—meaning that it has the force of law in the U.S. upon Senate ratification—or non-self-executing, meaning that it won't have the force of law in the U.S. unless and until Congress enacts a statute to implement it. In determining whether a particular treaty is self-executing, the main question is whether the President and Senate intended that it be self-executing. The Supreme Court has deemed a treaty non-self-executing when its text indicated that the treaty would not be directly enforceable in U.S. courts, or when the Senate conditioned its approval on the understanding that the treaty was non-self-executing.

An executive agreement is negotiated by the President (often through the President's delegate) but not submitted to the Senate for approval. The Constitution does not

explicitly refer to executive agreements, but they have been used since the early days of our nation.

All three categories (statutes, treaties, and executive agreements) are regarded as federal law. Just as a federal statute can preempt state law, a treaty or executive agreement can preempt state law. As with a statute, the question of preemption depends on whether the treaty or executive agreement was intended to preempt state law, which can be answered either by an express preemption provision or through an obstacle-preemption analysis.

B. FOREIGN AFFAIRS: FEDERALISM ISSUES

1. Introduction

When we studied federalism earlier, an important point is that the states have general police powers—that is, powers to regulate all sorts of things that affect the day-to-day lives of their residents—unless something in federal law takes such a power away. Is the same thing true about a state's ability to regulate foreign affairs? Definitely not! The Supreme Court has repeatedly said that the United States must speak with *one voice* on foreign affairs matters, which means that states are not supposed to nose into the arena of foreign affairs. But as we shall see, states get some latitude to enact laws that affect foreign affairs incidentally.

State laws that intrude on foreign affairs can be invalidated on three different theories, though in practice a plaintiff often asserts all three theories and hopes that at least one succeeds.

First, a state law may be declared unconstitutional if it **interferes too much with the federal government's conduct of foreign affairs**. How much is too much? We don't know, and there is only one case that used this theory to invalidate a state law. In *Zschernig* (1968), the Supreme Court invalidated an Oregon probate law that was being applied in ways that caused certain foreign governments to take offense. But in the same opinion, the Supreme Court cautioned that a state law is not unconstitutional if it has "only some incidental or indirect effect in foreign countries." Since *Zschernig* was decided, the Supreme Court has not applied its reasoning to invalidate a state law. And in *Hencely v. Flour Corp.* (2026), the Supreme Court

rejected the argument that a state tort claim against a military contractor intruded too much into the federal government's war powers.

Second, a state law may violate the **Dormant Foreign Commerce Clause**, which is a negative inference from Congress's affirmative power to regulate commerce with foreign nations. Cases involving the Dormant Foreign Commerce Clause doctrine often arise in the context of state taxation of multinational corporations. I have not included an excerpt from such a case because the taxation concepts are somewhat complicated.

Third, a state law that affects foreign affairs can be **preempted by a federal law, treaty, or executive agreement** that addresses the same foreign affairs topic. The *Crosby* (2000) case that we read in Chapter 2 (involving Massachusetts' sanctions against Burma) illustrates preemption by a federal statute. But as you'll see in the excerpt below from the Solicitor General's brief in *Crosby*, the federal government actually made three distinct arguments: It argued that the Massachusetts Burma law violated the Dormant Foreign Commerce Clause; that it was preempted by the federal statute establishing Burma sanctions; and that it intruded too much into foreign affairs (the *Zschernig* theory). The Supreme Court accepted the second argument and did not address the other two.

2. State intrusions on federal foreign affairs powers

Zschernig v. Miller, 389 U.S. 429 (1968)
(6-2 vote in relevant part)

*[**Background:** As a general matter, states have primary responsibility for enacting laws that govern inheritance (who gets what when a person dies). Here, however, the Oregon statute contained special provisions that said that heirs who live in a foreign country cannot inherit from Oregon residents unless U.S. citizens have a reciprocal right to inherit from that country's residents. In an earlier case called Clark v. Allen, 331 U.S. 503 (1947), the Supreme Court held that a similar California law did not—on its face—impermissibly interfere with the federal government's foreign affairs power. In this case, however, the Court said that the Oregon law was being applied by state probate judges in ways that crossed the line into impermissible interference. Justice Douglas wrote the opinion for the Court. Justice Harlan agreed with the bottom line but not the reasoning. Justice White dissented.]*

Justice DOUGLAS wrote the opinion for the Court:

This case concerns the disposition of the estate of a resident of Oregon who died there intestate in 1962. Appellants are decedent's sole heirs and they are residents of East Germany. Appellees include members of the State Land Board that petitioned the Oregon probate court for the escheat of the net proceeds of the estate under the provisions of Oregon law, which provides for escheat in cases where a nonresident alien claims real or personal property unless three requirements are satisfied:

> (1) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country;
> (2) the right of United States citizens to receive payment here of funds from estates in the foreign country; and
> (3) the right of the foreign heirs to receive the proceeds of Oregon estates without confiscation.

We held in *Clark v. Allen* that a similar general reciprocity clause in California law did not on its face intrude on the federal domain. We noted that the California statute, then a recent enactment, would have only "some incidental or indirect effect in foreign countries."

However, it now appears that in this reciprocity area under inheritance statutes, the probate courts of various States have launched inquiries into the type of governments that obtain in particular foreign nations—whether aliens under their law have enforceable rights, whether the so-called "rights" are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation. As we read the state court decisions that followed in the wake of *Clark v. Allen*, we find that they radiate some of the attitudes of the "cold war," where the search is for the "democracy quotient" of a foreign regime as opposed to the Marxist theory.[6]

> [6] For example, one state judge analyzed the rights in the Soviet system and found Russia had no separation of powers, too much control in the hands of the Communist Party, no independent judiciary, confused legislation, unpublished statutes, and unrepealed obsolete statutes.

> Before stating its holding of no reciprocity, the court also noted Stalin's crimes, the Beria trial, the doctrine of crime by analogy, Soviet xenophobia, and demonstrations at the American Embassy in Moscow unhindered by the police.

It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way.

The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. Where those laws conflict with a treaty, they must bow to the superior federal policy. Yet, even in absence of a treaty, a State's policy may disturb foreign relations. Certainly a State could not deny admission to a traveler from East Germany nor bar its citizens from going there. The present Oregon law is not as gross an intrusion in the federal domain as those others might be. Yet, as we have said, it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.

Hencely v. Fluor Corp., 146 S. Ct. 1086 (2026)
(6-3 vote)

[Background: Plaintiff Winston Hencely, a U.S. Army Specialist, was severely injured when a Taliban operative working for the military contractor Fluor Corporation carried out a suicide-bomb attack at Bagram Airfield in Afghanistan. Plaintiff filed a state-law tort action against Fluor for negligently supervising the attacker. The Supreme Court rejected Fluor's argument that allowing the state-law tort claims impermissibly intrude into the federal government's war powers. Note that the lineup of Justices was unusual.]

Justice THOMAS wrote the majority opinion, joined by Justices Sotomayor, Kagan, Gorsuch, Barrett, and Jackson. Justice Alito dissented, joined by Chief Justice Roberts and Justice Kavanaugh.

Justice THOMAS wrote the opinion for the Court:

In 2016, a Taliban operative working for respondent Fluor Corporation, a military contractor, carried out a suicide-bomb attack at Bagram Airfield in Afghanistan. After then-Army Specialist Winston T. Hencely confronted him, the bomber detonated his suicide vest. As a result of the injuries he received, Hencely is now permanently disabled. In an effort to recover damages for his injuries, Hencely sued Fluor, bringing state-law tort claims for negligently retaining and supervising the attacker. According to Hencely and the United States military, Fluor's conduct was not authorized by the military and even violated instructions the military had given it as a condition of operating on the base. The Army's investigation found Fluor primarily responsible for the attack. Interviews of Fluor personnel revealed an unreasonable complacency by Fluor to ensure Local National employees were properly supervised at all times, as required by their contract.

Fluor argues that federal law preempts Hencely's suit. But, no statute or constitutional provision expressly does so. And, our precedent suggests that state law is generally not preempted when the contractor could comply with both its contractual obligations to the military and state law—unlike when the state-imposed duty is precisely contrary to the duty imposed by the Government contract.

The Supremacy Clause provides that the Constitution, federal statutes, and treaties are "the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. When a regulated party cannot comply with both federal and state directives, the Supremacy Clause tells us the state law must yield. But, there is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it. Instead, the federal restrictions or rights that are said to conflict with state law must stem from either the Constitution itself or a valid statute enacted by Congress.

Fluor has not identified any provision of law expressly preempting Hencely's suit. No constitutional provision says it is preempted. Nor does any federal statute preempt this suit.

All acknowledge that the Federal Government has broad and sweeping war powers. The Constitution assigns Congress the power to "declare War," "raise and support Armies," "provide and maintain a Navy," and "make Rules for the Government and Regulation of the land and naval Forces." Art. I, § 8, cls. 11–13. The President is the "Commander in Chief of the Army and Navy of the United States" and militias in federal service. Art. II, § 2, cl. 1. States, for their *1098 part, may not "engage in War, unless actually invaded." Art. I, § 10, cl. 3.

But, the Constitution's grant of war powers does not imply that courts must reject any tort claim connected to a war zone. The assignment of those powers to Congress and the Executive has never been understood to bar all war-related tort suits.

Nor is Fluor protected from the consequences of its conduct simply because it was working for the Federal Government and state law is at issue. There is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. For example, States ordinarily cannot directly regulate or discriminate against federal officers and agencies. *M'Culloch v. Maryland*, 4 Wheat. 316, 436–437 (1819). But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions. Accordingly, absent a statute to the contrary, States can regulate or tax federal contractors on the same terms as any private company, even where the party asserts an indirect burden on federal activities.

Without a federal statute, contractors ordinarily have a constitutional defense only when the contractor is being sued precisely for accomplishing what the Federal Government requested. In *Yearsley*, a contractor, acting under military orders, built dikes on the Missouri River and washed away a part of petitioners' land as a result. Because Fluor is alleged to have acted outside the authority the military granted it, it does not attempt to invoke a *Yearsley* defense. And, we decline to extend *Yearsley* to bar allegations such as Hencely's.

Justice ALITO dissented, joined by Chief Justice Roberts and Justice Kavanaugh:

May a State regulate security arrangements on a military base in an active warzone? May state judges and juries pass judgment on questions that are inextricably tied to military decisions that balance war-related risks against long-term strategic objectives? In my judgment, the answer to these questions must be "no," and for that reason, this state-law tort case is preempted by the Constitution's grant of war powers exclusively to the Federal Government.

The Constitution makes federal law the "supreme Law of the Land," Art. VI, cl. 2, and over the years, this Court has identified a variety of circumstances in which federal law preempts state law. In this case, the opinion of the Court stresses the two situations in which preemption is most evident: where a federal law expressly preempts state law and where it is impossible for a regulated party to comply with

both federal and state law. But these two categories do not constitute an exhaustive list. Our precedents squarely establish that the Constitution and other federal laws may also *impliedly* preempt state law.

We have long recognized that federal law preempts state laws that intrude on the powers that the Constitution confers exclusively on the Federal Government, as well as laws that substantially interfere with the operation of the Federal Government's organs or the work of federal officers. Our decisions in this vein began at least as early as *M'Culloch v. Maryland*, 4 Wheat. 316 (1819), where the Court held that Maryland could not tax the Second Bank of the United States.

Preemption based on constitutional structure is especially important when state law intrudes upon the Federal Government's exclusive authority to conduct relations with other nations or to wage war. *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (the Constitution permits no "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress").

Applying state tort law in this case would substantially interfere with the Government's ability to wage war and, in particular, with its ability to implement its preferred security policies at Bagram Airfield, which for many years had been regularly attacked by Taliban supporters. Balancing strategic objectives and Bagram's security needs, military decisionmakers adopted a policy that entailed what they must have thought were tolerable and manageable risks. The policy manifested trust in the Afghan people, sought to promote economic development, and attempted to further the process of bringing former Taliban members back into the fold. This was the military's "Afghan First" policy, which gave heavy preference to the hiring of Afghans. It was under this program that Nayeb was cleared for employment on Bagram and then hired by one of Fluor's subcontractors. Because of Nayeb's past Taliban membership, clearing him entailed an obvious risk. But the military concluded that the United States' strategic objectives justified that danger. The military relied on Fluor to supervise Nayeb's conduct on the base, and this arrangement led to the bombing that seriously injured petitioner. Adjudication of Fluor's defense is very likely to entail an evaluation of the way the Federal Government assessed the risks and benefits of Nayeb's employment, and this would impermissibly intrude on the Federal Government's exclusive war powers.

Commentary: The dissent in *Hencely* observed that state law can be "preempted"—that is, displaced—by the structure of the Constitution. That concept dates back to *McCulloch*, where the Supreme Court inferred from the structure of the Constitution

that a state cannot regulate the federal government or its programs, such as the National Bank. The majority in *Hencely* did not dispute that premise; the Court simply did not conclude that such structural preemption occurred in *Hencely*, where the defendant was a contractor rather than part of the federal government itself.

The more common type of "preemption" occurs when a state law is displaced by a federal statute, treaty, executive agreement, or agency regulation. We already read the Supreme Court's decision in *Crosby* (2000) in Chapter 2, when we first learned that federal statutes can preempt state law. We will again consider statutory preemption in this chapter when we read *Arizona v. United States* (2012), which involved state efforts to regulate immigration. But before we turn to *Arizona*, we are reading a short excerpt from the federal government's amicus brief in *Crosby* to illustrate that the same state law can be challenged on multiple legal theories. In that amicus brief, the federal government argued that the Massachusetts Burma sanctions law was invalid for three different reasons that start with "First," "Second," and "Third" in the excerpt below. The Supreme Court accepted the statutory preemption argument and did not address the other two theories.

Excerpt from the federal government's Supreme Court amicus brief in Crosby

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly emphasized that "in international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979) (quoting *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933)); see also, *e.g., United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("The Federal Government *** is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-322 (1936).

The national government's preeminent role in acting for the United States in the international arena is reflected in several of the Constitution's express grants of power to Congress in Article I, Section 8,[8] and to the President in Article II, Sections 2 and 3,[9] and in several of its express restrictions on state power in Article I, Section 10.[10] The most significant of those enumerated powers, for present purposes, is

Congress's power "[t]o regulate Commerce with foreign Nations." U.S. Const. Art. I, § 8, Cl. 3.

> [8] Those include Congress's powers to "provide for the common Defence *** of the United States," "regulate Commerce with foreign Nations," "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," and "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. Const. Art. I, § 8, Cls. 1, 3, 10, 11.
>
> [9] Those include the President's powers to serve as "Commander in Chief of the Army and Navy of the United States," "make Treaties" and "appoint Ambassadors [and] other public Ministers and Consuls" with the advice and consent of the Senate, and "receive Ambassadors." U.S. Const. Art. II, § § 2, 3.
>
> [10] Those include restrictions on the States' "enter[ing] into any Treaty, Alliance, or Confederation," "grant[ing] Letters of Marque and Reprisal," "lay[ing] any Imposts or Duties on Imports or Exports," "enter[ing] into any Agreement or Compact *** with a foreign Power," and "engag[ing] in War." U.S. Const. Art. I, § 10.

The Framers understood that "if we are to be one nation in any respect, it clearly ought to be in respect to other nations." The Federalist No. 42, at 264 (James Madison). Under the Articles of Confederation, the national government's efforts to engage in political and commercial relations with other countries had been undermined by the States. There was even concern that the United States could not prevent a State from embroiling the nation in a war with another country. As Edmund Randolph of Virginia observed at the Constitutional Convention, "particular states might by their conduct provoke war without control" because, "if a State acts against a foreign power contrary to the laws of nations or violates a treaty," the national government "cannot punish that State, or compel its obedience to the treaty." 1 The Records of the Federal Convention of 1787, at 19, 24-25 (M. Farrand ed. 1966).

That instability and inconsistency caused the Framers to propose a Constitution that provided for a single national voice over foreign political and commercial affairs. Proponents of the Constitution perceived that single voice as essential to preserving "[t]he peace of the whole." The Federalist No. 80, at 476 (Alexander Hamilton) ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members."); see

also The Federalist No. 3, at 43 (John Jay) (asserting that adherence to the law of nations "will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies"); The Federalist No. 44, at 281 (James Madison) (recognizing "the advantage of uniformity in all points which relate to foreign powers").

The Framers' decision to vest responsibility for foreign commercial and political affairs in the national government exclusively has several implications for state laws such as the one at issue here.

First, because the Founders intended the scope Congress's foreign commerce power to be greater than its power over interstate commerce, this Court has applied heightened scrutiny when ascertaining the negative implications of Congress' power to regulate Commerce with foreign Nations. Accordingly, a state law may violate the Foreign Commerce Clause, even in the absence of a superseding federal law, if the state law either discriminates against foreign commerce, or prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments. The Massachusetts Burma Act suffers from both infirmities. The state law therefore violates the Dormant Foreign Commerce Clause unless it can be saved on the theory that the State is acting as a market participant in penalizing companies that do business in Burma. Here, the state law cannot be sustained on that theory.

Second, quite aside from the limitations imposed by the Foreign Commerce Clause of its own force, when a state law addresses concerns of foreign policy and foreign commerce that are also addressed by a federal law, the Supremacy Clause is implicated more strongly than it is in the purely domestic context. Thus, the state law will more readily be found to be preempted as standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Here, the Massachusetts Burma Act stands as such an obstacle to the effectuation of the United States' multifaceted and multilateral strategy toward Burma, as reflected in the Federal Burma Act and the Burma Executive Order.

Third, even absent preemption by an Act of Congress or an order of the President, a state law will be struck down if it has "a direct impact upon foreign relations," rather than a mere "incidental or indirect" one. *Zschernig v. Miller*, 389 U.S. 429, 434, 441 (1968). For the reasons stated above, the Massachusetts Burma Act is invalid on that ground as well.

Commentary: In the foreign affairs context, state laws can be preempted not only by federal statutes but also by **treaties** and **executive agreements**. In *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), the Supreme Court concluded that a California law was preempted because it was an obstacle to the accomplishment of the goals of the executive agreements between the Clinton Administration and certain European governments. I have not included an excerpt from *Garamendi* because the factual background is complicated. Oversimplifying, the California law was designed to help Holocaust survivors and their heirs sue insurance companies that had failed to pay out on Holocaust-era policies. The Supreme Court held that the California law was preempted by the Clinton Administration's executive agreements under which insurers agreed to create a multibillion-dollar fund to compensate Holocaust survivors and their heirs for unpaid insurance claims. Justice Ginsburg wrote a dissent, which Justices Stevens, Scalia, and Thomas joined (an unusual lineup).

3. Federal preemption of state immigration regulation

Although the Constitution does not use the phrase "immigration power," there is no doubt that Congress can set the terms on which foreign nationals (often referred to as aliens) can live in the United States. The Supreme Court has derived Congress's power to regulate immigration from other powers, including Congress's express power to regulate naturalization (the process by which a person can become a U.S. citizen) and the federal government's inherent power to conduct relations with foreign nations.

There has been a lot of litigation over whether state and local laws involving immigration are preempted by federal statutes. Some state and local governments pass laws that are meant to discourage illegal immigration. Others enact laws that give sanctuary to aliens without documentation. Regardless, preemption issues arise. The excerpt below from *Arizona v. United States* (2012), illustrates the way the Supreme Court addresses preemption questions in the immigration context. You can also use this case as an opportunity to refresh preemption concepts generally and make sure you know the different forms of preemption (express preemption, field preemption, and the two types of conflict preemption).

Arizona v. United States, 567 U.S. 387 (2012) (5-3 vote, with Justice Kagan recused)

*[**Background:** In this case, the United States challenged several different provisions of Arizona law, but the excerpt below addresses just two of them. Section 3 of the Arizona law made it a state misdemeanor for an alien to fail to carry a registration document in Arizona. The Supreme Court held that this provision was invalid under a field preemption theory. Section 5(C) of the Arizona law made it a state misdemeanor for an unauthorized alien to apply for work in Arizona. The Supreme Court held that this provision was invalid under an obstacle preemption theory. As you read the opinion, pay particular attention to the Supreme Court's description of its earlier decision in De Canas v. Bica, 424 U.S. 351 (1976). What did the California law at issue in De Canas do? Why wasn't it preempted by the federal immigration statute? What changed about the federal immigration statute after De Canas, and how did that affect the outcome in Arizona?]*

Justice Kennedy wrote the opinion for the Court, which Chief Justice Roberts and Justices Ginsburg, Breyer, and Sotomayor joined. Justices Scalia, Thomas, and Alito dissented.

Justice KENNEDY wrote the opinion for the Court:

To address pressing issues related to the large number of aliens within its borders who do not have a lawful right to be in this country, the State of Arizona in 2010 enacted a statute called the Support Our Law Enforcement and Safe Neighborhoods Act. The law is often referred to as S.B. 1070, the version introduced in the State Senate. Its stated purpose is to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." The law's provisions establish an official state policy of "attrition through enforcement." The question before the Court is whether federal law preempts and renders invalid four separate provisions of the state law.

II.

A.

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, in part, on the National Government's constitutional power to "establish an uniform Rule of Naturalization," Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations.

The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad.

It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States. See *Chy Lung v. Freeman*, 92 U.S. 275, 279–280 (1876); see also The Federalist No. 3, p. 39 (C. Rossiter ed. 2003) (J. Jay) (observing that federal power would be necessary in part because "bordering States ... under the impulse of sudden irritation, and a quick sense of apparent interest or injury" might take action that would undermine foreign relations). This Court has reaffirmed that "[o]ne of the most important and delicate of all international relationships ... has to do with the protection of the just rights of a country's own nationals when those nationals are in another country." *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941).

Federal governance of immigration and alien status is extensive and complex. Congress has specified categories of aliens who may not be admitted to the United States. See 8 U.S.C. § 1182. Unlawful entry and unlawful reentry into the country are federal offenses. §§ 1325, 1326. Once here, aliens are required to register with the Federal Government and to carry proof of status on their person. See §§ 1301–1306. Failure to do so is a federal misdemeanor. §§ 1304(e), 1306(a). Federal law also authorizes States to deny noncitizens a range of public benefits, § 1622; and it imposes sanctions on employers who hire unauthorized workers, § 1324a.

Congress has specified which aliens may be removed from the United States and the procedures for doing so. Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law. See § 1227. Removal is a civil, not criminal, matter. A principal feature of the removal system is the broad discretion exercised by immigration officials. See Brief for Former Commissioners of the United States Immigration and Naturalization Service as Amici Curiae 8–13 (hereinafter Brief for Former INS Commissioners). Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal.

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

Agencies in the Department of Homeland Security play a major role in enforcing the country's immigration laws. United States Customs and Border Protection (CBP) is responsible for determining the admissibility of aliens and securing the country's borders. In 2010, CBP's Border Patrol apprehended almost half a million people. Immigration and Customs Enforcement (ICE), a second agency, conducts criminal investigations involving the enforcement of immigration-related statutes. ICE also operates the Law Enforcement Support Center. LESC, as the Center is known, provides immigration status information to federal, state, and local officials around the clock. ICE officers are responsible for the identification, apprehension, and removal of illegal aliens from the United States. Hundreds of thousands of aliens are removed by the Federal Government every year.

B

The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States. Arizona bears many of the consequences of unlawful immigration. Hundreds of thousands of deportable aliens are apprehended in Arizona each year. Unauthorized aliens who remain in the State constitute, by one estimate, almost 6% of the population. And in the State's most populous county, these aliens are reported to be responsible for a disproportionate share of serious crime.

Statistics alone do not capture the full extent of Arizona's concerns. Accounts in the record suggest there is an epidemic of crime, safety risks, serious property damage, and environmental problems associated with the influx of illegal migration across private land near the Mexican border. Phoenix is a major city of the United States, yet

signs along an interstate highway 30 miles to the south warn the public to stay away. One reads, “DANGER—PUBLIC WARNING—TRAVEL NOT RECOMMENDED/Active Drug and Human Smuggling Area/Visitors May Encounter Armed Criminals and Smuggling Vehicles Traveling at High Rates of Speed.” The problems posed to the State by illegal immigration must not be underestimated.

These concerns are the background for the formal legal analysis that follows. The issue is whether, under preemption principles, federal law permits Arizona to implement the state-law provisions in dispute.

III

Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect. From the existence of two sovereigns follows the possibility that laws can be in conflict or at cross-purposes. The Supremacy Clause provides a clear rule that federal law “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” Art. VI, cl. 2. Under this principle, Congress has the power to preempt state law. See *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000). There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision.

State law must also give way to federal law in at least two other circumstances. First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.

Second, state laws are preempted when they conflict with federal law. This includes cases where compliance with both federal and state regulations is a physical impossibility, and those instances where the challenged state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *Hines*, 312 U.S. at 67; see also *Crosby*, 530 U.S. at 373 (“What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects”). In preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress.

IV

The challenged provisions of the state law each must be examined under these preemption principles.

A

Section 3 [of the Arizona law] creates a new state misdemeanor. It forbids the "willful failure to complete or carry an alien registration" that is required by federal law. In effect, § 3 adds a state-law penalty for conduct proscribed by federal law. The United States contends that this state enforcement mechanism intrudes on the field of alien registration, a field in which Congress has left no room for States to regulate.

Federal law includes a requirement that aliens carry proof of registration. Aliens who remain in the country for more than 30 days must apply for registration and be fingerprinted. Detailed information is required, and any change of address has to be reported to the Federal Government. The statute provides penalties for the willful failure to register.

The framework enacted by Congress leads to the conclusion that the Federal Government has occupied the field of alien registration. The federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance. Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.

Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders. If § 3 of the Arizona statute were valid, every State could give itself independent authority to prosecute federal registration violations, diminishing the Federal Government's control over enforcement and detracting from the integrated scheme of regulation created by Congress.

Arizona contends that § 3 can survive preemption because the provision has the same aim as federal law and adopts its substantive standards. This argument not only ignores the basic premise of field preemption—that States may not enter, in any respect, an area the Federal Government has reserved for itself—but also is unpersuasive on its own terms. Permitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted. Were § 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.

B

Section 5(C) makes it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona. Violations can be punished by a $2,500 fine and incarceration for up to six months. The United States contends that the provision upsets the balance struck by the Immigration Reform and Control Act of 1986 (IRCA) and must be preempted as an obstacle to the federal plan of regulation and control.

At a time when there was no comprehensive federal program regulating the employment of unauthorized aliens, this Court found that a State had authority to pass its own laws on the subject. In 1971, for example, California passed a law imposing civil penalties on the employment of aliens who were "not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." The law was upheld against a preemption challenge in *De Canas v. Bica*, 424 U.S. 351 (1976). *De Canas* recognized that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." At that point, however, the Federal Government had expressed no more than a peripheral concern with the employment of illegal entrants.

Current federal law is substantially different from the regime that prevailed when *De Canas* was decided. Congress enacted IRCA as a comprehensive framework for combating the employment of illegal aliens. The law makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers. It also requires every employer to verify the employment authorization status of prospective employees. These requirements are enforced through criminal penalties and an escalating series of civil penalties tied to the number of times an employer has violated the provisions.

This comprehensive framework does not impose federal criminal sanctions on the employee side (i.e., penalties on aliens who seek or engage in unauthorized work). Under federal law some civil penalties are imposed instead. With certain exceptions, aliens who accept unlawful employment are not eligible to have their status adjusted to that of a lawful permanent resident. Aliens also may be removed from the country for having engaged in unauthorized work. In addition to specifying these civil consequences, federal law makes it a crime for unauthorized workers to obtain employment through fraudulent means. Congress has made clear, however, that any information employees submit to indicate their work status may not be used for purposes other than prosecution under specified federal criminal statutes for fraud, perjury, and related conduct.

The legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment. A commission established by Congress to study immigration policy and to make recommendations concluded these penalties would be "unnecessary and unworkable." Proposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting IRCA. But Congress rejected them. See, e.g., 119 Cong. Rec. 14184 (1973) (statement of Rep. Dennis). In the end, IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives. See, e.g., Hearings before the Subcommittee No. 1 of the House Committee on the Judiciary, 92d Cong., 1st Sess., pt. 3, pp. 919–920 (1972) (statement of Rep. Rodino, the eventual sponsor of IRCA in the House of Representatives).

IRCA's express preemption provision, which in most instances bars States from imposing penalties on employers of unauthorized aliens, is silent about whether additional penalties may be imposed against the employees themselves. See 8 U.S.C. § 1324a(h)(2). But the existence of an express preemption provision does not bar the ordinary working of conflict preemption principles or impose a special burden that would make it more difficult to establish the preemption of laws falling outside the clause.

The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Under § 5(C), Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens. Although § 5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement. The Court has recognized that a conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy. The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose. Section 5(C) is preempted by federal law.

Commentary: When we studied preemption in Chapter 2, I told you that the line between field preemption and obstacle preemption is fuzzy and that, in real-world litigation, someone who makes a field preemption argument ordinarily makes an obstacle preemption argument to go along with it. The *Arizona* case is an example: The federal government's Supreme Court brief argued that section 3 of the Arizona law was invalid on a field preemption theory or, in the alternative, on an obstacle preemption theory. The Supreme Court accepted the field preemption argument, largely because the Court had accepted a very similar field preemption challenge to another state's alien registration statute in *Hines* (1941). But if *Hines* had not been on the books, I suspect that the Court would have said in *Arizona* that both section 3 and section 5(C) of the Arizona law were invalid on an obstacle preemption theory. In other words, I stand by my view that the distinction between field and obstacle preemption doesn't matter much in practice.

4. State surrender of sovereign immunity in the war powers context

Before we shift gears to consider foreign affairs from a separation-of-powers perspective, we are reading a short excerpt from one more foreign affairs case with a federalism issue. As you learned in Chapter 2, state sovereign immunity ordinarily prevents private parties from suing states for money damages. But as you may recall, there are exceptions to that general rule.

In *Torres* (2022), the Court announced a new exception. The federal statute at issue in *Torres* requires employers, including state employers, to give veterans their jobs back after they serve in the military. That requirement does not by itself necessarily implicate state sovereign immunity because it can be enforced in a suit for an injunction against state officials (remember the *Ex parte Young* exception to state sovereign immunity?). But the federal statute in *Torres*, the Uniformed Services Employment and Reemployment Rights Act (USERRA), also allows employees, including state employees, to sue for damages if their employer failed to comply with the statute's requirements. In *Torres*, the Supreme Court rejected a state's sovereign immunity defense to such a damages action. The Supreme Court reasoned that by entering the Union, states surrendered to Congress the powers that Congress finds necessary and proper to provide for the nation's defense. When Congress exercises its power to support the armed forces, it can override state sovereign immunity if it chooses to do so. In deciding that sovereign immunity issue, *Torres* provides a nice synopsis of the reasons that states relinquished war powers to the federal government at the time of the Framing.

Torres v. Texas Department of Public Safety, 597 U.S. 580 (2022)
(unanimous)

Justice BREYER wrote the opinion for the unanimous Court:

Congress has broad and sweeping power to raise and support armies. It has long exercised that power to encourage service in the Armed Forces in a variety of ways. Since before the United States' entry into World War II, Congress has sought to smooth volunteers' reentry into civilian life by recognizing veterans' right to return to civilian employment without adverse effect on career progress in the federal work force and private employment.

The Vietnam War prompted Congress to extend these protections to employment by States. Amidst political opposition to the war, some State and local jurisdictions had demonstrated a reluctance, and even an unwillingness, to reemploy returning servicemembers. So Congress authorized private damages suits against States to ensure that veterans who had previously held jobs as school teachers, policemen, firemen, and other State, county, and city employees would not be denied their old jobs as reprisal for their service. The statute at issue here, USERRA, embodies these protections today.

This case asks whether States may invoke sovereign immunity as a legal defense to block such suits. In our view, they cannot. Upon entering the Union, the States implicitly agreed that their sovereignty would yield to federal policy to build and keep a national military. States thus gave up their immunity from congressionally authorized suits pursuant to the plan of the Convention, as part of the structure of the original Constitution itself.

The Constitution's text, across several Articles, strongly suggests a complete delegation of authority to the Federal Government to provide for the common defense. Unlike most of the powers given to the National Government, the Constitution spells out the war powers not in a single, simple phrase, but in many broad, interrelated provisions. Article I gives Congress authority to "provide for th[at] common Defence" in six numbered paragraphs: to "declare War"; "raise and support Armies"; "provide and maintain a Navy"; "make Rules" for the Armed Forces; "provide for calling forth the Militia"; and "provide for [their] organizing, arming, and disciplining." § 8, cls. 1, 11–16. Article II makes the President the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several

States." § 2, cl. 1. And the Federal Government is charged with "protect[ing] each" State "against Invasion." Art. IV, § 4.

The Constitution also divests the States of like power. States may not "engage in War, unless actually invaded," "enter into any Treaty," or "keep Troops, or Ships of War in time of Peace." Art. I, § 10, cls. 1, 3. States retain a role in "the Appointment of the Officers" to and the "training [of] the Militia," but that delegation is strictly cabined. Art. I, § 8, cl. 16. States must do so "according to the discipline prescribed by Congress." Ibid. These substantial limitations on state authority, together with the assignment of sweeping power to the Federal Government, provide strong evidence that the structure of the Constitution prevents States from frustrating national objectives in this field.

History teaches the same lesson. When the Framers met in Philadelphia in the summer of 1787, they sought to create a cohesive national sovereign in response to the failings of the Articles of Confederation. The Founders recognized, first and foremost, "that the confederation produced no security agai[nst] foreign invasion; congress not being permitted to prevent a war nor to support it by the[ir] own authority," because Congress lacked the power to marshal and maintain a fighting force "fit for defence." 1 Records of the Federal Convention of 1787, p. 19 (M. Farrand ed. 1966) (Edmund Randolph opening remarks). "[T]he want of power in Congress to raise an army" had left the National Government "dependen[t] upon the States" to supply military forces via a system of quotas and requisition that had nearly cost the Nation victory in the Revolutionary War. *Selective Draft Law Cases*, 245 U.S. 366, 381 (1918). George Washington warned from the battlefield that, unless Congress is "vested with powers by the several States" to raise an army, "our cause is lost." Letter to J. Jones (May 31, 1780), in 8 Writings of George Washington 304 (W. Ford ed. 1890). In short, "[t]he experience of the whole country, during the revolutionary war, established, to the satisfaction of every statesman, the utter inadequacy and impropriety of this system of requisition." 3 J. Story, Commentaries on the Constitution of the United States § 1174, p. 65 (1833) (Story). The States ultimately ratified the Constitution knowing that their sovereignty would give way to national military policy.

C. FOREIGN AFFAIRS: SEPARATION OF POWERS ISSUES

1. Congress's delegations of foreign powers to the Executive Branch

In recent cases involving domestic affairs, the Supreme Court has been reluctant to uphold the Executive Branch's major policy initiatives without clear authorization from Congress. When foreign affairs are at issue, the Supreme Court's attitude is often quite different. Typically, the Court gives far more deference to the Executive Branch on foreign policy matters than on domestic affairs. The excerpt below from *Trump v. Hawaii* (2018)—where the Supreme Court upheld an immigration action by President Trump commonly known as the "travel ban"—is illustrative.

As you read the excerpt from *Trump v. Hawaii* (2018), think about the three-part framework for analyzing Executive Branch action that Justice Jackson set out in his concurring opinion in the *Youngstown* steel seizure case. Which part of that framework is at issue here? Can you make an argument that the Immigration and Nationality Act's delegation of authority to the President violates the nondelegation doctrine? Or an argument that the President's proclamation was invalid under the major questions doctrine? Why wasn't the Court troubled by such concerns?

Then, when you read the excerpt from *Learning Resources v. Trump* (2026)—where the Supreme Court rejected the argument that the International Emergency Economic Powers Act (IEEPA) authorized President Trump's tariffs—focus on why the Court reached that outcome even though the case involved foreign affairs.

Trump v. Hawaii, 585 U.S. 667 (2018)
(5-4 vote)

*[**Background:** The plaintiffs in this case challenged a proclamation that President Trump issued early in his first administration. The proclamation was colloquially known as the "travel ban." Based on national security concerns set out in the proclamation, President Trump restricted the entry into the United States by nationals of eight foreign states. The Supreme Court upheld the proclamation as a valid exercise of the power that Congress gave to the President in the Immigration and Nationality Act. Chief Justice Roberts wrote the opinion for the Court, which Justices*

Kennedy, Thomas, Alito, and Gorsuch joined. Justices Breyer, Kagan, Sotomayor, and Ginsburg dissented.]

Chief Justice ROBERTS wrote the opinion for the Court:

For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); see *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–589 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power."). Because decisions in these matters may implicate relations with foreign powers, or involve classifications defined in the light of changing political and economic circumstances, such judgments are frequently of a character more appropriate to either the Legislature or the Executive.

The Immigration and Nationality Act establishes numerous grounds on which an alien abroad may be inadmissible to the United States and ineligible for a visa. See, e.g., 8 U.S.C. §§ 1182(a)(1) (health-related grounds), (a)(2) (criminal history), (a)(3)(B) (terrorist activities), (a)(3)(C) (foreign policy grounds). Congress has also delegated to the President authority to suspend or restrict the entry of aliens in certain circumstances. The principal source of that authority, § 1182(f), enables the President to "suspend the entry of all aliens or any class of aliens" whenever he "finds" that their entry "would be detrimental to the interests of the United States."

By its terms, § 1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry ("[w]henever [he] finds that the entry" of aliens "would be detrimental" to the national interest); whose entry to suspend ("all aliens or any class of aliens"); for how long ("for such period as he shall deem necessary"); and on what conditions ("any restrictions he may deem to be appropriate"). It is therefore unsurprising that we have previously observed that § 1182(f) vests the President with "ample power" to impose entry restrictions in addition to those elsewhere enumerated in the INA. *Sale v. Haitian Centers Council*, 509 U.S. 155, 187 (1993) (finding it "perfectly clear" that the President could "establish a naval blockade" to prevent illegal migrants from entering the United States).

The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in § 1182(f) is that the President "find" that the entry of the covered aliens "would be detrimental to the interests of the United States." The President has undoubtedly fulfilled that requirement here. The Proclamation set forth extensive findings describing how deficiencies in the practices of select foreign

governments—several of which are state sponsors of terrorism—deprive the Government of "sufficient information to assess the risks [those countries' nationals] pose to the United States." Proclamation § 1(h)(i). Based on that review, the President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries. The Proclamation therefore "craft[ed] ... country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances," while securing the Nation "until such time as improvements occur." *Ibid.*[2]

> [2] The Proclamation states that it does not disclose every ground for the country-specific restrictions because "[d]escribing all of those reasons publicly ... would cause serious damage to the national security of the United States, and many such descriptions are classified." § 1(j).

Plaintiffs' request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. Whether the President's chosen method of addressing perceived risks is justified from a policy perspective is irrelevant to the scope of his § 1182(f) authority. And when the President adopts "a preventive measure ... in the context of international affairs and national security," he is "not required to conclusively link all of the pieces in the puzzle before courts grant weight to his empirical conclusions." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010).

Commentary: In the introduction above the "travel ban" case, I asked you to reflect on why the Court wasn't troubled by the concerns that underlie the nondelegation doctrine and the major questions doctrine. In his later concurrence in *FCC v. Consumers' Research* (2025), Justice Kavanaugh offered his perspective on why these doctrines should have less force in the context of foreign affairs:

> In the national security and foreign policy realms, the nondelegation doctrine (whatever its scope with respect to domestic legislation) appropriately has played an even more limited role in light of the President's constitutional responsibilities and independent Article II authority. In the area of foreign affairs, Congress must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.

> In addition, the major questions canon has not been applied by this Court in the national security or foreign policy contexts, because the canon does not reflect ordinary congressional intent in those areas. On the contrary, the usual understanding is that Congress intends to give the President substantial authority and flexibility to protect America and the American people—and that Congress specifies limits on the President when it wants to restrict Presidential power in those national security and foreign policy domains. The canon does not translate to those contexts because of the nature of Presidential decisionmaking in response to ever-changing national security threats and diplomatic challenges. Moreover, in those areas, the President possesses at least some independent constitutional power to act even without congressional authorization—that is, in *Youngstown* category 2.

FCC v. Consumers' Research, 145 S. Ct. at 2516 (Kavanaugh, J., concurring).

Based on that concurrence, some outside observers predicted that the Supreme Court would uphold the tariffs on foreign goods that President Trump imposed under the International Emergency Economic Power Act (IEEPA). But as you will see in the excerpt below from *Learning Resources, Inc. v. Trump* (2026), the Court held that IEEPA does not authorize those tariffs. As you read *Learning Resources*, focus on why the Court was reluctant to interpret IEPPA's text to authorize tariffs. Then, think about why Justice Kavanaugh dissented.

Learning Resources, Inc. v. Trump, 146 S. Ct. 628
(6-3 vote on the bottom line)

*[**Background:** Enacted in 1977, IEEPA gives the President economic tools to address significant foreign threats. When acting under IEEPA, the President must identify an "unusual and extraordinary threat" to American national security, foreign policy, or the economy, originating primarily "outside the United States." The President must "declare a national emergency" under the National Emergencies Act. He may then take the following actions to "deal with" the threat:*

> *investigate, block during the pendency of an investigation,* ***regulate,*** *direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation,* ***importation*** *or exportation* ***of****, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving,* ***any property in which any foreign country or a national thereof has any interest****.*

50 U.S.C. § 1702(a)(1)(B) (bold added). Early in his second Administration, President Trump relied on this statutory provision as authority to impose large tariffs on imports from many foreign countries. The President's proclamation imposing the tariffs stated that they were intended to address two types of foreign threats: (1) the influx of illegal drugs from Canada, Mexico, and China and (2) large and persistent trade deficits with many countries.

The Supreme Court concluded that IEEPA does not give a President the power to impose tariffs. Although the bottom-line vote was 6-3, the Justices in the majority disagreed over the reasoning. Chief Justice John Roberts, joined by Justices Neil Gorsuch and Amy Coney Barrett, relied on the major questions doctrine to guide their interpretation of IEEPA's text. Justice Sonia Sotomayor, joined by Justices Elena Kagan and Ketanji Brown Jackson, refused to join that part of the Chief's opinion but adopted the same interpretation of IEEPA based on ordinary principles of statutory interpretation. As you may remember, these three "liberal" Justices were critical of the major questions doctrine when it was used to invalidate actions taken during President Biden's administration, so they were trying to be consistent with that criticism here. Justice Kavanaugh wrote the principal dissent, joined by Justices Thomas and Alito. (Many Justices wrote separate opinions, but I only included snippets from some of them.)]

Chief Justice ROBERTS, writing here for the Court:

Based on two words separated by 16 others in Section 1702(a)(1)(B) of IEEPA—"regulate" and "importation"—the President asserts the independent power to impose tariffs on imports from any country, of any product, at any rate, for any amount of time. Those words cannot bear such weight.

A
1

Article I, Section 8, of the Constitution sets forth the powers of the Legislative Branch. The first Clause of that provision specifies that "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises." It is no accident that this power appears first. The power to tax was, Alexander Hamilton explained, "the most important of the authorities proposed to be conferred upon the Union." The Federalist No. 33, pp. 202–203 (C. Rossiter ed. 1961). It is both a "power to destroy," *M'Culloch v. Maryland*, 4 Wheat. 316, 431 (1819), and a power "necessary to the existence and prosperity of a nation"—"the one great power upon which the whole national fabric is based." *Nicol v. Ames*, 173 U.S. 509, 515 (1899).

The power to impose tariffs is "very clearly ... a branch of the taxing power." *Gibbons v. Ogden*, 9 Wheat. 1, 201 (1824). "A tariff," after all, "is a tax levied on imported goods and services." Congressional Research Service (CRS). And tariffs raise revenue—the defining feature of a tax. Indeed, the Framers expected that the Government would for a long time depend chiefly on tariffs for revenue. Little wonder, then, that the First Congress's first exercise of its taxing power (and its second enacted law, right after the one providing for the new officials to take an oath) was a tariff law. See Act of July 4, 1789, ch. 2, 1 Stat. 24.

Recognizing the taxing power's unique importance, and having just fought a revolution motivated in large part by "taxation without representation," the Framers gave Congress "alone ... access to the pockets of the people." The Federalist No. 48, at 310 (J. Madison); see also Declaration of Independence ¶19. They did not vest any part of the taxing power in the Executive Branch. See *Nicol*, 173 U.S. at 515 ("[T]he whole power of taxation rests with Congress").

The Government thus concedes, as it must, that the President enjoys no inherent authority to impose tariffs during peacetime. Tr. of Oral Arg. 70–71. And it does not defend the challenged tariffs as an exercise of the President's warmaking powers. The United States, after all, is not at war with every nation in the world. The Government instead relies exclusively on IEEPA. It reads the words "regulate" and "importation" to effect a sweeping delegation of Congress's power to set tariff policy—authorizing the President to impose tariffs of unlimited amount and duration, on any product from any country. 50 U.S.C. § 1702(a)(1)(B).

Chief Justice ROBERTS, joined only by Justices Gorsuch and Barrett:

2

We have long expressed "reluctance to read into ambiguous statutory text" extraordinary delegations of Congress's powers. *West Virginia v. EPA*, 597 U.S. 697,

723 (2022). In *Biden v. Nebraska*, 600 U.S. 477 (2023), for example, we declined to read authorization to "waive or modify" statutory or regulatory provisions applicable to financial assistance programs as a delegation of power to cancel $430 billion in student loan debt. In *West Virginia v. EPA*, we declined to read authorization to determine the "best system of emission reduction" as a delegation of power to force a nationwide transition away from the use of coal. And in *National Federation of Independent Business v. OSHA*, 595 U.S. 109 (2022) (per curiam), we declined to read authorization to ensure "safe and healthful working conditions" as a delegation of power to impose a vaccine mandate on 84 million Americans. see also, *e.g., Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 594 U.S. 758, 764–765 (2021) (per curiam).

We have described several of these cases as "major questions" cases. Both separation of powers principles and a practical understanding of legislative intent suggested Congress would not have delegated highly consequential power through ambiguous language.

These considerations apply with particular force where, as here, the purported delegation involves the core congressional power of the purse. If Congress were to relinquish that weapon to another branch, a reasonable interpreter would expect it to do so clearly.

What common sense suggests, congressional practice confirms. When Congress has delegated its tariff powers, it has done so in explicit terms, and subject to strict limits. Congress has consistently used words like "duty" in statutes delegating authority to impose tariffs. (A customs "duty" is simply "the federal tax levied on goods shipped into the United States." Black's Law Dictionary 638 (12th ed. 2024).) See, e.g., 19 U.S.C. § 1338(d) ("rates of duty"); § 2132(a) ("temporary import surcharge ... in the form of duties"); § 2253(a)(3)(A) ("duty on the imported article"); § 2411(c)(1)(B) ("duties or other import restrictions"). It has capped the amount and duration of tariffs. See, e.g., § 1338(d) (50% cap); § 2132(a) (15% cap, 150-day time limit); § 2253(e) (50% cap, phasedown requirement after one year). And it has conditioned exercise of the tariff power on demanding procedural prerequisites. See, e.g., § 2252 (investigation by the United States International Trade Commission, public hearings, report of findings and recommendation); §§ 2411–2414 (investigation by the United States Trade Representative, consultation with relevant country and interested parties, publication of findings).

Against this backdrop of clear and limited delegations, the Government reads IEEPA to give the President power to unilaterally impose unbounded tariffs. On this reading,

moreover, the President is unconstrained by the significant procedural limitations in other tariff statutes and free to issue a dizzying array of modifications at will. All it takes to unlock that extraordinary power is a Presidential declaration of emergency, which the Government asserts is unreviewable. And the only way of restraining the exercise of that power is a veto-proof majority in Congress. That view, if credited, would represent a transformative expansion of the President's authority over tariff policy and indeed—as demonstrated by the exercise of that authority in this case—over the broader economy as well. It would replace the longstanding executive-legislative collaboration over trade policy with unchecked Presidential policymaking. Congress seldom effects such sea changes through vague language.

It is also telling that in IEEPA's "half century of existence," no President has invoked the statute to impose any tariffs—let alone tariffs of this magnitude and scope. The lack of historical precedent for the IEEPA tariffs, coupled with the breadth of authority" that the President now claims, is a telling indication that the tariffs extend beyond the President's legitimate reach.

3

The economic and political significance of the authority the President has asserted likewise provides a reason to hesitate before concluding that Congress' meant to confer such authority. As the Government admits—indeed, boasts—the economic and political consequences of the IEEPA tariffs are astonishing. The Government points to projections that the tariffs will reduce the national deficit by $4 trillion, and that international agreements reached in reliance on the tariffs could be worth $15 trillion. Brief for Federal Parties 3, 11. In the President's view, whether "we are a rich nation" or a "poor" one hangs in the balance. *Id.* at 2. These stakes dwarf those of other major questions cases. See, *e.g.*, *Nebraska*, 600 U.S. at 483 ($430 billion); *Alabama Assn.*, 594 U.S. at 764 (nearly $50 billion); *West Virginia*, 597 U.S. at 714 ("billions of dollars in compliance costs"). As in those cases, a reasonable interpreter would not expect" Congress to "pawn" such a "big-time policy call[ ] ... off to another branch." *Nebraska*, 600 U.S. at 515 (BARRETT, J., concurring).

The Government and the principal dissent attempt to avoid application of the major questions doctrine on several grounds. None is convincing.

The Government argues first that the doctrine should not apply to emergency statutes. But this argument is nearly identical to one it already advanced in *Nebraska*. There, the Government contended that a different emergency statute should be interpreted broadly because its "whole point" was to provide "substantial discretion to ... respond to unforeseen emergencies." We rejected that argument in *Nebraska*, and

we reject it here as well. “Emergency powers,” after all, “tend to kindle emergencies.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (JACKSON, J., concurring). Dozens of IEEPA emergencies remain ongoing today, including the first—declared over four decades ago in response to the Iranian hostage crisis. CRS, Casey, International Emergency Economic Powers Act, at 20. And as the Framers understood, emergencies can “afford a ready pretext for usurpation” of congressional power. *Youngstown*, 343 U.S. at 650 (JACKSON, J., concurring).

The Government’s and the principal dissent’s proposed foreign affairs exception fares no better. As a general matter, the President of course enjoys some “independent constitutional powers” over foreign affairs “even without congressional authorization.” *FCC v. Consumers’ Research*, 606 U.S. 656, 707 (2025) (KAVANAUGH, J., concurring). And Congress certainly may intend to “give the President substantial authority and flexibility” in many foreign affairs or national security contexts. *Id.* at 706. But “flipping” the “presumption” under the major questions doctrine, Brief for Federal Parties 34, makes little sense when it comes to tariffs. As the Government admits, the President and Congress do not “enjoy concurrent constitutional authority” to impose tariffs during peacetime. *Ibid.*; Tr. of Oral Arg. 70–71. The Framers gave that power to Congress alone—notwithstanding the obvious foreign affairs implications of tariffs. And whatever may be said of other powers that implicate foreign affairs, we would not expect Congress to relinquish its tariff power through vague language, or without careful limits.

Accordingly, the President must “point to clear congressional authorization” to justify his extraordinary assertion of the power to impose tariffs. Nebraska, 600 U.S., at 506, 143 S.Ct. 2355 (internal quotation marks omitted). He cannot.

Chief Justice ROBERTS, writing again here for the Court:

B

To begin, IEEPA authorizes the President to “investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit ... importation or exportation.” 50 U.S.C. § 1702(a)(1)(B). Absent from this lengthy list of powers is any mention of tariffs or duties.

The power to “regulate ... importation” does not fill that void. The U.S. Code is replete with statutes granting the Executive the authority to “regulate” someone or something. Yet the Government cannot identify any statute in which the power to regulate includes the power to tax.

A contrary reading would render IEEPA partly unconstitutional. IEEPA authorizes the President to "regulate ... importation *or exportation*." 50 U.S.C. § 1702(a)(1)(B) (emphasis added). Taxing exports, however, is expressly forbidden by the Constitution. Art. I, § 9, cl. 5.

We do not attempt to set forth the metes and bounds of the President's authority to "regulate ... importation" under IEEPA. That "interpretive question" is "not at issue" in this case, and any answer would be "plain dicta." West Virginia, 597 U.S., at 734–735, and n. 5, 142 S.Ct. 2587. Our task today is to decide only *644 whether the power to "regulate ... importation," as granted to the President in IEEPA, embraces the power to impose tariffs. It does not.[4]

> [4] The principal dissent surmises that the President could impose "most if not all" of the tariffs at issue under statutes other than IEEPA. The cited statutes contain various combinations of procedural prerequisites, required agency determinations, and limits on the duration, amount, and scope of the tariffs they authorize. We do not speculate on hypothetical cases not before us.

Justice KAGAN, joined by Justices Sotomayor and Jackson, concurring in part and concurring in the judgment:

The Court holds today that the International Emergency Economic Powers Act (IEEPA) does not authorize the President to impose tariffs. I agree with that conclusion, as I do with the bulk of the principal opinion's reasoning. But because I think the ordinary tools of statutory interpretation amply support today's result, I do not join the part of that opinion invoking the so-called major-questions doctrine.

Justice KAVANAUGH, joined by Justices Thomas and Alito, dissenting:

The sole legal question here is whether, under IEEPA, tariffs are a means to "regulate ... importation." Statutory text, history, and precedent demonstrate that the answer is clearly yes: Like quotas and embargoes, tariffs are a traditional and common tool to regulate importation.

In my view, as I will explain, the major questions canon does not control here for two alternative and independent reasons. First, the statutory text, history, and precedent constitute clear congressional authorization for the President to impose tariffs under IEEPA. Throughout American history, Presidents have commonly imposed tariffs as

a means to “regulate ... importation.” So tariffs were not an “unheralded” power when Congress enacted IEEPA in 1977 and authorized the President to “regulate ... importation” of foreign goods. Therefore, the major questions doctrine is satisfied here.

Second, in any event, the Court has never before applied the major questions doctrine in the foreign affairs context, including foreign trade. Rather, as Justice Robert Jackson summarized and remains true, this Court has always recognized the “unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636, n.2 (1952) (concurring opinion). In foreign affairs cases, courts read the statute as written and do not employ the major questions doctrine as a thumb on the scale against the President.

Although I firmly disagree with the Court's holding today, the decision might not substantially constrain a President's ability to order tariffs going forward. That is because numerous other federal statutes authorize the President to impose tariffs and might justify most (if not all) of the tariffs at issue in this case—albeit perhaps with a few additional procedural steps that IEEPA, as an emergency statute, does not require. Those statutes include, for example, the Trade Expansion Act of 1962 (Section 232); the Trade Act of 1974 (Sections 122, 201, and 301); and the Tariff Act of 1930 (Section 338). In essence, the Court today concludes that the President checked the wrong statutory box by relying on IEEPA rather than another statute to impose these tariffs.

Commentary: Right after the Supreme Court issued its decision in *Learning Resources*, President Trump imposed new, smaller tariffs. He relied on the authority granted by other statutes. The new tariffs have been challenged in cases that are pending in lower courts.

2. The allocation of war powers between Congress and the President

The allocation of war powers between the President and Congress is another fuzzy area of law. On the one hand, Article I gives Congress the power to declare war, to raise and support the armed forces, and to make rules for the armed forces and for calling up state militias. On the other hand, Article II makes the President the

"Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States."

What kinds of events triggers the President's power as commander in chief? That power clearly applies when Congress declares war. And in the *Prize Cases*, 67 U.S. 635 (1863), the Supreme Court upheld the blockade of Southern ports that President Lincoln established after the attack on Fort Sumpter, even though Congress had not yet approved the blockade. The Supreme Court reasoned that the President can use force to resist and repel an attack on the United States, without waiting for Congress's approval.

When President Lincoln issued the **Emancipation Proclamation** in 1863, he invoked "the power in me vested as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion against authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion." The Constitution did not give the President any general power to free enslaved persons, so President Lincoln needed to rely on his power as commander in chief. His logic was that freeing enslaved persons would help the Union fight the rebellious states. Because Lincoln was a careful lawyer, the Emancipation Proclamation was written so that it applied only to enslaved persons in rebellious states not yet under Union control. The Emancipation Proclamation did not apply in loyal border states, and it also excluded those parts of the Confederacy that were already under Union control. Of course, there were also political reasons for President Lincoln to restrict the geographic scope of the Emancipation Proclamation, such as to avoid alienating the loyal border states. But we are focused here on the legal reasons for the Emancipation Proclamation's limited scope.

Presidents and Congress have long disagreed about whether a President can send U.S. troops to fight abroad without congressional authorization. For example, President Truman did not seek congressional authorization before sending troops to Korea, and Presidents Kennedy and Johnson did not seek congressional authorization before sending troops to Vietnam. In 1973, Congress enacted the **War Power Resolution** (also called the War Powers Act) over President Nixon's veto. That statute was Congress's attempt to reassert control over the commitment of U.S. forces in conflicts abroad. It required the President to consult Congress "in every possible instance" before committing U.S. troops in hostilities abroad and to report to Congress within 48 hours of deploying U.S. forces if Congress has not declared war or authorized the deployment. The statute established fast-track procedures for Congress to authorize the use of U.S. forces or direct their removal from hostilities. But in practice, the statute did little to inhibit Presidents from sending troops abroad without prior congressional authorization. The Supreme Court has never addressed a

challenge to the War Powers Act's requirements. Lower courts have avoided resolving challenges to the President's decisions to send U.S. troops into hostile situations by dismissing the cases on threshold grounds of non-justiciability, mootness, ripeness, or standing. For instance, in *Campbell v. Clinton*, 52 F. Supp.2d 34 (D.D.C. 1999), the district court dismissed a challenge to the military air campaign in Kosovo on standing grounds.

3. The allocation of diplomatic powers between Congress and the President

In the federalism context, the Supreme Court often says the United States must speak with **one voice** on matters of foreign affairs. That principle is not controversial insofar as it means the voice of the federal government as opposed to the cacophony of 50 state voices. But the question of whose voice should dominate gets complicated when the political branches of the federal government disagree on a foreign policy question. *Zivotofsky* (2015) illustrates such a clash. As you read the *Zivotofsky* opinions, pay particular attention to the descriptions of how diplomatic powers are shared between the President and Congress.

Zivotofsky v. Kerry, 576 U.S. 1 (2015)
(6-3 vote in relevant part)

*[**Background:** Israel, Jordan, and the Palestinians each assert sovereignty over Jerusalem. Because of the diplomatic sensitivities, U.S. Presidents have long refrained from taking a side in that dispute. Congress, however, passed a statute that allowed U.S. citizens born in Jerusalem to identify their birthplace as "Israel" on a U.S. passport—despite the State Department's objections. Siding with the Executive Branch, the Supreme Court held that the statute infringed on the President's exclusive power to recognize the degree of a foreign state's sovereignty.]*

Justice Kennedy wrote the opinion for the Court, which Justices Ginsburg, Breyer, Sotomayor, and Kagan joined. Justice Thomas concurred in part and dissented in part. Chief Justice Roberts, Justice Alito, and Justice Scalia dissented.

Justice KENNEDY wrote the opinion for the Court:

I.

Jerusalem's political standing has long been, and remains, one of the most sensitive issues in American foreign policy, and indeed it is one of the most delicate issues in current international affairs. In 1948, President Truman formally recognized Israel in a signed statement of "recognition." That statement did not recognize Israeli sovereignty over Jerusalem. Over the last 60 years, various actors have sought to assert full or partial sovereignty over the city, including Israel, Jordan, and the Palestinians. Yet, in contrast to a consistent policy of formal recognition of Israel, neither President Truman nor any later United States President has issued an official statement or declaration acknowledging any country's sovereignty over Jerusalem. Instead, the Executive Branch has maintained that the status of Jerusalem should be decided not unilaterally but in consultation with all concerned. See, e.g., Remarks by President Obama in Address to the United Nations Gen. Assembly (Sept. 21, 2011), 2011 Daily Comp. of Pres. Doc. 00661, p. 4 ("Ultimately, it is the Israelis and the Palestinians, not us, who must reach agreement on the issues that divide them," including "Jerusalem").

The President's position on Jerusalem is reflected in State Department policy regarding passports and consular reports of birth abroad. Understanding that passports will be construed as reflections of American policy, the State Department's Foreign Affairs Manual (FAM) instructs its employees, in general, to record the place of birth on a passport as the "country [having] present sovereignty over the actual area of birth." If a citizen objects to the country listed as sovereign by the State Department, he or she may list the city or town of birth rather than the country. The FAM, however, does not allow citizens to list a sovereign that conflicts with Executive Branch policy. Because the United States does not recognize any country as having sovereignty over Jerusalem, the FAM instructs employees to record the place of birth for citizens born there as "Jerusalem."

In 2002, Congress passed the Act at issue here, the Foreign Relations Authorization Act, Fiscal Year 2003. Section 214 of the Act is titled "United States Policy with Respect to Jerusalem as the Capital of Israel." The subsection that lies at the heart of this case, § 214(d), addresses passports. That subsection seeks to override the FAM by allowing citizens born in Jerusalem to list their place of birth as "Israel." Section 214(d) states "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." When he signed the Act into law, President George W. Bush issued a statement declaring his position that § 214 would, "if construed as

mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states."

II.

In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–638 (1952) (concurring opinion). The framework divides exercises of Presidential power into three categories: First, when "the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." Second, "in absence of either a congressional grant or denial of authority" there is a "zone of twilight in which he and Congress may have concurrent authority," and where "congressional inertia, indifference or quiescence may" invite the exercise of executive power. Finally, when "the President takes measures incompatible with the expressed or implied will of Congress ... he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Ibid. To succeed in this third category, the President's asserted power must be both "exclusive" and "conclusive" on the issue.

Because the President's refusal to implement § 214(d) falls into Justice Jackson's third category, his claim must be scrutinized with caution, and he may rely solely on powers the Constitution grants to him alone.

Recognition is a formal acknowledgement that a particular entity possesses the qualifications for statehood or that a particular regime is the effective government of a state. Despite the importance of the recognition power in foreign relations, the Constitution does not use the term "recognition," either in Article II or elsewhere.

The Secretary asserts that the President exercises the recognition power based on the Reception Clause, which directs that the President "shall receive Ambassadors and other public Ministers." Art. II, § 3. At the time of the founding, prominent international scholars suggested that receiving an ambassador was tantamount to recognizing the sovereignty of the sending state. It is a logical and proper inference, then, that a Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations.

The text and structure of the Constitution grant the President the power to recognize foreign nations and governments. The question then becomes whether that power is

exclusive. The various ways in which the President may unilaterally effect recognition—and the lack of any similar power vested in Congress—suggest that it is. So, too, do functional considerations. Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not. Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received; whether their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights. These assurances cannot be equivocal.

Recognition is a topic on which the Nation must "'speak ... with one voice.'" *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 424 (2003) (quoting *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000)). That voice must be the President's. Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, "[d]ecision, activity, secrecy, and dispatch." The Federalist No. 70, p. 424 (A. Hamilton). The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition. He is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law. These qualities explain why the Framers listed the traditional avenues of recognition—receiving ambassadors, making treaties, and sending ambassadors—as among the President's Article II powers.

It remains true, of course, that many decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action. Congress may "regulate Commerce with foreign Nations," "establish an uniform Rule of Naturalization," "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," "declare War," "grant Letters of Marque and Reprisal," and "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., Art. I, § 8. In addition, the President cannot make a treaty or appoint an ambassador without the approval of the Senate. Art. II, § 2, cl. 2. The President, furthermore, could not build an American Embassy abroad without congressional appropriation of the necessary funds. Art. I, § 8, cl. 1. Under basic separation-of-powers principles, it is for the Congress to enact the laws, including "all Laws which shall be necessary and proper for carrying into Execution" the powers of the Federal Government. § 8, cl. 18.

Although the President alone effects the formal act of recognition, Congress' powers, and its central role in making laws, give it substantial authority regarding many of the

policy determinations that precede and follow the act of recognition itself. If Congress disagrees with the President's recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress. In this way ambition counters ambition, ensuring that the democratic will of the people is observed and respected in foreign affairs as in the domestic realm. See The Federalist No. 51, p. 322 (J. Madison).

III.

As the power to recognize foreign states resides in the President alone, the question becomes whether § 214(d) infringes on the Executive's consistent decision to withhold recognition with respect to Jerusalem.

Section 214(d) requires that, in a passport or consular report of birth abroad, "the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel" for a "United States citizen born in the city of Jerusalem." 116 Stat. 1366. That is, § 214(d) requires the President, through the Secretary, to identify citizens born in Jerusalem who so request as being born in Israel. But according to the President, those citizens were not born in Israel. As a matter of United States policy, neither Israel nor any other country is acknowledged as having sovereignty over Jerusalem. In this way, § 214(d) directly contradicts the carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem.

This is not to say Congress may not express its disagreement with the President in myriad ways. For example, it may enact an embargo, decline to confirm an ambassador, or even declare war. But none of these acts would alter the President's recognition decision. Although the statement required by § 214(d) would not itself constitute a formal act of recognition, it is a mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State. As a result, it is unconstitutional.

Justice BREYER, concurring:

I continue to believe that this case presents a political question inappropriate for judicial resolution. See *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (BREYER, J., dissenting). But because precedent precludes resolving this case on political question grounds, see id. at 1424–1425 (majority opinion), I join the Court's opinion.

Chief Justice ROBERTS, dissenting, joined by Justice Alito:

Today's decision is a first: Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs. We have instead stressed that the President's power reaches "its lowest ebb" when he contravenes the express will of Congress, "for what is at stake is the equilibrium established by our constitutional system." *Youngstown*, 343 U.S. 579, 637–638 (Jackson, J., concurring).

The first principles in this area are firmly established. The Constitution allocates some foreign policy powers to the Executive, grants some to the Legislature, and enjoins the President to "take Care that the Laws be faithfully executed." Art. II, § 3. The Executive may disregard "the expressed or implied will of Congress" only if the Constitution grants him a power "at once so conclusive and preclusive" as to "disable the Congress from acting upon the subject." *Youngstown*, 343 U.S. at 637–638 (Jackson, J., concurring).

In this case, the President claims the exclusive and preclusive power to recognize foreign sovereigns. The Court devotes much of its analysis to accepting the Executive's contention. I have serious doubts about that position. The majority places great weight on the Reception Clause, which directs that the Executive "shall receive Ambassadors and other public Ministers." Art. II, § 3. But that provision, framed as an obligation rather than an authorization, appears alongside the duties imposed on the President by Article II, Section 3, not the powers granted to him by Article II, Section 2. Indeed, the People ratified the Constitution with Alexander Hamilton's assurance that executive reception of ambassadors "is more a matter of dignity than of authority" and "will be without consequence in the administration of the government." The Federalist No. 69, p. 420 (C. Rossiter ed. 1961). In short, at the time of the founding, "there was no reason to view the reception clause as a source of discretionary authority for the president." Adler, The President's Recognition Power: Ministerial or Discretionary? 25 Presidential Studies Q. 267, 269 (1995). The majority's other asserted textual bases are even more tenuous. The President does have power to make treaties and appoint ambassadors. Art. II, § 2. But those authorities are shared with Congress, ibid., so they hardly support an inference that the recognition power is exclusive.

As for history, the majority admits that it points in both directions. Some Presidents have claimed an exclusive recognition power, but others have expressed uncertainty about whether such preclusive authority exists. Those in the skeptical camp include

Andrew Jackson and Abraham Lincoln, leaders not generally known for their cramped conceptions of Presidential power.

But even if the President does have exclusive recognition power, he still cannot prevail in this case, because the statute at issue does not implicate recognition. The relevant provision, § 214(d), simply gives an American citizen born in Jerusalem the option to designate his place of birth as Israel "[f]or purposes of" passports and other documents. Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1366. The State Department itself has explained that "identification"—not recognition—"is the principal reason that U.S. passports require 'place of birth.'" And the annals of diplomatic history record no examples of official recognition accomplished via optional passport designation.

Resolving the status of Jerusalem may be vexing, but resolving this case is not. Whatever recognition power the President may have, exclusive or otherwise, is not implicated by § 214(d). It has not been necessary over the past 225 years to definitively resolve a dispute between Congress and the President over the recognition power. Perhaps we could have waited another 225 years. But instead the majority strains to reach the question based on the mere possibility that observers overseas might misperceive the significance of the birthplace designation at issue in this case. And in the process, the Court takes the perilous step—for the first time in our history—of allowing the President to defy an Act of Congress in the field of foreign affairs.

Commentary: I'll close this chapter on foreign affairs with some commentary on an important historical event: the 1803 Louisiana Purchase. That purchase nearly doubled the size of the United States. At the time, the land was owned by France, and Napoleon was eager to sell it. Napoleon had agreed to sell 828,000 square miles of territory for just $15 million (about $18 per acre). President Thomas Jefferson wanted to make the purchase, which struck him as a very good deal. But did the Constitution give him the power to do so?

Think back to the 1791 cabinet debate between Thomas Jefferson and Alexander Hamilton over the First Bank of the United States. As you may remember, Jefferson opposed the Bank's creation, arguing that the federal government's enumerated powers did not expressly include creating a bank. A decade later, in 1800, Thomas Jefferson was elected President. Although he was eager to make the Louisiana

Purchase, the Constitution does not expressly say that the President can buy gigantic tracts of land from foreign governments. At first, Jefferson thought that a constitutional amendment was needed to authorize the Louisiana Purchase. But Jefferson's envoys were worried that Napoleon might change his mind, so they went ahead and signed the Louisiana Purchase Treaty. James Madison—a principal architect of the Constitution who in 1803 was serving as Jefferson's Secretary of State—convinced Jefferson that the Louisiana Purchase was authorized by the President's express power to make treaties (subject to Senate ratification). After overcoming opposition from his own Federalist party, Jefferson persuaded the Senate to ratify the Louisiana Purchase Treaty.

The Louisiana Purchase was never challenged in court. But 25 years later, in the unrelated case called *American Insurance Co. v. Canter*, 26 U.S. 511 (1828), Chief Justice Marshall essentially approved that earlier land purchase. He wrote: "The Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty." In other words, the President's express authority to make treaties (subject to Senate ratification) includes the power to acquire foreign territory by treaty.

PART TWO: INDIVIDUAL RIGHTS

CHAPTER 5. THE INCORPORATION DOCTRINE AND THE STATE ACTION REQUIREMENT

A. INTRODUCTION TO INDIVIDUAL RIGHTS

We have completed our survey of what is often called the **powers of government** portion of constitutional law. We will spend the rest of the book examining the **individual rights** that the Constitution protects. Let's begin by considering the relationship between government powers and individual rights. A recurring question in constitutional law is: Can the government do "X" (with "X" being the challenged action)? Typically, you will want to break that question into **two distinct questions**: powers questions and rights questions.

First, you ask: What is the source of the government's power to do the challenged action? For example, imagine that the challenged action is a federal statute. You typically would start by asking whether the law is a valid exercise of one of Congress's enumerated powers (such as the commerce power). That type of question is often described as a **powers question**.

Second, if you conclude that the government had the power to do the challenged act, you ask: Did the government exercise its power in a way that violated someone's **individual rights**? For example, even if a federal statute falls within Congress's commerce power, it might violate someone's First Amendment right to free speech. In other words, you can think of individual rights as putting **additional limits** on government powers.

That said, sometimes it will be obvious that a particular law falls within the government's powers, and the only hard question will be whether that law violates someone's individual rights. Or vice versa. On exams and in real-world litigation, you typically don't waste time addressing issues that have obvious answers. The two-step process described above is just meant to help you understand the relationship between powers questions and rights questions.

In chapters 6 through 9, we will closely examine various individual rights that are protected by different clauses of constitutional amendments. Our focus will be on rights protected by the **Bill of Rights**—which is the collective term used for the First Amendment through the Tenth Amendment—and by the **Civil War Amendments**, which is the collective term used for the Thirteenth, Fourteenth, and Fifteenth Amendments. However, this book does not cover the rights that are protected by the First Amendment, nor does it cover rights that arise primarily in criminal proceedings. Why have I not covered those important topics in this book? Because those topics are huge. First Amendment law is such a big topic that it's often taught as a separate course. Criminal procedure is nearly always taught as a separate course. I have not tried to squeeze those huge topics into this lean casebook.

Before we start our deep dive into specific individual rights, we will use this chapter to learn about two doctrines that are cross-cutting, meaning that the principles apply to most of the individual rights. The first cross-cutting doctrine is known as the **incorporation doctrine**. The second cross-cutting doctrine is known as the **state action requirement**.

B. THE INCORPORATION DOCTRINE

1. The Fourteenth Amendment's incorporation of the Bill of Rights

The question that the incorporation doctrine answers is this: Do the rights created by the Bill of Rights restrict the powers of the **federal government only**, or do they also restrict the powers of the **states**? I'll start with the short answer and then walk you through the longer version. In 1833, Chief Justice John Marshall held that the rights created by the Bill of Rights restricted the powers of the federal government only. But that's not the end of the story! After the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments were ratified. Those amendments imposed major new restrictions on the states. The Supreme Court later held that the Fourteenth Amendment's Due Process Clause—which explicitly applies to states—**incorporates** nearly all of the protections in the Bill of Rights. So as a practical matter, nearly all of those protections now restrict state and local governments, as well as the federal government.

Here is the longer version. When the Constitution was ratified in 1788, it had no Bill of Rights. To reassure the Constitution's opponents who worried that the Constitution gave the new federal government too much power, James Madison drafted the Bill of Rights,

which was ratified in 1791. If you look at the text of the Bill of Rights, it's clear that some amendments restricted the federal government only (not states). For example, the First Amendment says "Congress shall make no law" abridging free speech etc. But other amendments in the Bill of Rights use the passive voice, so it was less textually obvious whether the constraints applied to the states as well as the federal government. For example, the Fifth Amendment says "no person shall … be deprived of life, liberty, or property without due process of law."

In *Barron v. City of Baltimore*, 32 U.S. 243 (1833), the Supreme Court unanimously held that the Bill of Rights restricted only Congress, not the states. Chief Justice Marshall, who wrote the opinion, said the issue was "of great importance, but not of much difficulty." He explained that when the Constitution was meant to restrict the states, the text was clear about that. For example, Article I, section 10 says that "no state shall enter into any treaty" or "coin money." Chief Justice Marshall also explained that states had their own state constitutions and were free to include in those whatever protections their own residents deemed appropriate.

The holding of *Barron* remained the controlling law until after the Civil War. The Fourteenth Amendment was ratified in 1868. In a series of cases beginning in 1925, the Supreme Court concluded that the "liberty" protected by the Fourteenth Amendment incorporates nearly all of the protections in the Bill of Rights, which means they restrict state and local governments as well as the federal government. That is the **incorporation doctrine**. The *McDonald* (2010) case is the most recent Supreme Court decision involving the incorporation doctrine.

McDonald v. City of Chicago, 561 U.S. 742 (2010)
(5-4 vote)

*[**Background:** The question in this case was whether the Fourteenth Amendment incorporates the Second Amendment's right to bear arms (guns). The Court said yes. The opinion's footnotes identify which rights have been incorporated against states and which have not. It's easier to remember the few rights that are not incorporated rather than the many rights that are incorporated.]*

Justice Alito wrote the opinion for the Court (mostly), which Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined. Justices Stevens, Breyer, Ginsburg, and Sotomayor dissented.

Justice ALITO, writing for the Court (mostly):

Two years ago, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home. The city of Chicago (City) and the village of Oak Park, a Chicago suburb, have laws that are similar to the District of Columbia's, but Chicago and Oak Park argue that their laws are constitutional because the Second Amendment has no application to the States. We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.

The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government. In *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. 243 (1833), the Court, in an opinion by Chief Justice Marshall, explained that this question was "of great importance" but "not of much difficulty." In less than four pages, the Court firmly rejected the proposition that the first eight Amendments operate as limitations on the States, holding that they apply only to the Federal Government.

The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system. The provision at issue in this case, § 1 of the Fourteenth Amendment, provides, among other things, that a State may not abridge "the privileges or immunities of citizens of the United States" or deprive "any person of life, liberty, or property, without due process of law."

[**Note:** The Supreme Court here reviewed the historical evolution of the incorporation doctrine. That history is interesting but it can be confusing so I omitted most of it, picking up below with the part of the opinion that describes the approach that's good law today.]

The Supreme Court eventually moved to what has been called a process of "selective incorporation," i.e., the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments. Under that approach, the Court inquired whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice. The Court eventually incorporated almost all of the provisions of the Bill of Rights.[12]

[12] [This footnote cites the Supreme Court cases holding that the Due Process Clause incorporates the rights protected by the First Amendment (Establishment Clause, Free Exercise Clause, freedom of assembly, freedom of speech, and freedom of the press); the Fourth Amendment (warrant requirement, exclusionary rule, and freedom from unreasonably searches and seizures); the Fifth Amendment (Double Jeopardy Clause, privilege against self-incrimination, and right to just compensation for a taking of property); the Sixth Amendment (right to trial by jury in criminal cases, compulsory process, speedy trial, right to confront an adverse witness, assistance of counsel, and right to a public trial); and the Eighth Amendment (cruel and unusual punishment and prohibition against excessive bail).]

Only a handful of the Bill of Rights protections remain unincorporated.[13]

[13] [This footnote explains that the only rights not fully incorporated against the states are the Fifth Amendment's grand jury indictment requirement and the Seventh Amendment's right to a jury trial in civil cases. The Court has not yet decided whether the Third Amendment's protection against quartering of soldiers or the Eighth Amendment's prohibition of excessive fines are incorporated against the states.]

Finally, the Court held that incorporated Bill of Rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."[14]

[14] [This footnote explains that there is one exception to this general rule. Although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a *unanimous* jury verdict in state criminal trials even though the Sixth Amendment right to trial by jury applies in state criminal trials.]

With this framework in mind, we now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, as just explained, we must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty. Our decision in *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is "the central component" of the Second

Amendment right. *Heller* thus makes it clear that this right is "deeply rooted in this Nation's history and tradition."

---

2. The Fifth Amendment's reverse incorporation of the Equal Protection Clause

We now touch briefly on a related doctrine (not addressed in *McDonald*) that is known as **reverse incorporation**. That doctrine answers the question: Does the Fourteenth Amendment's Equal Protection Clause—which expressly restricts the states—restrict the federal government as well? The bottom line is yes.

A lot of language in the Fifth Amendment (which binds the federal government) is materially identical language to language in the Fourteenth Amendment. But if you look at both amendments, you'll see that the Fifth Amendment has no Equal Protection Clause. Not to worry! In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Supreme Court unanimously held that the liberty protected by the Fifth Amendment's Due Process Clause incorporates the concept of equal protection. That doctrine is known as the **reverse incorporation**.

Bolling was a school segregation case that the Supreme Court decided along with five other school segregation cases, including *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954). The difference was that *Bolling* involved school segregation in Washington, D.C., which is not a state. Because D.C. is part of the federal government, it is controlled by Congress (though Congress has given D.C. a "home rule" charter). The issue of reverse incorporation arose because the merits claim in all of the cases was that school segregation deprived students of the equal protection of the laws. So, in *Bolling*, the Supreme Court held that the "liberty" that is protected by the Fifth Amendment's Due Process Clause includes the right to equal protection.

C. THE STATE ACTION REQUIREMENT

The **state action requirement** (aka state action doctrine) is the confusing name for this principle: The individual rights that are protected by the Constitution are limits on **government** power—including the federal government, as well as state and local

governments—as opposed to limits on **private** conduct. So, for a constitutional challenge to proceed, the first question is whether the challenged action is government action or private action.

For example, if your political yard sign is removed by an official who is acting on behalf of the federal government, a state government, or a local government, you can challenge that removal as a violation of your First Amendment rights. But if your neighbor Tom removes your political yard sign, you can't sue him for a First Amendment violation because Tom is just a private person. In general, the individual rights created by the Bill of Rights and Civil War Amendments are protections against government action only, not against private conduct. (The one exception is the Thirteenth Amendment's abolition of slavery, which applies to both private and government action, but we won't worry about that exception until we study the Thirteenth Amendment.)

I don't know why this doctrine got named the "state action" doctrine rather than the "government action" doctrine. But you need to recognize and be able to use the correct terminology. If a client comes to you and says "My constitutional rights have been violated!" the first thing you'll want to confirm is that the (alleged) violation was done by a government actor (satisfying the state action requirement), rather than by a private party. If your client is complaining about private conduct, you'll typically have to tell your client "Sorry, but there's no state action here." You can then brainstorm about whether there is some other (nonconstitutional) basis to challenge the private conduct, such as tort law.

Often, it's easy to spot state action. For example, if the challenged action is a federal law, a state law, or a local law, it clearly counts as state action. The same is true of other government policies, such as a federal agency's rule or a police department's hiring policy. And the same is true of actions taken by people who work for the government, as long they are acting in an official capacity, which means on behalf of the government.

Important note: The state action requirement is satisfied even if a government employee *misuses* her power. For example, if a police officer uses excessive force in making an arrest, that counts as state action even if the police officer violated the police department's policy on the permissible use of force.

Although it's usually not hard to figure out if a fact pattern involves state action, there are some grey areas. The grey areas fall into two categories: (1) actions by private parties that get treated as state action because there was significant government involvement; and (2) actions by public officials that get treated as private action

because they were done in a private capacity. We'll start with the first category and then turn to the second.

1. Significant state involvement in private action

Sometimes, but quite rarely, private conduct will be treated as state action because of the state's significant involvement. The *Edmonson* (1991) case below is an example. I want to emphasize, however, that it is quite rare for private conduct to be treated as state action. A private actor will *not* be treated as a state actor simply because it is heavily funded or heavily regulated by the government. For example, a private utility company will not be treated as a state actor merely because the state gave it a monopoly to provide utility service and closely regulated its prices and operations. A private hospital will not be treated as a state actor simply because it gets 80% of its revenue from the federal government (such as through Medicare). Even military defense contractors—which often get 100% of their revenue from the federal government—are not treated as state actors simply because of that funding.

Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991)
(6-3 vote)

*[**Background:** In this private tort action, the company that was sued used its peremptory challenges to strike potential jurors based on their race. That company was just a private actor. Nonetheless, the Supreme Court held that the company's action in striking jurors was properly attributed to the government, largely because of the role that judges play in overseeing jury selection. Because the Court found state action, it allowed the plaintiff to proceed on his claim that the race-based juror strikes denied him equal protection.]*

Justice Kennedy wrote the opinion for the Court, which Justices White, Marshall, Blackmun, Stevens, and Souter joined. Justice O'Connor dissented, joined by Chief Justice Rehnquist and Justice Scalia.

Justice KENNEDY wrote the opinion for the Court:

Edmonson, a construction worker, was injured in a jobsite accident at Fort Polk, Louisiana. Edmonson sued Leesville Concrete Company for negligence in the United States District Court for the Western District of Louisiana, claiming that a Leesville employee permitted one of the company's trucks to roll backward and pin him against some construction equipment. During voir dire, Leesville used two of its three peremptory challenges authorized by statute to remove black persons from the prospective jury.

The Constitution's protections of individual liberty and equal protection apply in general only to action by the government. Racial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action. Thus, the legality of the [jurors'] exclusion at issue here turns on the extent to which a litigant in a civil case may be subject to the Constitution's restrictions.

Although private use of state-sanctioned private remedies or procedures does not rise, by itself, to the level of state action, our cases have found state action when private parties make extensive use of state procedures with the overt, significant assistance of state officials.

The trial judge exercises substantial control over voir dire in the federal system. Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose. By enforcing a discriminatory peremptory challenge, the court has not only made itself a party to the biased act, but has elected to place its power, property and prestige behind the alleged discrimination. In so doing, the government has created the legal framework governing the challenged conduct, and in a significant way has involved itself with invidious discrimination. Finally, we note that the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself.

---

2. Public officials who are acting in a private capacity

People who work for the government also have personal lives. They aren't on duty 24/7. When such a person acts in her **private capacity** (aka personal capacity), there is no state action. By contrast, when she acts in her **official capacity**, there is state action. But remember: The state action requirement is satisfied even if the person *misuses* her government power when she is acting in her official capacity (the excessive force hypo above).

Usually, it's clear whether the person was acting in her official capacity or in her personal capacity. But sometime the lines can get blurry, as the *Lindke* (2024) case illustrates.

Lindke v. Freed, 144 S. Ct. 756 (2024)
(unanimous)

Justice BARRETT wrote the opinion for the unanimous Court:

Like millions of Americans, James Freed maintained a Facebook account on which he posted about a wide range of topics, including his family and his job. Like most of those Americans, Freed occasionally received unwelcome comments on his posts. In response, Freed took a step familiar to Facebook users: He deleted the comments and blocked those who made them.

For most people with a Facebook account, that would have been the end of it. But Kevin Lindke, one of the unwelcome commenters, sued Freed for violating his right to free speech. Because the First Amendment binds only the government, this claim is a nonstarter if Freed posted as a private citizen. Freed, however, is not only a private citizen but also the city manager of Port Huron, Michigan—and while Freed insists that his Facebook account was strictly personal, Lindke argues that Freed acted in his official capacity when he silenced Lindke's speech.

When a government official posts about job-related topics on social media, it can be difficult to tell whether the speech is official or private. We hold that such speech is attributable to the State only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media.

In the run-of-the-mill case, state action is easy to spot**.** Courts do not ordinarily pause to consider whether the actions of police officers, public schools, or prison officials are state action.

Sometimes, however, the line between private conduct and state action is difficult to draw**.** *Griffin v. Maryland*, 378 U.S. 130 (1964), is a good example. There, we held that a security guard at a privately owned amusement park engaged in state action when he enforced the park's policy of segregation against black protesters. Though employed by the park, the guard had been "deputized as a sheriff of Montgomery County" and possessed "'the same power and authority'" as any other deputy sheriff. The State had therefore allowed its power to be exercised by someone in the private sector. And the source of the power, not the identity of the employer, controlled.

By and large, our state-action precedents have grappled with variations of the question posed in Griffin: whether a *nominally private person* has engaged in state action. See, e.g., *Marsh v. Alabama*, 326 U.S. 501, 502–503 (1946) (company town); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 146–147 (1970) (restaurant); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 151–152 (warehouse company).

Today's case, by contrast, requires us to analyze whether *a state official* engaged in state action or functioned as a private citizen. This Court has had little occasion to consider how the state-action requirement applies in this circumstance. The question is difficult, especially in a case involving a state or local official who routinely interacts with the public. Such officials may look like they are always on the clock, making it tempting to characterize every encounter as part of the job. But the state-action doctrine avoids such broad-brush assumptions—for good reason. While public officials can act on behalf of the State, they are also private citizens with their own constitutional rights. By excluding from liability acts of officers in the ambit of their personal pursuits, the state-action requirement protects a robust sphere of individual liberty for those who serve as public officials or employees.

The dispute between Lindke and Freed illustrates this dynamic. Freed did not relinquish his First Amendment rights when he became city manager. On the contrary, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. Thus, if Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights—instead, he exercised his own.

So Lindke cannot hang his hat on Freed's status as a state employee. The distinction between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights. Categorizing conduct, therefore, can require a close look.

A close look is definitely necessary in the context of a public official using social media. There are approximately 20 million state and local government employees across the Nation, with an extraordinarily wide range of job descriptions—from Governors, mayors, and police chiefs to teachers, healthcare professionals, and transportation workers. Many use social media for personal communication, official communication, or both—and the line between the two is often blurred. Moreover, social media involves a variety of different and rapidly changing platforms, each with distinct features for speaking, viewing, and removing speech. The Court has frequently emphasized that the state-action doctrine demands a fact-intensive inquiry. We repeat that caution here.

That said, our precedent articulates principles that govern cases analogous to this one. For the reasons we explain below, a public official's social-media activity constitutes state action only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media. The appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first.

A.

The first prong of this test is grounded in the bedrock requirement that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. An act is not attributable to a State unless it is traceable to the State's power or authority. Private action—no matter how "official" it looks—lacks the necessary lineage.

This rule runs through our cases. *Griffin* stresses that the security guard was "possessed of state authority" and "purport[ed] to act under that authority." 378 U.S. at 135. *West v. Atkins* states that the "traditional definition" of state action "requires that the defendant ... have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" 487 U.S. 42, 49 (1988). *Lugar* emphasizes that state action exists only when "the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." 457 U.S. at 939. By contrast, when the challenged conduct "entail[s] functions and obligations in no way dependent on state authority," state

action does not exist. *Polk County v. Dodson*, 454 U.S. 312, 318–319 (1981) (no state action because criminal defense "is essentially a private function ... for which state office and authority are not needed").

Freed's conduct is not attributable to the State unless he was "possessed of state authority" to post city updates and register citizen concerns. *Griffin*, 378 U.S. at 135. For state action to exist, the State must be "responsible for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004, (1982). There must be a tie between the official's authority and "the gravamen of the plaintiff's complaint." *Id.*, at 1003.

To be clear, the "*misuse* of power, possessed by virtue of state law," constitutes state action**.** *Classic*, 313 U.S. at 326. While the state-action doctrine requires that the State have granted an official the type of authority that he used to violate rights—e.g., the power to arrest—it encompasses cases where his "particular action"—e.g., an arrest made with excessive force—violated state or federal law. To misuse power, however, one must possess it in the first place.

Where does the power come from? Section 1983 lists the potential sources: "statute, ordinance, regulation, custom, or usage." Statutes, ordinances, and regulations refer to written law through which a State can authorize an official to speak on its behalf. "Custom" and "usage" encompass persistent practices of state officials that are so permanent and well settled that they carry "the force of law."

So a city manager like Freed would be authorized to speak for the city if written law like an ordinance empowered him to make official announcements. He would also have that authority even in the absence of written law if, for instance, prior city managers have purported to speak on its behalf and have been recognized to have that authority for so long that the manager's power to do so has become permanent and well settled.. And if an official has authority to speak for the State, he may have the authority to do so on social media even if the law does not make that explicit.

In sum, a defendant like Freed must have actual authority rooted in written law or longstanding custom to speak for the State. That authority must extend to speech of the sort that caused the alleged rights deprivation. If the plaintiff cannot make this threshold showing of authority, he cannot establish state action.

B.

For social-media activity to constitute state action, an official must not only have state authority—he must also purport to use it. State officials have a choice about the

capacity in which they choose to speak. If the public employee does not use his speech in furtherance of his official responsibilities, he is speaking in his own voice.

Consider a hypothetical from the offline world. A school board president announces at a school board meeting that the board has lifted pandemic-era restrictions on public schools. The next evening, at a backyard barbecue with friends whose children attend public schools, he shares that the board has lifted the pandemic-era restrictions. The former is state action taken in his official capacity as school board president; the latter is private action taken in his personal capacity as a friend and neighbor. While the substance of the announcement is the same, the context—an official meeting versus a private event—differs. He invoked his official authority only when he acted as school board president.

The context of Freed's speech is hazier than that of the hypothetical school board president. Had Freed's account carried a label (e.g., "this is the personal page of James R. Freed") or a disclaimer (e.g., "the views expressed are strictly my own"), he would be entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal. Markers like these give speech the benefit of clear context: Just as we can safely presume that speech at a backyard barbeque is personal, we can safely presume that speech on a "personal" page is personal (absent significant evidence indicating that a post is official). Conversely, context can make clear that a social-media account purports to speak for the government—for instance, when an account belongs to a political subdivision (e.g., a "City of Port Huron" Facebook page) or is passed down to whomever occupies a particular office (e.g., an "@PHuronCityMgr" Instagram account). Freed's page, however, was not designated either "personal" or "official," raising the prospect that it was "mixed use"—a place where he made some posts in his personal capacity and others in his capacity as city manager.

Categorizing posts that appear on an ambiguous page like Freed's is a fact-specific undertaking in which the post's content and function are the most important considerations. In some circumstances, the post's content and function might make the plaintiff's argument a slam dunk. Take a mayor who makes the following announcement exclusively on his Facebook page: "Pursuant to Municipal Ordinance 22.1, I am temporarily suspending enforcement of alternate-side parking rules." The post's express invocation of state authority, its immediate legal effect, and the fact that the order is not available elsewhere make clear that the mayor is purporting to discharge an official duty. If, by contrast, the mayor merely repeats or shares otherwise available information—for example, by linking to the parking

announcement on the city's webpage—it is far less likely that he is purporting to exercise the power of his office.

In sum, the state-action doctrine requires Lindke to show that Freed (1) had actual authority to speak on behalf of the State on a particular matter, and (2) purported to exercise that authority in the relevant posts.

Commentary: In *Lindke*, the Supreme Court announced the test to determine whether Freed's actions on his Facebook page counted as state action but did not apply that test to the facts of the case. Instead, the Court remanded to the lower courts to apply the test. The Court explained that the answer to the "state action" question is a fact-intensive inquiry that should be done on a post-by-post basis.

CHAPTER 6. PROCEDURAL DUE PROCESS AND EQUAL PROTECTION

A. INTRODUCTION

Having learned about the cross-cutting issues of incorporation and state action, we now turn our attention to specific rights that various clauses in the Constitution create. There is no magic to the sequence in which we examine these rights, but I have organized the chapters in ways that are meant to help you digest the materials and see connections between doctrines.

In this chapter, we will study two categories of individual rights: procedural due process and equal protection. In Chapter 7, we will move on to another two categories of individual rights: fundamental rights (aka substantive due process) and the right to travel. In chapter 8, we will turn to individual rights that involve guns and money: the Second Amendment right to bear arms (guns) and the Fifth Amendment right to just compensation (money) when the government takes private property. Finally, in Chapter 9, we will close the book with a topic at the intersection of powers and rights: the additional enumerated powers that the Thirteenth, Fourteenth, and Fifteenth Amendments gave Congress to enact legislation to enforce the Constitution's individual rights.

B. PROCEDURAL DUE PROCESS

1. Overview

Is the government allowed to do things that cause people harm? Absolutely. Think of some familiar examples. The government can put people in prison. It can revoke a person's professional license, such as the license needed to work as a doctor, lawyer, plumber, or electrician. It can stop paying a person's welfare benefits or disability benefits.

Those examples involve individual people, but the government is likewise allowed to do things that harm businesses and other private organizations. For instance, the government can revoke a hospital's license to prescribe controlled substances (drugs). It can shut down a nursing home because it is unsafe. It can terminate grants or contracts with private organizations. It can deny a business the zoning certificate it needs to expand. And so on.

Fortunately, there are protections in the Constitution that are meant to ensure that the government acts fairly if it is going to cause these types of harms to private parties. The right to **procedural due process** refers to the procedures that the Constitution requires the government to use if it wants to take away someone's life, liberty, or property.

Where does the right to procedural due process come from? From the **Due Process Clauses** of the Fifth Amendment and the Fourteenth Amendment. The relevant language in the Fifth Amendment says: "No person shall … be deprived of life, liberty, or property, without due process of law." Likewise, the relevant language in the Fourteenth Amendment says: "Nor shall any State deprive any person of life, liberty, or property, without due process of law." Although the protections in these two clauses are identical, you should be careful to keep your amendments straight in exams or real-world litigation. If the fact pattern prompts you to consider whether the federal government's procedures are adequate, you should refer to the Fifth Amendment. If the fact pattern prompts you to consider whether a state or local government's procedures are adequate, you should refer to the Fourteenth Amendment.

The right to procedural due process does not kick in unless the government is depriving someone of "**life, liberty, or property**." In a procedural due process case, often the first question is whether the government has denied someone a protected interest in life, liberty, or property. Depriving a person of life is easy to spot and basically means the death penalty. Depriving a person of liberty includes—but is not limited to—putting the person in jail or prison for a crime. There are lots of procedural protections in the criminal law context that you can learn about in a casebook on criminal constitutional procedure.

Here, we'll focus on protected interests in liberty or property that arise in the civil context. What types of government actions implicate protected liberty interests? Liberty interests are typically rights protected by statute or under the Constitution. Examples include taking away someone's license to practice law or to teach in the public schools.

What types of interests count as protected property interests? The Supreme Court has emphasized that the Due Process Clauses do not create property interests, which are created by other sources of law (state or federal). The Supreme Court also has said that someone's abstract need or desire for particular property or a unilateral expectation of a benefit is not enough to create a protected property interest. Instead, there must be a legitimate claim or entitlement to the benefit under state or federal law. The *AstraZeneca* case that is excerpted below illustrates this principle.

Assuming that the government is depriving someone of a protected interest in liberty or property, the big question is: What procedures does the government have to use to take it away? In the civil context, the right to procedural due process has two components. First, the government must provide an **unbiased** decisionmaker. Second, the government must give the injured party **a meaningful opportunity to object**. We'll read more about those issues after the excerpt from *AstraZeneca*.

2. What counts as a protected property interest?

As just explained, there are sometimes threshold disputes about whether someone challenging government action has a property interest that is sufficient to trigger the protections of the Due Process Clauses. The case that is excerpted below is a court of appeals decision (not a Supreme Court case), but it provides a nice example of why a claimed interest might not count as a protected property interest for due process purposes.

AstraZeneca Pharmaceuticals v. Secretary of HHS, 137 F.4th 116 (3d Cir. 2025) (3-0 vote)

*[**Background:** The drug company in this case challenged on due process grounds the provision of a new federal law that requires the U.S. Department of Health and Human Services to negotiate the prices that the federal government pays for certain drugs covered by Medicare, which is the huge federal program that provides health insurance for persons age 65 and older. The Third Circuit rejected that argument, holding that drug companies do not have a protected property interest in the amounts that the federal government pays for drugs.]*

Judge FREEMAN wrote the opinion for the unanimous panel of the Third Circuit:

The Inflation Reduction Act of 2022 ("IRA") created the Drug Price Negotiation Program ("Negotiation Program"). The Negotiation Program directs the Centers for Medicare & Medicaid Services ("CMS") to negotiate prices for certain drugs that have resulted in high expenditures to Medicare. To implement that statutory directive, CMS issued guidance explaining how it would select the qualifying drugs for 2026—the first year of the Negotiation Program. CMS then selected the drugs that are subject to negotiation. One of the selected drugs is Farxiga, which is manufactured by AstraZeneca.

AstraZeneca claims that the Negotiation Program deprives it of procedural due process. AstraZeneca argues that the Negotiation Program deprives the company of its property interests in drugs subject to negotiation and does not provide adequate procedural safeguards.

To state a procedural due process claim, a plaintiff must allege that (1) he was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of life, liberty, or property, and (2) the procedures available to him did not provide due process of law. For a property interest to be protected, a plaintiff must show a legitimate claim of entitlement to it. The Due Process Clause protects property interests that are created and defined outside of the Constitution, such as by federal statute or state law. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

AstraZeneca argues that the Negotiation Program limits its ability to sell its drugs at a market rate, thereby infringing on its property rights. It contends that those property rights derive from its patents and regulatory exclusivity periods.

AstraZeneca is correct that patent rights exist to permit greater profits during a product's exclusivity period to incentivize innovation. But federal patent laws do not confer a right to sell at all, they do not confer a right to sell at a particular price. There is no protected property interest in selling goods to Medicare beneficiaries at a price higher than what the government is willing to pay when it reimburses those costs. AstraZeneca's asserted interest does not resemble any traditional conception of property,[9] and AstraZeneca has no more than "a unilateral expectation" of that interest, *Roth*, 408 U.S. at 577.

[9] We look to A. M. Honoré's eleven "standard incidents" of property ownership to determine whether a claimed interest qualified as property under the Due Process Clause. Honoré's list of "standard incidents" of property ownership are "the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity." A. M. Honoré, *Ownership*, in Oxford Essays in Jurisprudence 107 (A.G. Guest, ed. 1961), reprinted in Tony Honoré, Making Law Bind: Essays Legal and Philosophical (1987). AstraZeneca's claimed interest does not align with any of these incidents of ownership.

Because AstraZeneca does not articulate a protected property interest, we will affirm the District Court's grant of summary judgment in favor of the government on AstraZeneca's due process claim.

---

3. The right to an unbiased decisionmaker

If the party bringing a due process claim has a protected property or liberty interest, the Due Process Clauses require that the government official who took that interest away be unbiased. What it means for a decisionmaker to be biased is complicated. We won't be getting into those details in this book, but you should be aware that governments generally get a lot of latitude in deciding what counts as bias. The Supreme Court has said that it is not "constitutionalizing" most disputes about whether a decisionmaker had a conflict of interest. The *Caperton* (2009) case excerpted below is unusual in holding that the facts established bias that rose to the level of a due process violation.

Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009)
(5-4 vote)

*[**Background:** This civil case was a dispute between two private companies. Caperton sued Massey for fraud, and a jury in a West Virginia state court awarded Caperton $50 million in damages. Massey appealed. Anticipating that the appeal would be heard by the West Virginia Supreme Court, Massey's chairman Don Blankenship contributed $3 million to the election campaign of Brent Benjamin, who was running to be a Justice on the West Virginia Supreme Court. (Unlike in the federal Judiciary, the judges on some state courts are chosen by election.) Benjamin won the election and then, as a Justice on the West Virginia Supreme Court, he voted with the majority to reverse the $50 damages award. The vote was 3-2, meaning that Justice Benjamin's vote was decisive. The case then went to the U.S. Supreme Court, which agreed with Caperton that due process required Justice Benjamin to recuse (disqualify) himself from the case for bias.]*

Justice Kennedy wrote the opinion for the Court, which Justices Stevens, Souter, Ginsburg, and Breyer joined. Chief Justice Roberts dissented, joined by Justices Scalia, Thomas, and Alito.

Justice KENNEDY wrote the opinion for the Court:

It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process. As the Court has recognized, however, "most matters relating to judicial disqualification do not rise to a constitutional level." *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948). The early and leading case on the subject is *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). There, the Court stated that "matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion."

The *Tumey* Court concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has a direct, personal, substantial, pecuniary interest in a case. Personal bias or prejudice alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause. As new problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.

Caperton contends that Blankenship's pivotal role in getting Justice Benjamin elected created a constitutionally intolerable probability of actual bias. Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected.

Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case. We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

Applying this principle, we conclude that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case. Blankenship contributed some $3 million to unseat the incumbent and replace him with Benjamin. His contributions eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee.

Whether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry. Due process requires an objective inquiry. In an election decided by fewer than 50,000 votes (382,036 to 334,301), Blankenship's campaign contributions—in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election—had a significant and disproportionate influence on the electoral outcome. And the risk that Blankenship's influence engendered actual bias is sufficiently substantial that it must be forbidden if the guarantee of due process is to be adequately implemented.

Chief Justice ROBERTS dissented, joined by Justices Scalia, Thomas, and Alito:

I, of course, share the majority's sincere concerns about the need to maintain a fair, independent, and impartial judiciary—and one that appears to be such. But I fear that the Court's decision will undermine rather than promote these values.

Until today, we have recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for

certain criminal contempts. Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents. Those issues were instead addressed by legislation or court rules.

Today, however, the Court enlists the Due Process Clause to overturn a judge's failure to recuse because of a “probability of bias.” Unlike the established grounds for disqualification, a “probability of bias” cannot be defined in any limited way. The Court’s new “rule” provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.

Commentary: As *Caperton* illustrates, figuring out what counts as “bias” for constitutional purposes is not always a straightforward task. Although we are not exploring those details, it is important for you to know that the requirement of an unbiased decisionmaker is not limited to court proceedings. Federal and state agencies also have employees who adjudicate private claims or disputes. The due process requirement that the decisionmaker be unbiased applies in such administrative proceedings (as well as in court proceedings).

4. The right to a meaningful opportunity to object to the government’s action

Most of the litigation involving procedural due process is not about claims of bias. Instead, it involves the question of whether the government gave the injured party a **meaningful opportunity to object** to the deprivation of liberty or property.

There is no single answer to that question. The answer depends on the application of a three-part balancing test that the Supreme Court announced in a famous case called *Mathews v. Eldridge* (1976). Under that test, courts ask: (1) How important is the private interest that is at stake? (2) How much value would be gained from additional procedures? (3) What costs and burdens would additional procedures

impose on the government? No single factor is dispositive; a court is supposed to balance the three factors to reach a bottom line.

As you read *Mathews*, pay close attention to how the Court applied each element of that three-part test to the facts of the case. In addition, pay attention to the way the Court distinguished its earlier decision in *Goldberg v. Kelly* (1970). You should make sure that you understand why *Mathews* and *Goldberg* came out in opposite ways.

Mathews v. Eldridge, 424 U.S. 319 (1976)
(7-2 vote)

*[**Background:** This case involved the federal statute that authorizes the Social Security Administration to pay disability benefits to people who are unable to work because of an injury or other serious medical condition. If a person is found entitled to disability benefits, the statute requires the agency to conduct periodic reviews to determine whether the person's medical condition has improved enough that disability benefits should stop. If so, the statute requires the agency to stop making payments, but it allows the affected person to request a hearing before the agency to challenge the agency's determination. If the evidence at the hearing shows that the person is still disabled, the agency must resume making the benefits payments and pay an amount that covers the past period when benefits should have been paid. The constitutional question was whether the statute violated the Due Process Clause because the hearing did not occur until after—rather than before—disability benefits were terminated. The Supreme Court concluded that the statute's procedures were fair under the circumstances and that there was thus no due process violation.]*

Justice Powell wrote the opinion of the Court. Justices Brennan and Marshall dissented.

Justice POWELL wrote the opinion for the Court:

The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.

In the Social Security Act, Congress authorized cash benefits to be paid to workers during periods in which they are completely disabled within the meaning of the Act. Respondent George Eldridge was awarded benefits in 1968. In March 1972, he

received a questionnaire from the state agency charged with monitoring his medical condition. Eldridge completed the questionnaire, indicating that his condition had not improved and identifying the medical sources, including physicians, from whom he had received treatment recently. The state agency then obtained reports from his physician and a psychiatric consultant. After considering these reports and other information in his file, the state agency informed Eldridge by letter that it had made a tentative determination that his disability had ceased in May 1972. The letter included a statement of reasons for the proposed termination of benefits, and advised Eldridge that he might request reasonable time in which to obtain and submit additional information pertaining to his condition.

In his written response, Eldridge disputed one characterization of his medical condition and indicated that the agency already had enough evidence to establish his disability. The state agency then made its final determination that he had ceased to be disabled in May 1972. This determination was accepted by the federal Social Security Administration (SSA), which notified Eldridge in July that his benefits would terminate after that month. The notification also advised him of his right to seek reconsideration by the state agency of this initial determination within six months.

Eldridge commenced this action challenging the constitutional validity of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability. Eldridge relied exclusively upon this Court's decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970), which established a right to an "evidentiary hearing" prior to termination of welfare benefits. The Secretary contended that *Goldberg* was not controlling since eligibility for disability benefits, unlike eligibility for welfare benefits, is not based on financial need and since issues of credibility and veracity do not play a significant role in the disability entitlement decision, which turns primarily on medical evidence. [The district court entered an injunction that prohibited the termination of Eldridge's benefits prior to an evidentiary hearing. The Fourth Circuit affirmed that injunction. The Supreme Court reversed.]

III

A

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes that the interest of an individual in continued receipt of these benefits is a statutorily created "property" interest protected by the Fifth

Amendment. Rather, the Secretary contends that the existing administrative procedures, detailed below, provide all the process that is constitutionally due before a recipient can be deprived of that interest.

This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Eldridge agrees that the review procedures available to a claimant would be adequate if disability benefits were not terminated until *after* the evidentiary hearing stage of the administrative process. The dispute centers upon what process is due *prior to* the initial termination of benefits.

In recent years this Court increasingly has had occasion to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. In only one case, *Goldberg v. Kelly*, has the Court held that a hearing closely approximating a judicial trial is necessary.

"Due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Instead, due process is flexible and calls for such procedural protections as the situation demands. Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: *First*, the private interest that will be affected by the official action; *second*, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

We turn first to a description of the procedures for the termination of Social Security disability benefits and thereafter consider the factors bearing upon the constitutional adequacy of these procedures.

B

Under the Social Security Act, the disability insurance program that Congress created is administered jointly by state and federal agencies. State agencies make the initial determination whether a disability exists, when it began, and when it ceased. The

standards applied and the procedures followed are prescribed by the Secretary, who has delegated his responsibilities and powers under the Act to the SSA.

In order to establish initial and continued entitlement to disability benefits, the statute requires a worker to demonstrate that he is unable:

> to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. 423(d)(1)(A).

To satisfy this test the worker bears a continuing burden of showing, by means of "medically acceptable clinical and laboratory diagnostic techniques," that he has a physical or mental impairment of such severity that "he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

The principal reasons for benefits terminations are that the worker is no longer disabled or has returned to work. As Eldridge's benefits were terminated because he was determined to be no longer disabled, we consider only the sufficiency of the procedures involved in such cases.

The continuing-eligibility investigation is made by a state agency acting through a "team" consisting of a physician and a nonmedical person trained in disability evaluation. The agency periodically communicates with the disabled worker, usually by mail in which case he is sent a detailed questionnaire or by telephone, and requests information concerning his present condition, including current medical restrictions and sources of treatment, and any additional information that he considers relevant to his continued entitlement to benefits. Information regarding the recipient's current condition is also obtained from his sources of medical treatment. If there is a conflict between the information provided by the beneficiary and that obtained from medical sources such as his physician, or between two sources of treatment, the agency may arrange for an examination by an independent consulting physician. Whenever the agency's tentative assessment of the beneficiary's condition differs from his own assessment, the beneficiary is informed that benefits may be

terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file. He also may respond in writing and submit additional evidence.

The state agency then makes its final determination, which is reviewed by an examiner in the SSA Bureau of Disability Insurance. If, as is usually the case, the SSA accepts the agency determination it notifies the recipient in writing, informing him of the reasons for the decision, and of his right to seek de novo reconsideration by the state agency. Upon acceptance by the SSA, benefits are terminated effective two months after the month in which medical recovery is found to have occurred.

The recipient then has a right to an evidentiary hearing before an SSA administrative law judge. The hearing is non-adversary, and the SSA is not represented by counsel. As at all prior and subsequent stages of the administrative process, however, the claimant may be represented by counsel or other spokesmen. If this hearing results in an adverse decision, the claimant is entitled to request discretionary review by the SSA Appeals Council, and finally may obtain judicial review.

Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date of cessation initially established, the worker is entitled to retroactive payments. If, on the other hand, a beneficiary receives any payments to which he is later determined not to be entitled, the statute authorizes the Secretary to attempt to recoup these funds in specified circumstances.

C

Despite the elaborate character of the administrative procedures provided by the Secretary, the courts below held them to be constitutionally inadequate, concluding that due process requires an evidentiary hearing prior to termination. In light of the private and governmental interests at stake here and the nature of the existing procedures, we think this was error.

Since a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim.

Only in *Goldberg* has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence:

> The crucial factor in this context a factor not present in the case of . . . virtually anyone else whose governmental entitlements are ended is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.

Eligibility for disability benefits, in contrast, is not based upon financial need. As *Goldberg* illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process. The potential deprivation here is generally likely to be less than in *Goldberg*, although the degree of difference can be overstated. As the District Court emphasized, to remain eligible for benefits a recipient must be "unable to engage in substantial gainful activity." Thus, there is little possibility that the terminated recipient will be able to find even temporary employment to ameliorate the interim loss.

The possible length of wrongful deprivation of benefits also is an important factor in assessing the impact of official action on the private interests. The Secretary concedes that the delay between a request for a hearing before an administrative law judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final decision after a hearing exceeds one year.

In view of the torpidity of this administrative review process, and the typically modest resources of the family unit of the physically disabled worker, the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level. In view of these potential sources of temporary income, there is less reason here than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

D

An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards. In order to remain eligible for benefits the disabled worker must demonstrate by means of "medically acceptable clinical and laboratory diagnostic

techniques," 42 U.S.C. 423(d)(3), that he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." 423(d)(1)(A). In short, a medical assessment of the worker's physical or mental condition is required. This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, issues of witness credibility and veracity often are critical to the decisionmaking process. *Goldberg* noted that in such circumstances "written submissions are a wholly unsatisfactory basis for decision."

By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon routine, standard, and unbiased medical reports by physician specialists, concerning a subject whom they have personally examined. In *Richardson*, this Court recognized the "reliability and probative worth of written medical reports," emphasizing that while there may be "professional disagreement with the medical conclusions" the "specter of questionable credibility and veracity is not present." To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less in this context than in *Goldberg*.

The decision in *Goldberg* also was based on the Court's conclusion that written submissions were an inadequate substitute for oral presentation. Here, by contrast, the detailed questionnaire which the state agency periodically sends the recipient identifies with particularity the information relevant to the entitlement decision, and the recipient is invited to obtain assistance from the local SSA office in completing the questionnaire. More important, the information critical to the entitlement decision usually is derived from medical sources, such as the treating physician. The conclusions of physicians often are supported by X-rays and the results of clinical or laboratory tests, information typically more amenable to written than to oral presentation.

A further safeguard against mistake is the policy of allowing the disability recipient's representative full access to all information relied upon by the state agency. In addition, prior to the cutoff of benefits the agency informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions. These procedures, again as contrasted with those before the Court in *Goldberg*,

enable the recipient to “mold” his argument to respond to the precise issues which the decisionmaker regards as crucial.

E

In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase, but the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option. Nor would the theoretical right of the Secretary to recover undeserved benefits result, as a practical matter, in any substantial offset to the added outlay of public funds. The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial.

Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited.

The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it. All that is necessary is that the procedures be tailored, in light of the decision to be made, to ensure a meaningful opportunity to be heard. We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process.

Nelson v. Colorado, 581 U.S. 128 (2017)
(7-1 vote with Justice Gorsuch recused)

*[**Background:** As this case illustrates, the Mathews balancing test is still used today. Nelson and Madden were convicted of criminal offenses under Colorado law and, as a result, they were required to pay Colorado various fees. Their criminal convictions were overturned on appeal, however. Colorado law did not automatically refund the fees that Nelson and Madden had paid; instead, it required that they file a claim for a refund and prove their innocence of the crimes charged by clear and convincing evidence. The Supreme Court held that this procedure violated the Due Process Clause.]*

Justice Ginsburg wrote the opinion of the Court, which Chief Justice Roberts and Justices Kennedy, Breyer, Sotomayor, and Kagan joined. Justice Alito concurred in the judgment. Justice Thomas dissented.

Justice GINSBURG wrote the opinion for the Court:

I.

When a criminal conviction is invalidated by a reviewing court and no retrial will occur, is the State obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction? Our answer is yes.

Absent conviction of a crime, one is presumed innocent. Under the Colorado law before us in these cases, however, the State retains conviction-related assessments unless and until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence. This scheme, we hold, offends the Fourteenth Amendment's guarantee of due process.

Colorado's Exoneration Act provides a civil claim for relief "to compensate an innocent person who was wrongly convicted." To succeed on an Exoneration Act claim, a petitioner must show, by clear and convincing evidence, her actual innocence of the offense of conviction. A successful petitioner may recoup, in addition to compensation for time served, any fine, penalty, court costs, or restitution paid as a result of his or her wrongful conviction.

Under Colorado's legislation, as just recounted, a defendant must prove her innocence by clear and convincing evidence to obtain the refund of costs, fees, and restitution paid pursuant to an invalid conviction. That scheme, we hold, does not comport with due process. Accordingly, we reverse the judgment of the Supreme Court of Colorado.

The familiar procedural due process inspection instructed by *Mathews v. Eldridge*, 424 U.S. 319 (1976), governs these cases. Under the *Mathews* balancing test, a court evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake. 424 U.S. at 335. All three considerations weigh decisively against Colorado's scheme.

II.

Petitioners Nelson and Madden have an obvious interest in regaining the money they paid to Colorado.

There is a risk of erroneous deprivation of defendants' interest in return of their funds if, as Colorado urges, state law conditions refund on defendants' proof of innocence by clear and convincing evidence. To get their money back, defendants should not be saddled with any proof burden. Furthermore, state law provides no remedy at all for any assessments tied to invalid misdemeanor convictions. And when amounts a defendant seeks to recoup are not large, as is true in Nelson's and Madden's cases, the cost of mounting a claim under the Exoneration Act and retaining a lawyer to pursue it would be prohibitive.

Colorado suggests that "numerous pre- and post-deprivation procedures"—including the need for probable cause to support criminal charges, the jury-trial right, and the State's burden to prove guilt beyond a reasonable doubt—adequately minimize the risk of erroneous deprivation of property. But Colorado misperceives the risk at issue. The risk here involved is not the risk of wrongful or invalid conviction any criminal defendant may face. It is, instead, the risk faced by a defendant whose conviction has already been overturned that she will not recover funds taken from her solely on the basis of a conviction no longer valid. None of the above-stated procedures addresses that risk.

Colorado's scheme fails due process measurement because defendants' interest in regaining their funds is high, the risk of erroneous deprivation of those funds under the Exoneration Act is unacceptable, and the State has shown no countervailing

interests in retaining the amounts in question. To comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated.

Commentary and questions: To practice applying the *Mathews* test, you can apply each of its three factors to the facts of *Nelson*. Did all of the factors cut the same way (in Nelson's favor)? Or did the Court need to balance the three factors?

C. EQUAL PROTECTION

1. Overview

Part B above addressed the procedures that the government is constitutionally required to provide when it deprives a private party of a protected liberty or property interest. Those procedural rights arise when the government makes an *individualized* determination to take away someone's liberty or property. For example, in *Mathews*, the government took away George Eldridge's benefits.

By contrast, people often want to challenge government action that establishes a *general policy*. For example, imagine that Congress amended the Social Security Act to say that disability benefits would be paid to women only. That change in the law would not implicate anyone's right to procedural due process. But there are other constitutional grounds to challenge the new law. Most obviously, the new law could be challenged on the theory that its discrimination against men is a denial of equal protection.

In this part, we are studying equal protection claims. The essence of an equal protection claim is that a law or other government policy is treating some people or entities differently from other, similarly situated people or entities. As you do the readings, pay close attention to the different **standards of review** (also known as **levels of scrutiny**) that courts use when analyzing equal protection claims: (1) **strict scrutiny**; (2) **intermediate scrutiny**; and (3) **rational basis review**. It's crucial to understand these legal tests and how they work in practice, as illustrated by the cases that we're reading.

Strict scrutiny is used if a **suspect classification** or a **fundamental right** is at issue. The suspect classifications are **race**, **national origin**, and **alienage**. If the government discriminates based on any of those characteristics, courts will apply strict scrutiny, which puts the **burden on the government** to show:

(1) that the challenged government action furthers a **compelling government interest AND**
(2) that it does so by means that are **narrowly tailored** to achieve that interest. (Sometimes courts use other formulations such as "necessary" instead of "narrowly tailored.")

In practice, it is extremely hard (but not impossible) for the government to win when strict scrutiny applies.

When we read about strict scrutiny in this chapter, our focus will be on suspect classifications. We will learn more about fundamental rights (such as marriage) in Chapter 7.

There is a wrinkle you should know about that involves **alienage**, which I described above as a suspect classification. The term "alien" refers to someone who is not a U.S. citizen (regardless of whether they are lawfully present). Although strict scrutiny applies if a state or local government discriminates based on alienage, Congress's immigration power allows the federal government to discriminate against aliens. For example, Congress can provide that only U.S. citizens are eligible for certain jobs, and that federal law will be upheld as long as it has a rational basis.

Intermediate scrutiny is used if a classification is based on **sex (aka gender)** or **legitimacy (aka being born out of wedlock)**. Under intermediate scrutiny, the **burden is on the government** to show:

(1) that the challenged government action furthers an **important government interest AND**
(2) that it does so by means that are **substantially related** to that interest. (Again, you may see other formulations, such as that the government must show that the classification furthers the important interest "in a direct and material way.")

Rational basis review applies whenever the other two standards of review are not triggered. It is an extremely deferential standard of review and the challenge rarely succeeds. Under rational basis review, a law or other government action will be upheld as long as it is **rationally related** to a **legitimate government interest**.

The cases that we are reading illustrate these three levels of scrutiny.

2. Rational basis review

Olson (9th Cir. 2024) (en banc) illustrates how deferential courts are when they apply rational basis review. Although this opinion was written by a court of appeals rather than by the Supreme Court, it applied the principles for rational basis review that are drawn from the Supreme Court's decision in *FCC v. Beach Communications*, 508 U.S. 307 (1993). Your case outline should include the various ways that the Supreme Court gives deference to a legislature when rational basis review applies.

Olson v. California, 104 F.4th 66 (9th Cir. 2024) (en banc)
(unanimous)

*[**Background:** This case was an Equal Protection Clause challenge to a California statute (A.B. 5) that established a new framework for classifying workers as "employees" or "independent contractors" for purposes of California labor laws. The classification affected things like whether the employer must pay the state minimum wage. A.B. 5 applied to many different industries—including ride-share companies like Uber—but it exempted some industries. Uber brought this suit, alleging that the distinctions in the California law violate the Equal Protection Clause of the Fourteenth Amendment. A panel of the Ninth Circuit initially issued a 2-1 decision accepting Uber's claim, but that ruling was wrong and important. So, the Ninth Circuit reheard the case "en banc"—meaning as a full court—and rejected Uber's claim unanimously. The en banc opinion correctly recognizes that courts are required to be extremely deferential to legislative judgments when rational basis review applies. (The Supreme Court denied Uber's cert. petition, meaning that it declined to hear the case on the merits.)]*

Circuit Judge Nguyen wrote the opinion for a unanimous en banc Ninth Circuit:

Drawing the line between "employee" and "independent contractor" is a difficult task, with significant consequences for workers and businesses. In an effort to address what it perceived as a systemic problem of misclassification—that is, businesses improperly characterizing their workers as independent contractors to avoid fiscal

responsibilities owed to employees—the California legislature enacted Assembly Bill 5 ("A.B. 5").

We must decide whether A.B. 5's differential treatment of app-based work arrangements in the transportation and delivery service industry, on the one hand, and app-based work arrangements in other industries, on the other hand, survives rational basis review. In other words, we must determine whether it was rational for the California legislature to apply one test to determine the classification of Uber drivers and a different test to determine the classification of dogwalkers who provide services through Wag!, the "Uber for dogs."

Under the deferential rational basis standard, we approach A.B. 5 with "a strong presumption of validity," and we will invalidate it only if plaintiffs negate "every conceivable basis" which might justify the lines it draws. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993). Plaintiffs have failed to carry that burden here. There are plausible reasons for treating transportation and delivery referral companies differently from other types of referral companies, particularly where the legislature perceived transportation and delivery companies as the most significant perpetrators of the problem it sought to address—worker misclassification.

I.

Plaintiff Uber Technologies, Inc. operates app-based platforms that connect individual consumers with providers. Uber offers the UberEats, Uber Rides, and Uber Driver mobile platforms. The UberEats app connects merchants, consumers, and drivers to facilitate the delivery of food orders. The Uber Rides app allows riders to connect with available drivers based on their location. The Uber Driver app connects app-based drivers to those requesting rides. Plaintiff Lydia Olson uses the Uber Driver mobile platform to connect with riders in need of transportation.

II.

Plaintiffs bring Equal Protection claims under the federal and California constitutions. We address these claims together because the equal protection analysis under the California Constitution is 'substantially similar' to analysis under the federal Equal Protection Clause.

The Equal Protection Clause prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Plaintiffs do not allege that A.B. 5 employs suspect classifications, nor does their Equal Protection claim allege that A.B. 5 impinges on fundamental rights. We therefore apply rational basis review to their claims. Under this standard, A.B. 5 carries with it a

presumption of rationality, and we must uphold it if the legislative means are rationally related to a legitimate governmental purpose.

A.

Plaintiffs contend that other app-based companies like Wag!, which provides on-demand dog-walking, and TaskRabbit, which provides on-demand help with daily tasks like handyman work, are functionally identical "in all relevant aspects" to Uber and Postmates. Wag!'s business model, Plaintiffs allege, is so similar to Uber's that Wag! is referred to as "Uber for dogs."

Even if we assume that Uber and Postmates are similarly situated to Wag! and TaskRabbit, and that A.B. 5 treats Uber disparately from those similarly situated comparators, Plaintiffs' Equal Protection claim nevertheless fails. There are rational reasons for that disparate treatment.

When conducting rational basis review of economic legislation that disparately treats similarly situated groups, we ask whether "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Commc'ns, Inc.*, 508 U.S. at 313. We may consider any "purposes the legislature, litigants, or district court have espoused," but we are not limited to those reasons—we may consider "any other rational purposes possibly motivating enactment of the challenged statute." *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 457–58, 463 (1988)). And so long as there is some conceivable legitimate purpose justifying the statute, we need not inquire into the legislature's actual purpose in enacting it. *Beach Commc'ns, Inc.*, 508 U.S. at 315.

The stated purpose of A.B. 5 is to address the "misclassification of workers," which the California legislature described as a "significant factor in the erosion of the middle class and the rise in income inequality." A.B. 5 § 1(c). Plaintiffs do not contest that protecting workers, stemming the erosion of the middle class, and reducing income inequality are legitimate state interests. We therefore turn our focus to whether A.B. 5's distinction between transportation and delivery referral services, on the one hand, and other types of referral services on the other, is rationally related to this stated purpose. We conclude that it is.

While plaintiffs allege that Uber and Wag! have functionally identical business models, that similarity alone does not compel us to conclude that there is no rational reason to treat those apps differently. One explanation for such a distinction is that the legislature perceived Uber and other transportation and delivery services as more substantial contributors to the problem of misclassification than referral agencies

engaged in other services. It is certainly conceivable that misclassification was more rampant in certain industries and therefore deserving of special attention. To the extent that it perceived Uber and other transportation and delivery app-based services as posing a greater risk of misclassification than Wag! or TaskRabbit, the California legislature acted rationally by "striking at the evil where it is felt and reaching the class of cases where it most frequently occurs." *Silver v. Silver*, 280 U.S. 117, 124 (1929). It is not necessary that such a perception be supported by "evidence or empirical data." *Beach Commc'ns, Inc.*, 508 U.S. at 315.

According to plaintiffs, Wag! is sometimes referred to as "Uber for dogs." While plaintiffs allege that this underscores the similarity between Uber and Wag!, it also highlights another plausible justification for their disparate treatment. The legislature may have perceived Uber as the pioneer of the on-demand app-based business model that many other services replicated. It is certainly reasonable for the legislature to try to target the problem of misclassification at its origin. See *Angelotti Chiropractic*, 791 F.3d at 1085–86 (recognizing that a legislature may approach a problem incrementally by targeting the worst offenders).

B.

Nevertheless, Plaintiffs argue that A.B. 5 is an unconstitutionally irrational means of achieving California's stated interest of addressing misclassification. Plaintiffs argue that A.B. 5's numerous broad exemptions contradict that purpose.

That A.B. 5 may be underinclusive does not render it unconstitutionally irrational. "The law need not be in every respect logically consistent with its aims to be constitutional." *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 487–88 (1955). Whether A.B. 5, with all of its expansions and exemptions, will have a net effect of improving or worsening misclassification and income inequality remains to be seen, but that is entirely irrelevant for our purposes. To consider whether the law is actually effective in achieving its stated goals would require us to second guess a legitimate "legislative choice" and engage in "courtroom fact-finding." *Beach Commc'ns, Inc.*, 508 U.S. at 315. The Equal Protection Clause does not give us license to do so. *Id.* at 313.

Finally, Plaintiffs argue that A.B. 5 was motivated by impermissible animus and political favoritism. Because we have identified plausible legitimate purposes motivating A.B. 5 and the lines it draws between workers in different industries and occupations, we need not further address these arguments. See *Beach Comm'ns, Inc.*, 508 U.S. at 315 (under rational basis review, "it is entirely irrelevant for

constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.”).

---

3. Strict scrutiny

Strict scrutiny is at the other end of the spectrum from rational basis review. If a law or policy is subject to strict scrutiny, the government almost always loses. Under the modern test, the government must show that the challenged action satisfies two requirements that are related but not the same. The first requirement addresses the goal of the challenged action. Under strict scrutiny, the government must show that the challenged action furthers a **compelling interest**. The second requirement addresses the means used to accomplish that goal. The government must show that the challenged action is **narrowly tailored** to accomplish the compelling interest, which means that there is no other way to achieve it.

The Supreme Court developed that test over time, so you will not see it in the older cases. Also, even in modern cases, the Supreme Court sometimes uses different language when it describes the test. For example, instead of saying “compelling interest,” the Court might say the government must have an interest “of the highest order.” And instead of saying “narrowly tailored,” the Court might say the government must show that it has “no alternative means” to accomplish its objective. Or the Court might use these formulations interchangeably in the same opinion. The key takeaway is that under the modern doctrine, the government must show it has no other way to accomplish something that is exceptionally important.

Strict scrutiny gets used in contexts other than equal protection claims, but we are focused here on equal protection. And most equal protections cases that involve strict scrutiny involve race discrimination, as illustrated by the cases that are excerpted below.

In the first three cases below—*Brown v. Board of Education* (1954), *Loving v. Virginia* (1967), and *Palmore v. Sidoti* (1984), the Court struck down laws that discriminated on their face on the basis of race. By contrast, in *Washington v. Davis* (1976), the Court held that a facially neutral policy’s disparate impact on racial minorities is not enough to establish an equal protection claim, which must be based on intentional discrimination.

The fourth case below, *Students for Fair Admissions v. Harvard* (2023), is the Supreme Court's most recent decision on the use of race as a factor in college admissions. In earlier cases involving college admissions, the Supreme Court held that strict scrutiny was satisfied because there was a compelling interest in achieving a racially diverse student body that could not be accomplished without race discrimination. But in this recent case against Harvard (which was heard together with a similar case against the University of North Carolina), the Supreme Court overruled those precedents and held that race cannot be used as a factor in admissions.

Brown v. Board of Education, 347 U.S. 483 (1954)
(unanimous)

*[**Background:** This case is one of the most famous in U.S. history. In a unanimous opinion written by Chief Justice Earl Warren, the Court held that racially segregated public school systems violate the Equal Protection Clause of the Fourteenth Amendment. In so ruling, the Court overruled its (now infamous) decision in **Plessy v. Ferguson, 163 U.S. 537 (1896)**.]*

Chief Justice Earl WARREN wrote the opinion for the unanimous Court:

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment.

In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws.

Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the [Fourteenth] Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this court until 1896 in the case of *Plessy v. Ferguson*, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In *Sweatt v. Painter*, 339 U.S. 629 (1950), the

Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive

> them of some of the benefits they would receive in a racially integrated school system.

A similar finding was made in the Delaware case: "I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated." 87 A.2d 862, 865 [per Chancellor Collins J. Seitz].

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.[11] Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

> [11] K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44—48; Frazier, The Negro in the United States (1949), 674—681. And see generally Myrdal, An American Dilemma (1944).

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Note: At the end of the opinion, the Supreme Court ordered additional briefing and argument on the issue of remedy. Although we are not studying the remedy issues here, you should be aware that the Court's pronouncement that school districts should desegregate "with all deliberate speed" lead to extensive delays in desegregation.

Loving v. Virginia, 388 U.S. 1 (1967)
(unanimous)

*[**Background:** The challenged provisions of Virginia law made it unlawful for a Black person and a White person to get married in Virginia. The Supreme Court unanimously held that the state law violated the Equal Protection Clause of the Fourteenth Amendment. That outcome may seem obvious today, but it was revolutionary at the time—even though a century had passed since the Fourteenth Amendment was ratified. As we saw in the Ollie's BBQ case (Katzenbach v. McClung (1964)), the Civil War led to the emancipation of enslaved persons, but it certainly did not eliminate race discrimination.]*

Chief Justice WARREN wrote the opinion for the unanimous Court:

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection Clause of the Fourteenth Amendment. We conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

The State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race.

Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination, where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in New York City, *Railway Express Agency, Inc. v. People of State of New York*, 336 U.S. 106 (1949), or an exemption in Ohio's ad valorem tax for merchandise owned by a non-resident in a storage warehouse, *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959). In those cases, involving distinctions not drawn according to race, the Court has merely asked

whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "(d)istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. 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.

Palmore v. Sidoti, 466 U.S. 429 (1984)
(unanimous)

*[**Background:** The Florida court in this case took away a White woman's custody of her infant child because of her remarriage to a Black man. The Supreme Court unanimously held that the state court's action violated the Equal Protection Clause of the Fourteenth Amendment. This case was more nuanced than Loving because the Florida judge was trying to protect the child from societal discrimination. As you read the opinion, try to apply the modern two-part test that is used in strict scrutiny cases. Did the state have a compelling interest? If so, was the custody decision a narrowly tailored means to achieve that interest? And if the answer to both questions is "yes," why did the Supreme Court find an equal protection violation?]*

Chief Justice BURGER wrote the opinion for a unanimous Court:

We granted certiorari to review a judgment of a state court divesting a natural mother of the custody of her infant child because of her remarriage to a person of a different race.

II

The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court. However, the state court's opinion, after stating that the "father's evident resentment of the mother's choice of a black partner is not sufficient" to deprive her of custody, then turns to what it regarded as the damaging impact on the child from remaining in a racially mixed household. This raises important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race.

The Florida court did not focus directly on the parental qualifications of the natural mother or her present husband, or indeed on the father's qualifications to have custody of the child. The court found that "there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent." This, taken with the absence of any negative finding as to the quality of the care provided by the mother, constitutes a rejection of any claim of petitioner's unfitness to continue the custody of her child.

The court correctly stated that the child's welfare was the controlling factor. But that court was entirely candid and made no effort to place its holding on any ground other than race. Taking the court's findings and rationale at face value, it is clear that the

outcome would have been different had petitioner married a Caucasian male of similar respectability.

A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be "necessary ... to the accomplishment" of their legitimate purpose, *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964). See *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. In common with most states, Florida law mandates that custody determinations be made in the best interests of the children involved. The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause.

It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. 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. Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.

This is by no means the first time that acknowledged racial prejudice has been invoked to justify racial classifications. In *Buchanan v. Warley*, 245 U.S. 60 (1917), for example, this Court invalidated a Kentucky law forbidding Negroes to buy homes in white neighborhoods. The Court explained:

> It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.

Washington v. Davis, 426 U.S. 229 (1976)
(7-2 vote)

*[**Background:** The D.C. police department required candidates applying to be police officers to pass a test of reading and vocabulary. That test was challenged on the ground that it was screening out a disproportionate number of Black candidates. The Supreme Court held that a disparate impact on racial minorities does not—standing alone—establish a violation of the Equal Protection Clause. Instead, the evidence must show that the discrimination was intentional, which was not the case here. Justice White wrote the opinion for the Court. Various Justices wrote concurring opinions. Justices Brennan and Marshall dissented.]*

Justice WHITE wrote the opinion for the Court:

This case involves the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department. According to the findings and conclusions of the District Court, to be accepted by the Department and to enter an intensive 17-week training program, the police recruit was required to satisfy certain physical and character standards, to be a high school graduate or its equivalent, and to receive a grade of at least 40 out of 80 on “Test 21,” which is “an examination that is used generally throughout the federal service,” which “was developed by the Civil Service Commission, not the Police Department,” and which was “designed to test verbal ability, vocabulary, reading and comprehension.” The validity of Test 21 was the sole issue before the court on the

motions for summary judgment. There was no claim of "an intentional discrimination or purposeful discriminatory acts" but only a claim that Test 21 bore no relationship to job performance and "has a highly discriminatory impact in screening out black candidates."

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. The Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. Bolling v. Sharpe, 347 U.S. 497 (1954). But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.

Almost 100 years ago, Strauder v. West Virginia, 100 U.S. 303 (1880), established that the exclusion of Negroes from grand and petit juries in criminal proceedings violated the Equal Protection Clause, but the fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the Clause. A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination.

The rule is the same in other contexts. Wright v. Rockefeller, 376 U.S. 52 (1964), upheld a New York congressional apportionment statute against claims that district lines had been racially gerrymandered. The challenged districts were made up predominantly of whites or of minority races, and their boundaries were irregularly drawn. The challengers did not prevail because they failed to prove that the New York Legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"; the plaintiffs had not shown that the statute "was the product of a state contrivance to segregate on the basis of race or place of origin."

The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of de jure segregation is "a current condition of segregation resulting from intentional state action. The differentiating factor between De jure segregation and so-called De facto segregation . . . is Purpose or Intent to segregate."

The Court has also recently rejected allegations of racial discrimination based solely on the statistically disproportionate racial impact of various provisions of the Social Security Act because "(t)he acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be."

This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

An invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants. As we have said, the test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue. Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race.

Commentary and questions: The rule announced in *Washington v. Davis* is still the law: a disparate impact on racial minorities is not enough to show an equal protection violation. But that does not mean such statistical evidence is *irrelevant* to proving an

equal protection violation. Imagine that your client comes to you complaining that a different police department is requiring candidates to pass a calculus exam to qualify as police officers, and that this calculus exam is screening out a disproportionate number of Black applicants. Under *Washington v. Davis*, you will need to show *intentional* race discrimination. Think creatively: What additional evidence might be helpful to your case? And what facts (if true) might help you to distinguish the facts of *Washington v. Davis*?

Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (6-3 vote)

*[**Background:** Like many other colleges and universities, Harvard and the University of North Carolina (UNC) considered race as a factor in making admissions decisions. For reasons that had to do with the evolution of the Supreme Court's doctrine in this area of law, the schools argued that this use of race was narrowly tailored to achieve a racially diverse student body, which is the interest that the earlier cases had deemed to be compelling. In this case, the Court overruled those precedents and held that this use of race in admissions is unconstitutional. At the same time, the Court explained that a school can consider a particular student's race to the extent that it is relevant to that student's life experience. As you read the opinions (majority and dissents), be as charitable as you can, even if you feel strongly about the outcome that you think is correct. Your case outline should include the strongest arguments on each side.]*

Chief Justice Roberts wrote the opinion for the Court, which Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined. Justices Sotomayor, Kagan, and Jackson dissented.

Chief Justice ROBERTS wrote the opinion for the Court:

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

Petitioner, Students for Fair Admissions (SFFA), filed separate lawsuits against Harvard College and the University of North Carolina, arguing that their race-based admissions programs violated, respectively, Title VI of the Civil Rights Act of 1964, 42

U.S.C. § 2000d et seq., and the Equal Protection Clause of the Fourteenth Amendment.[2]

> [2] Title VI [of the Civil Rights Act of 1964] provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. "We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." *Gratz v. Bollinger*, 539 U.S. 244, 276, n. 23 (2003). Although Justice GORSUCH questions that proposition, no party asks us to reconsider it. We accordingly evaluate Harvard's admissions program under the standards of the Equal Protection Clause itself.

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

Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as "strict scrutiny." Under that standard we ask, first, whether the racial classification is used to "further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Second, if so, we ask whether the government's use of race is "narrowly tailored"—meaning "necessary"—to achieve that interest.

Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot.

The first time we determined that a governmental racial classification satisfied "the most rigid scrutiny" was 10 years before *Brown v. Board of Education*, 347 U.S. 483

(1954), in the infamous case *Korematsu v. United States*, 323 U.S. 214, 216 (1944). There, the Court upheld the internment of "all persons of Japanese ancestry in prescribed West Coast ... areas" during World War II because "the military urgency of the situation demanded" it. We have since overruled *Korematsu*, recognizing that it was "gravely wrong the day it was decided." *Trump v. Hawaii*, 138 S. Ct. 2392, 2448 (2018). The Court's decision in *Korematsu* nevertheless "demonstrates vividly that even the most rigid scrutiny can sometimes fail to detect an illegitimate racial classification" and that "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future."

Our acceptance of race-based state action has been rare for a reason. Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. That principle cannot be overridden except in the most extraordinary case.

***

These cases involve whether a university may make admissions decisions that turn on an applicant's race. Our Court first considered that issue in ***Regents of University of California v. Bakke*, 438 U.S. 265, 272-76 (1978)**, which involved a set-aside admissions program used by the University of California, Davis, medical school. Each year, the school held 16 of its 100 seats open for members of certain minority groups, who were reviewed on a special admissions track separate from those in the main admissions pool. The plaintiff, Allan Bakke, was denied admission two years in a row, despite the admission of minority applicants with lower grade point averages and MCAT scores. Bakke subsequently sued the school, arguing that its set-aside program violated the Equal Protection Clause.

In a deeply splintered decision that produced six different opinions—none of which commanded a majority of the Court—we ultimately ruled in part in favor of the school and in part in favor of Bakke. Justice Powell announced the Court's judgment, and his opinion—though written for himself alone—would eventually come to "serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003),

Justice Powell began by finding three of the school's four justifications for its policy not sufficiently compelling. The school's first justification of "reducing the historic deficit of traditionally disfavored minorities in medical schools," he wrote, was akin to "[p]referring members of any one group for no reason other than race or ethnic origin." That was "discrimination for its own sake," which "the Constitution forbids." Justice Powell next observed that the goal of "remedying ... the effects of 'societal

discrimination'" was also insufficient because it was "an amorphous concept of injury that may be ageless in its reach into the past." Finally, Justice Powell found there was "virtually no evidence in the record indicating that [the school's] special admissions program" would, as the school had argued, increase the number of doctors working in underserved areas.

Justice Powell then turned to the school's last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse student body. That interest, in his view, was "a constitutionally permissible goal for an institution of higher education." But a university's freedom was not unlimited. "Racial and ethnic distinctions of any sort are inherently suspect," Justice Powell explained, and antipathy toward them was deeply "rooted in our Nation's constitutional and demographic history." A university could not employ a quota system, for example, reserving "a specified number of seats in each class for individuals from the preferred ethnic groups." The role of race had to be cabined. It could operate only as "a 'plus' in a particular applicant's file." And even then, race was to be weighed in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant."

We took up the matter again in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which concerned the admissions system used by the University of Michigan law school. There, in another sharply divided decision, the Court for the first time "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."

Even with Justice Powell's constraints in place, *Grutter* expressed marked discomfort with the use of race in college admissions. The Court stressed the fundamental principle that "there are serious problems of justice connected with the idea of [racial] preference itself." Ibid. (quoting *Bakke*, 438 U.S. at 298 (opinion of Powell, J.)). It observed that all "racial classifications, however compelling their goals," were "dangerous." Id. at 342. And it cautioned that all "race-based governmental action" should "remain subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." Id. at 341.

To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs. At some point, the Court held, they must end. *Grutter*, 539 U.S. at 342. This requirement was critical, and *Grutter* emphasized it repeatedly. "[A]ll race-conscious admissions programs [must] have a termination point"; they "must have reasonable durational limits"; they "must be limited in time"; they must have "sunset provisions"; they "must have a logical end point"; their "deviation from the

norm of equal treatment" must be "a temporary matter." Ibid. The importance of an end point was not just a matter of repetition. It was the reason the Court was willing to dispense temporarily with the Constitution's unambiguous guarantee of equal protection. "Enshrining a permanent justification for racial preferences," the Court explained, "would offend this fundamental equal protection principle." Ibid.

Grutter thus concluded with the following caution: "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education.... We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U.S. at 343.

IV

Twenty years later, no end is in sight. "Harvard's view about when [race-based admissions will end] doesn't have a date on it." Tr. of Oral Arg. in No. 20–1199, p. 85; Brief for Respondent in No. 201199, p. 52. Neither does UNC's. 567 F.Supp.3d at 612. Yet both insist that the use of race in their admissions programs must continue.

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

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

Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. Comparing respondents' asserted goals to interests we have recognized as compelling further illustrates their elusive nature. In the context of racial violence in a prison, for example, courts can ask whether temporary racial

segregation of inmates will prevent harm to those in the prison. See *Johnson*, 543 U.S. at 512–513. When it comes to workplace discrimination, courts can ask whether a race-based benefit makes members of the discriminated class "whole for [the] injuries [they] suffered." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (internal quotation marks omitted). And in school segregation cases, courts can determine whether any race-based remedial action produces a distribution of students "compar[able] to what it would have been in the absence of such constitutional violations." *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 420 (1977).

Second, respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational benefits of diversity, the universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American. It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue. For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether South Asian or East Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbitrary or undefined. And still other categories are underinclusive. When asked at oral argument "how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran, [and] Egypt," UNC's counsel responded, "[I] do not know the answer to that question." Cf. post, at 2210 - 2211 (GORSUCH, J., concurring) (detailing the "incoherent" and "irrational stereotypes" that these racial categories further).

The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a "negative" and that it may not operate as a stereotype. How else but "negative" can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been? And by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race qua race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot offer." *Bakke*, 438 U.S. at 316 (opinion of Powell, J.); see also Tr. of Oral Arg.

in No. 20–1199, at 92. UNC is much the same. It argues that race in itself "says [something] about who you are." Tr. of Oral Arg. in No. 21–707, at 97; see also id., at 96 (analogizing being of a certain race to being from a rural area).

We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those "who may have little in common with one another but the color of their skin." *Shaw*, 509 U.S. at 647. The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is not like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well. When a university admits students on the basis of race, it engages in the offensive and demeaning assumption that students of a particular race, because of their race, think alike—at the very least alike in the sense of being different from nonminority students. In doing so, the university furthers stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.

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

At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. What cannot be done directly cannot be done indirectly. A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

Justice KAVANAUGH, concurring:

A generation has now passed since *Grutter*, and about 50 years have gone by since the era of *Bakke*, when race-based affirmative action programs in higher education largely began. In light of the Constitution's text, history, and precedent, the Court's decision today appropriately respects and abides by *Grutter*'s explicit temporal limit on the use of race-based affirmative action in higher education.

Justice SOTOMAYOR, Justice KAGAN, and Justice JACKSON disagree with the Court's decision. I respect their views. They thoroughly recount the horrific history of slavery and Jim Crow in America, as well as the continuing effects of that history on African Americans today. And they are of course correct that for the last five decades, *Bakke* and *Grutter* have allowed narrowly tailored race-based affirmative action in higher education.

But I respectfully part ways with my dissenting colleagues on the question of whether, under this Court's precedents, race-based affirmative action in higher education may extend indefinitely into the future. The dissents suggest that the answer is yes. But this Court's precedents make clear that the answer is no. The Court in *Grutter* declared that race-based affirmative action in higher education could continue for another generation, and only for another generation, at least absent something unexpected. 539 U.S. at 343. I would abide by that temporal limit rather than discarding it, as today's dissents would do.

Justice SOTOMAYOR dissented, joined by Justices Kagan and Jackson:

Today, the Court concludes that indifference to race is the only constitutionally permissible means to achieve racial equality in college admissions. That interpretation of the Fourteenth Amendment is not only contrary to precedent and the entire teachings of our history, but is also grounded in the illusion that racial inequality was a problem of a different generation. Entrenched racial inequality remains a reality today. That is true for society writ large and, more specifically, for Harvard and the University of North Carolina (UNC), two institutions with a long history of racial exclusion. Ignoring race will not equalize a society that is racially unequal. What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgment of inequality.

For much of its history, UNC was a bastion of white supremacy. Its leadership included "slaveholders, the leaders of the Ku Klux Klan, the central figures in the white supremacy campaigns of 1898 and 1900, and many of the State's most ardent

defenders of Jim Crow and race-based Social Darwinism in the twentieth century." 3 App. 1680. The university excluded all people of color from its faculty and student body, glorified the institution of slavery, enforced its own Jim Crow regulations, and punished any dissent from racial orthodoxy. Id., at 1681–1683. It resisted racial integration after this Court's decision in *Brown*, and was forced to integrate by court order in 1955. 3 App. 1685. It took almost 10 more years for the first Black woman to enroll at the university in 1963. See Karen L. Parker Collection, 1963–1966, UNC Wilson Special Collections Library. Even then, the university admitted only a handful of underrepresented racial minorities, and those students suffered constant harassment, humiliation, and isolation. 3 App. 1685. UNC officials openly resisted racial integration well into the 1980s, years after the youngest Member of this Court was born. Id., at 1688–1690. During that period, Black students faced racial epithets and stereotypes, received hate mail, and encountered Ku Klux Klan rallies on campus. 2 id., at 781–784; 3 id., at 1689.

UNC is not alone. Harvard, like other Ivy League universities in our country, "stood beside church and state as the third pillar of a civilization built on bondage." C. Wilder, Ebony & Ivy: Race, Slavery, and the Troubled History of America's Universities 11 (2013). From Harvard's founding, slavery and racial subordination were integral parts of the institution's funding, intellectual production, and campus life. Harvard and its donors had extensive financial ties to, and profited from, the slave trade, the labor of enslaved people, and slavery-related investments. As Harvard now recognizes, the accumulation of this wealth was "vital to the University's growth" and establishment as an elite, national institution. Harvard & the Legacy of Slavery, Report by the President and Fellows of Harvard College 7 (2022) (Harvard Report). Harvard suppressed antislavery views, and enslaved persons "served Harvard presidents and professors and fed and cared for Harvard students" on campus. Id., at 7, 15.

Today, benefactors with ties to slavery and white supremacy continue to be memorialized across campus through "statues, buildings, professorships, student houses, and the like." Harvard Report 11. Black and Latino applicants account for only 20% of domestic applicants to Harvard each year. For years, the university has reported that inequities on campus remain. For example, Harvard has reported that "far too many black students at Harvard experience feelings of isolation and marginalization," and that "student survey data show[ed] that only half of Harvard undergraduates believe that the housing system fosters exchanges between students of different backgrounds."

These may be uncomfortable truths to some, but they are truths nonetheless. “Institutions can and do change,” however, as societal and legal changes force them “to live up to [their] highest ideals.” Harvard Report 56. It is against this historical backdrop that Harvard and UNC have reckoned with their past and its lingering effects. Acknowledging the reality that race has always mattered and continues to matter, these universities have established institutional goals of diversity and inclusion. Consistent with equal protection principles and this Court's settled law, their policies use race in a limited way with the goal of recruiting, admitting, and enrolling underrepresented racial minorities to pursue the well-documented benefits of racial integration in education.

***

The Court argues that Harvard’s and UNC’s programs must end because they unfairly disadvantage some racial groups. According to the Court, college admissions are a “zero-sum” game and respondents’ use of race unfairly “advantages” underrepresented minority students “at the expense of” other students.

That is not the role race plays in holistic admissions. Consistent with the Court's precedents, respondents’ holistic review policies consider race in a very limited way. Race is only one factor out of many. That type of system allows Harvard and UNC to assemble a diverse class on a multitude of dimensions. Respondents’ policies allow them to select students with various unique attributes, including talented athletes, artists, scientists, and musicians. They also allow respondents to assemble a class with diverse viewpoints, including students who have different political ideologies and academic interests, who have struggled with different types of disabilities, who are from various socioeconomic backgrounds, who understand different ways of life in various parts of the country, and—yes—students who self-identify with various racial backgrounds and who can offer different perspectives because of that identity.

That type of multidimensional system benefits all students. Stated simply, race is one small piece of a much larger admissions puzzle where most of the pieces disfavor underrepresented racial minorities. That is precisely why underrepresented racial minorities remain underrepresented. The Court’s suggestion that an already advantaged racial group is “disadvantaged” because of a limited use of race is a myth.

In a society where opportunity is dispensed along racial lines, racial equality cannot be achieved without making room for underrepresented groups that for far too long were denied admission through the force of law, including at Harvard and UNC. Quite the opposite: A racially integrated vision of society, in which institutions reflect all

sectors of the American public and where “the sons of former slaves and the sons of former slave owners [are] able to sit down together at the table of brotherhood,” is precisely what the Equal Protection Clause commands. Martin Luther King “I Have a Dream” Speech (Aug. 28, 1963). It is “essential if the dream of one Nation, indivisible, is to be realized.” *Grutter*, 539 U.S. at 332.

Justice JACKSON dissented, joined by Justices Sotomayor and Kagan:

Our country has never been colorblind. Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented “intergenerational transmission of inequality” that still plagues our citizenry.

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

It is hardly John’s fault that he is the seventh generation to graduate from UNC. UNC should permit him to honor that legacy. Neither, however, was it James’s (or his family’s) fault that he would be the first. And UNC ought to be able to consider why. Most likely, seven generations ago, when John’s family was building its knowledge base and wealth potential on the university’s campus, James’s family was enslaved and laboring in North Carolina's fields. Six generations ago, the North Carolina “Redeemers” aimed to nullify the results of the Civil War through terror and violence, marauding in hopes of excluding all who looked like James from equal citizenship. Five generations ago, the North Carolina Red Shirts finished the job. Four (and three) generations ago, Jim Crow was so entrenched in the State of North Carolina that UNC “enforced its own Jim Crow regulations.” Two generations ago, North Carolina's Governor still railed against “‘integration for integration’s sake’”—and UNC Black enrollment was minuscule. So, at bare minimum, one generation ago, James's family was six generations behind because of their race, making John's six generations ahead.

Permitting (not requiring) colleges like UNC to assess merit fully, without blinders on, plainly advances (not thwarts) the Fourteenth Amendment’s core promise. UNC

considers race as one of many factors in order to best assess the entire unique import of John's and James's individual lives and inheritances on an equal basis. Doing so involves acknowledging (not ignoring) the seven generations' worth of historical privileges and disadvantages that each of these applicants was born with when his own life's journey started a mere 18 years ago.

Commentary: Take a look back at footnote 2 of the majority opinion. If this case is about the Equal Protection Clause, why is the Court talking about Title VI of the Civil Rights Act of 1964? The reason is the state action requirement that we learned about in Chapter 5. The University of North Carolina is a state actor because it is a public university. UNC is therefore bound by the Equal Protection Clause. By contrast, Harvard University is a private institution. And as you know, private actors are not bound by the Equal Protection Clause. But Harvard does receive federal funding, and Title VI prohibits race discrimination in programs that receive federal funding. In other words, Title VI is a string that Congress attached to federal funds as an exercise of its spending power. And as footnote 2 of the opinion explains, the Supreme Court has treated the restrictions on race discrimination in Title VI as identical to the restrictions that are imposed by the Equal Protection Clause.

4. Intermediate scrutiny

We now turn to classifications that are subject to intermediate scrutiny. As the name suggests, intermediate scrutiny is more deferential to the government than strict scrutiny but much less deferential than rational basis review. Intermediate scrutiny is used if the challenged classification is based on sex (aka gender) or legitimacy (aka, being born out of wedlock). Most of the cases involve sex discrimination, which will be our focus here.

Intermediate scrutiny requires the government to show (1) that the challenged action furthers an **important** interest and (2) that the means used are **substantially related** to that interest. But as with strict scrutiny, this test evolved over time, so you won't necessarily see it in the older cases. And even in modern cases, you will see variants on the bolded language. For example, the Court sometimes says that a gender classification must further an important interest "in a direct and material way" instead of saying that it must be "substantially related" to an important interest.

It took a big push from women's rights advocates to get the Supreme Court to say that sex discrimination is subject to heightened (intermediate) scrutiny rather than rational basis review. A leader of that push was Ruth Bader Ginsburg (RBG), who at the time worked for the ACLU as the founding director of its Women's Rights Project. Before we read excerpts from cases, we will learn about that history through the multimedia assignments described below. These two assignments should help you develop a sophisticated understanding of litigation strategy, as well as to learn about some important sex discrimination cases.

First, you should listen to the 65-minute Radiolab podcast *More Perfect: Sex Appeal* (Episode 629, Mar. 7, 2025). The podcast tells the story of how RBG convinced an all-male Supreme Court to take discrimination against women seriously—using a case involving discrimination against men. That case was *Craig v. Boren*, 429 U.S. 190 (1976), which invalidated an Oklahoma law that made it unlawful to sell 3.2% beer to males who were under age 21 but to females who were under age 18. The Supreme Court held that this gender discrimination violated the Equal Protection Clause. In so ruling, the Court for the first time clearly held that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"—the standard that became known as intermediate scrutiny—rather than to rational basis review.

Second, you should watch the 98-minute documentary *RBG* (Directed by Betsy West. Magnolia Pictures, 2018). The film chronicles RBG's life and includes interviews with key players from the sex discrimination cases. It should help you understand and remember the cases much better than just reading them would do.

Then, you should read the excerpts below from four of the Supreme Court's many sex discrimination cases: *Weinberger v. Wiesenfeld* (1975), *Craig v. Boren* (1976), *Mississippi University for Women v. Hogan* (1982), and *United States v. Virginia* (1996). In addition, you will read an excerpt from the Supreme Court's recent decision in *Skrmetti* (2025), which held that a state ban on certain gender-affirming medical treatments for transgender minors does not qualify as "sex discrimination" and thus is subject only to rational basis review.

Weinberger v. Stephen Wiesenfeld, 420 U.S. 636 (1975)
(unanimous)

*[**Background:** A 1939 amendment to the Social Security Act authorized federal benefits to be paid to the parent of a minor child, upon the death of a spouse who had paid into the social security system through payroll taxes. But those benefits—titled "Mother's Insurance Benefits" —were available only to a widow (woman) and not a widower (man). The Supreme Court held that this gender discrimination violated the equal protection component of the Fifth Amendment's Due Process Clause. Ruth Bader Ginsburg argued for the widower, Stephen Wiesenfeld. The Court's decision was a victory for RBG but it did not (yet) achieve her goal of obtaining heightened scrutiny for gender classifications. Justice Brennan wrote the opinion for the unanimous Court.]*

Justice BRENNAN wrote the opinion for the unanimous Court:

The question in this case is whether the gender-based distinction in section 402(g) of the Social Security Act violates the Due Process Clause of the Fifth Amendment.[2]

> [2] While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.

Stephen Wiesenfeld and Paula Polatschek were married in 1970. Paula, who worked as a teacher for five years before her marriage, continued teaching after her marriage. Each year she worked, maximum social security contributions were deducted from her salary. Paula's earnings were the couple's principal source of support during the marriage, being substantially larger than those of Weisenfeld. On June 5, 1972, Paula died in childbirth. Stephen Wiesenfeld was left with the sole responsibility for the care of their infant son. Shortly after his wife's death, Stephen Wiesenfeld applied at the Social Security office for social security survivors' benefits for himself and his son. He did obtain benefits for his son, but he was told that he was not eligible for benefits for himself, because section 402(g) benefits were available only to women.

Section 402(g) was added to the Social Security Act in 1939 to "afford more adequate protection to the family as a unit." H.R. Rep. No. 728, 76th Cong., 1st

Sess., 7 (1939). Congress legislated on the then generally accepted presumption that a man is responsible for the support of his wife and children. Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support. Section 402(g) clearly operates, as did the statutes invalidated by our judgment in *Frontiero v. Richardson*, 411 U.S. 677 (1973), to deprive women of protection for their families which men receive as a result of their employment.

Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of section 402(g) is entirely irrational. The classification discriminates among surviving children solely on the basis of the sex of the surviving parent. Even in the typical family hypothesized by the Act, in which the husband is supporting the family and the mother is caring for the children, this result makes no sense. The fact that a man is working while there is a wife at home does not mean that he would, or should be required to, continue to work if his wife dies. It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the "companionship, care, custody, and management" of "the children he has sired and raised, (which) undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

Craig v. Boren, 429 U.S. 190 (1976)
(7-2 vote)

*[**Background:** As you know from the podcast, the challenged Oklahoma law made it unlawful to sell 3.2% beer to males under 21 but to females under 18. The Supreme Court held that this sex discrimination violated the Equal Protection Clause of the Fourteenth Amendment. Justice Brennan wrote the opinion for the Court, and Justices White, Marshall, Stevens, and Blackmun joined the part that held that sex discrimination is subject to intermediate scrutiny. Various Justices concurred. Chief Justice Burger and Justice Rehnquist dissented.]*

Justice BRENNAN wrote the opinion for the Court:

The interaction of two sections of an Oklahoma statute prohibits the sale of "nonintoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18. The question to be decided is whether such a gender-based differential constitutes a denial to males 18-20 years of age of the equal protection of the laws in violation of the Fourteenth Amendment.

We first address a preliminary question of standing. Appellant Craig attained the age of 21 after we [took the case]. Therefore, since only declaratory and injunctive relief against enforcement of the gender-based differential is sought, the controversy has been rendered moot as to Craig. The question thus arises whether appellant Whitener, the licensed vendor of 3.2% beer, who has a live controversy against enforcement of the statute, may rely upon the equal protection objections of males 18-20 years of age to establish her claim of unconstitutionality of the age-sex differential. We conclude that she may. We now consider those arguments.

To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.

We accept for purposes of discussion the District Court's identification of the objective underlying [the Oklahoma law] as the enhancement of traffic safety. Clearly, the protection of public health and safety represents an important function of state and local governments. However, appellees' statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot withstand equal protection challenge. The most focused and relevant of the statistical surveys, arrests of 18-20-year-olds for alcohol-related driving offenses, exemplifies the ultimate unpersuasiveness of this evidentiary record. The statistics broadly establish that .18% of females and 2% of males in that age group were arrested for that offense. While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device. Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous "fit."

Moreover, the statistics exhibit a variety of other shortcomings that seriously impugn their value to equal protection analysis. Setting aside the obvious methodological problems, the surveys do not adequately justify the salient features of Oklahoma's gender-based traffic-safety law. None purports to measure the use and dangerousness of 3.2% beer as opposed to alcohol generally, a detail that is of

particular importance since, in light of its low alcohol level, Oklahoma apparently considers the 3.2% beverage to be "nonintoxicating."

There is no reason to belabor this line of analysis. It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause. Suffice to say that the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving.

Mississippi University for Women v. Joe Hogan, 458 U.S. 718 (1982)
(5-4 vote)

*[**Background:** In this case, the Supreme Court invalidated on equal protection grounds Mississippi's exclusion of men from the state university's school of nursing. Justice Sandra Day O'Connor, who had been appointed by President Reagan in 1981 to be the first woman Justice on the Supreme Court, wrote the opinion for the Court. Her opinion emphasized the high bar of intermediate scrutiny. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented.]*

Justice O'CONNOR wrote the opinion for the Court:

In 1884, the Mississippi Legislature created the Mississippi Industrial Institute and College for the Education of White Girls of the State of Mississippi, now the oldest state-supported all-female college in the United States. The school, known today as Mississippi University for Women (MUW), has from its inception limited its enrollment to women.[1]

> [1] Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide "separate but equal" undergraduate institutions for males and females.

In 1974, MUW established a 4-year baccalaureate program in nursing. Respondent, Joe Hogan, is a registered nurse but does not hold a baccalaureate degree in nursing. With a baccalaureate degree, Hogan would be able to earn a higher salary

and would be eligible to obtain specialized training as an anesthetist. Hogan applied for admission to the MUW School of Nursing's baccalaureate program. Although he was otherwise qualified, he was denied admission to the School of Nursing solely because of his sex. School officials informed him that he could audit the courses in which he was interested, but could not enroll for credit.

We begin our analysis aided by several firmly established principles. Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. That this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review. Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. See *Frontiero v. Richardson*, 411 U.S. 677, 684-685 (1973) (plurality opinion).[10]

> [10] History provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function. In 1873, this Court remained unmoved by Myra Bradwell's argument that the Fourteenth Amendment prohibited a State from classifying her as unfit to practice law simply because she was female. *Bradwell v. Illinois*, 16 Wall. 130. In a similar vein, the Court in *Goesaert v. Cleary*, 335 U.S. 464 (1948), upheld a legislature's right to preclude women from bartending, except under limited circumstances, on the ground that the legislature could devise preventive measures against "moral and social problems" that result when women, but apparently not men, tend bar.

If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.

Mississippi's primary justification for maintaining the single-sex admissions policy of MUW's School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action. As applied to the School of Nursing, we find the State's argument unpersuasive. Mississippi has made no showing that women lack opportunities to obtain training in the field of nursing. In fact, the year before the School of Nursing's first class enrolled, women earned 94% of the nursing baccalaureate degrees conferred in Mississippi and 98.6% of the degrees earned nationwide. As one would expect, the labor force reflects the same predominance of women in nursing. When MUW's School of Nursing began operation, nearly 98% of all employed registered nurses were female.

The policy also fails the second part of the equal protection test, for the State has made no showing that the gender-based classification is substantially and directly related to its proposed compensatory objective. To the contrary, MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men.

United States v. Virginia, 518 U.S. 515 (1996)
(7-1 vote with Justice Thomas recused)

*[**Background:** In 1990, during the administration of President George W. Bush, the Department of Justice brought this suit alleging that Virginia's exclusion of women from the Virginia Military Institute (VMI) violated the Equal Protection Clause of the Fourteenth Amendment. In 1993, President Bill Clinton appointed Ruth Bader Ginsburg—who had been a judge on the D.C. Circuit since 1980—to be a Justice on the Supreme Court. In 1996, she wrote this opinion holding that the exclusion of women from VMI was an equal protection violation. The opinion is widely regarded as one of her most important. (A bit of personal trivia: I clerked for RBG in 1994-95, which was a less eventful year!)]*

Justice Ginsburg wrote the opinion for the Court, which Justices Stevens, O'Connor, Kennedy, Souter, and Breyer joined. Chief Justice Rehnquist concurred in the judgment. Justice Scalia dissented. Justice Thomas did not participate.

Justice GINSBURG wrote the opinion of the Court:

Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute (VMI). The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. We agree.

I

Founded in 1839, VMI is today the sole single-sex school among Virginia's 15 public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. VMI pursues this mission through pervasive training of a kind not available anywhere else in Virginia. Assigning prime place to character development, VMI uses an "adversative method" modeled on English public schools and once characteristic of military instruction. VMI constantly endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. The school's graduates leave VMI with heightened comprehension of their capacity to deal with duress and stress, and a large sense of accomplishment for completing the hazardous course.

VMI has notably succeeded in its mission to produce leaders; among its alumni are military generals, Members of Congress, and business executives. The school's alumni overwhelmingly perceive that their VMI training helped them to realize their

personal goals. VMI's endowment reflects the loyalty of its graduates; VMI has the largest per-student endowment of all public undergraduate institutions in the Nation.

Neither the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women. And the school's impressive record in producing leaders has made admission desirable to some women. Nevertheless, Virginia has elected to preserve exclusively for men the advantages and opportunities a VMI education affords.

II.

In 1990, prompted by a complaint filed with the Attorney General by a female high-school student seeking admission to VMI, the United States sued the Commonwealth of Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment. Trial of the action consumed six days and involved an array of expert witnesses on each side.

The parties agreed that "*some* women can meet the physical standards now imposed on men," and the court below was satisfied that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women." The Court of Appeals, however, accepted the District Court's finding that "at least these three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach—would be materially affected by coeducation."

III.

Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action. *Mississippi Univ. for Women*, 458 U.S. at 724. Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional right to the franchise. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination. See, *e.g., Goesaert v. Cleary*, 335 U.S. 464, 467 (1948) (rejecting challenge of female tavern owner and her daughter to Michigan law denying bartender licenses to females—except for wives and daughters of male tavern owners; Court would not "give ear" to the contention that "an unchivalrous desire of male bartenders to ... monopolize the calling" prompted the legislation).

In 1971, for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws. *Reed v. Reed*, 404 U.S. 71, 73 (1971) (holding unconstitutional Idaho Code prescription that, among "'several persons claiming and equally entitled to administer [a decedent's estate], males must be preferred to females'"). Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities. See, *e.g., Kirchberg v. Feenstra*, 450 U.S. 455, 462–463 (1981) (affirming invalidity of Louisiana law that made husband "head and master" of property jointly owned with his wife, giving him unilateral right to dispose of such property without his wife's consent); *Stanton v. Stanton*, 421 U.S. 7 (1975) (invalidating Utah requirement that parents support boys until age 21, girls only until age 18).

Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment for denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975).

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. See *Loving v. Virginia*, 388 U.S. 1 (1967). Physical differences between men and women, however, are enduring: The two sexes are not fungible; a community made up exclusively of one sex is different from a community composed of both.

"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or

for artificial constraints on an individual's opportunity. Sex classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.

V

Virginia asserts two justifications in defense of VMI's exclusion of women. First, the Commonwealth contends, "single-sex education provides important educational benefits," and the option of single-sex education contributes to "diversity in educational approaches." Second, the Commonwealth argues, "the unique VMI method of character development and leadership training," the school's adversative approach, would have to be modified were VMI to admit women. We consider these two justifications in turn.

Single-sex education affords pedagogical benefits to at least some students, Virginia emphasizes, and that reality is uncontested in this litigation. But neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options. A purpose genuinely to advance an array of educational options is not served by VMI's historic and constant plan—a plan to "afford a unique educational benefit only to males." However liberally this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not equal protection.

Virginia next argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women. Alterations to accommodate women would necessarily be "radical," so "drastic," Virginia asserts, as to transform, indeed "destroy," VMI's program. Neither sex would be favored by the transformation, Virginia maintains: Men would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would "eliminate the very aspects of the program that distinguish [VMI] from ... other institutions of higher education in Virginia."

It is uncontested that women's admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. It is also undisputed, however, that "the VMI methodology could be used to educate women. "Some women, at least, would want to attend VMI if they had the opportunity," the District Court recognized, and "some women," the expert testimony established, "are capable of all of the individual activities required of VMI cadets." The parties, furthermore, agree that "some women can meet the physical standards VMI now imposes on men." In sum, neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women.

State actors controlling gates to opportunity may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women*, 458 U.S. at 725. Equal protection principles, as applied to gender classifications, mean state actors may not rely on "overbroad" generalizations to make "judgments about people that are likely to ... perpetuate historical patterns of discrimination."

It may be assumed, for purposes of this decision, that most women would not choose VMI's adversative method. As Fourth Circuit Judge Diana Motz observed, however, it is also probable that "many men would not want to be educated in such an environment." (On that point, even our dissenting colleague might agree.) Education, to be sure, is not a "one size fits all" business. The issue, however, is not whether "women—or men—should be forced to attend VMI"; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.

The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other self-fulfilling prophecies, once routinely used to deny rights or opportunities.

A like fear, according to a 1925 report, accounted for Columbia Law School's resistance to women's admission. Medical faculties similarly resisted men and women as partners in the study of medicine. More recently, women seeking careers in policing encountered resistance based on fears that their presence would "undermine male solidarity," see F. Heidensohn, Women in Control? 201 (1992); deprive male partners of adequate assistance, see id., at 184–185; and lead to sexual misconduct, see C. Milton et al., Women in Policing 32–33 (1974). Field studies did not confirm these fears. See Heidensohn, supra, at 92–93; P. Bloch & D. Anderson, Policewomen on Patrol: Final Report (1974).

Women's successful entry into the federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for the future of VMI may not be solidly grounded. The Commonwealth's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, cannot rank as "exceedingly persuasive," as we have explained and applied that standard.[16]

[16] VMI has successfully managed another notable change. The school admitted its first African–American cadets in 1968. See The VMI Story

347–349 (students no longer sing “Dixie,” salute the Confederate flag or the tomb of General Robert E. Lee at ceremonies and sports events).

[**Note:** The Supreme Court went on to hold that Virginia’s proposed remedy—maintaining VMI as an all-male institution and creating a new Virginia Women’s Institute for Leadership at Mary Baldwin College—was constitutionally inadequate because that new program would not be comparable to VMI in many ways.]

Chief Justice REHNQUIST concurred in the judgment:

The Court holds that Virginia violates the Equal Protection Clause by maintaining VMI’s all-male admissions policy. While I agree with that conclusion, I disagree with the Court’s analysis and so I write separately.

Two decades ago in *Craig v. Boren*, 429 U.S. 190, 197 (1976), we announced that “[t]o withstand constitutional challenge, ... classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” We have adhered to that standard of scrutiny ever since. While the majority adheres to this test today, it also says that the Commonwealth must demonstrate an “exceedingly persuasive justification” to support a gender-based classification. It is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test.

While terms like “important governmental objective” and “substantially related” are hardly models of precision, they have more content and specificity than does the phrase “exceedingly persuasive justification.” To avoid introducing potential confusion, I would have adhered more closely to our traditional, firmly established, standard that a gender-based classification “must bear a close and substantial relationship to important governmental objectives.”

Justice SCALIA dissented:

Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people.

I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it). Such formulas are

essential to evaluating whether the *new* restrictions that a changing society constantly imposes upon private conduct comport with that "equal protection" our society has always accorded in the past. But in my view the function of this Court is to *preserve* our society's values regarding (among other things) equal protection, not to revise them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted so as to reflect—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts. More specifically, it is my view that when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. The same applies to a practice asserted to be in violation of the post-Civil War Fourteenth Amendment.

The all-male constitution of VMI comes squarely within such a governing tradition. Founded by the Commonwealth of Virginia in 1839 and continuously maintained by it since, VMI has always admitted only men. And in that regard it has not been unusual. For almost all of VMI's more than a century and a half of existence, its single-sex status reflected the uniform practice for government-supported military colleges. Another famous Southern institution, The Citadel, has existed as a state-funded school of South Carolina since 1842. And all the federal military colleges—West Point, the Naval Academy at Annapolis, and even the Air Force Academy, which was not established until 1954—admitted only males for most of their history. Their admission of women in 1976 came not by court decree, but because the people, through their elected representatives, decreed a change. In other words, the tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat. The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law.

To reject the Court's disposition today, however, it is not necessary to accept my view that the Court's made-up tests cannot displace longstanding national traditions as the primary determinant of what the Constitution means. It is only necessary to apply honestly the test the Court has been applying to sex-based classifications for the past two decades. It is well settled that we evaluate a statutory classification based on sex under a standard that lies "between the extremes of rational basis review and strict scrutiny." We have denominated this standard "intermediate

scrutiny" and under it have inquired whether the statutory classification is "substantially related to an important governmental objective."

Intermediate scrutiny has never required a least-restrictive-means analysis, but only a substantial relation between the classification and the state interests that it serves. For example, in *Rostker v. Goldberg*, 453 U.S. 57 (1981), we held that selective-service registration could constitutionally exclude women, because even "assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans."

The Court's most fundamental error is its reasoning that VMI's all-male composition is unconstitutional because "*some* women are capable of all of the individual activities required of VMI cadets," and would prefer military training on the adversative model. This unacknowledged adoption of what amounts to (at least) strict scrutiny is without antecedent in our sex-discrimination cases.

If the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review. It is hard to consider women a "discrete and insular minority" unable to employ the "political processes ordinarily to be relied upon," when they constitute a majority of the electorate. ***United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 n.4 (1938)**. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns. Moreover, a long list of legislation proves the proposition false. See, e.g., Equal Pay Act of 1963; Title VII of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; Women's Business Ownership Act of 1988; Violence Against Women Act of 1994.

The Court's decision today will have consequences that extend far beyond the parties to the litigation. Under the constitutional principles announced and applied today, single-sex public education is unconstitutional. The rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny. No state official in his right mind will buy such a high-cost, high-risk lawsuit by commencing a single-sex program. This is especially regrettable because educational experts in recent years have increasingly come to support the view that substantial educational benefits flow from a single-gender environment, be it male or female, that cannot be replicated in a coeducational setting. Until quite recently, some public officials have attempted to institute new single-sex programs, at least as experiments. In 1991, for example, the

Detroit Board of Education announced a program to establish three boys-only schools for inner-city youth. Today's opinion assures that no such experiment will be tried again.

Commentary and questions: Justice Scalia's prediction that the *VMI* decision would put an end to single-sex public education did not turn out to be true, as you will see in the article below. Why not? If you were asked to defend the single-sex public schools described in this article, what would you argue? How would you distinguish *VMI*?

Single-Gender Public Schools in 5 Charts, EDUCATION WEEK (Nov. 2, 2017)

Single-gender education has long been a pillar in the world of private schools, but in the past decade, several big-city school districts have opened all-boys schools designed to improve academic achievement and social-emotional skills for non-white students. Those efforts have been widely praised for the resources they are bringing to some of society's most disadvantaged children, but also have raised concerns over whether girls of color are being unfairly left behind in this rising trend.

An Education Week Research Center analysis of federal data found that while there are more all-boys public schools in the country, more girls attend single-gender public schools. While U.S. Department of Education data indicate that there are more than 1,000 single-gender public schools, this analysis excludes juvenile-justice facilities and alternative, special education, and vocational schools. Of the schools we examined, most are racially and economically segregated: the students enrolled are overwhelmingly black and Latino and are 1.5 times more likely to qualify for free or low-cost meals than their peers nationwide.

There were 283 single-gender public schools during the 2014-15 school year with Florida and Texas leading the pack with 29 each. Only seven states had no single-gender public schools. More than 75 percent of single-gender public schools are located in urban and rural areas, with only 12 percent located in suburban areas. Of the 283 single-gender public schools nationwide, 170 are all-boys and 113 are all-girls. However, girls outnumber boys in overall enrollment in single-gender public schools, at over 21,000 compared to 17,000. Students who attend public K-12 single-gender schools are overwhelmingly black and Latino: about one in 10 students in these schools are white. That's in sharp contrast to the nation's public schools,

where roughly 50 percent of students are white. Regarding income levels, students at single-gender schools are 1.5 times more likely to qualify for free or low-cost meals than their peers nationwide.

Commentary and questions: We now transition to a theoretical question that Justice Scalia raised in his *VMI* dissent and that was debated by some of the Justices in the recent *Skrmetti* (2025) case that is excerpted below, which involved classifications affecting transgender persons. That theoretical question is this: How should the Supreme Court decide whether a particular group is a "suspect" or "quasi-suspect" class, meaning that laws classifying on that basis are subject to heightened judicial scrutiny (strict scrutiny for suspect classes and intermediate scrutiny for quasi-suspect classes)? In his *VMI* dissent, Justice Scalia argued that sex-based classifications should be subject to rational basis review, rather than heightened scrutiny. He wrote:

> It is hard to consider women a "discrete and insular minority" unable to employ the 'political processes ordinarily to be relied upon,' when they constitute a majority of the electorate. ***United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 n.4 (1938)**. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns. Moreover, a long list of legislation proves the proposition false. See, e.g., Equal Pay Act of 1963; Title VII of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; Women's Business Ownership Act of 1988; Violence Against Women Act of 1994.

The cited *Carolene Products* case involved a federal law that distinguished among different types of skim milk. Unsurprisingly, the Court applied rational basis review and rejected the equal protection claim. But in **footnote 4**—which is the most famous footnote in constitutional law—the Supreme Court (per Justice Stone) distinguished laws that reflect "**prejudice against discrete and insular minorities**." Justice Stone noted that such laws "may be a special condition, **which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities**, and which may call for a correspondingly more searching judicial inquiry."

The classifications subject to strict scrutiny became known as "suspect" classifications, and the classifications subject to intermediate scrutiny became known as "quasi-suspect" classifications. The reasoning in footnote 4 of *Carolene Products* raises the question: Which classifications should be regarded as suspect or quasi-suspect? Should sex remain a quasi-suspect classification? Are there other classifications that you think should be subject to heightened scrutiny? Reflect on these questions as you read Justice Barrett's concurring opinion in *Skrmetti* below, which argued that transgender individuals should not be treated as a quasi-suspect classification, and Justice Sotomayor's dissent, which took the opposite view.

5. Classifications involving transgender individuals

United States v. Skrmetti, 145 S. Ct. 1816 (2025)
(6-3 vote)

*[**Background:** In this 2025 case, the Supreme Court held that a Tennessee law banning certain medical treatments for transgender minors does not violate the Equal Protection Clause of the Fourteenth Amendment. The Court rejected the argument that this state law (referred to as "SB1" in the opinion) discriminates on the basis of sex. The Court also rejected the argument that the state law discriminates against transgender individuals and declined to decide whether intermediate scrutiny would apply to transgender discrimination. Applying rational basis review, the Court upheld the state law. Because the majority did not regard the Tennessee law as drawing a line that is based on transgender status, the majority did not decide whether transgender individuals are a quasi-suspect class. But that issue was addressed by Justice Barrett and Justice Sotomayor in their respective concurring and dissenting opinions, which reached opposite conclusions.]*

Chief Justice Roberts wrote the opinion for the Court, which Justices Thomas, Gorsuch, Kavanaugh, and Barrett joined and which Justice Alito joined in part. Justices Thomas, Barrett, and Alito wrote concurrences. Justice Sotomayor dissented, which Justices Jackson and Kagan joined in relevant part.

Chief Justice ROBERTS wrote the opinion for the Court:

An estimated 1.6 million Americans over the age of 13 identify as transgender, meaning that their gender identity does not align with their biological sex. Some transgender individuals suffer from gender dysphoria, a medical condition characterized by persistent, clinically significant distress resulting from an incongruence between gender identity and biological sex. Left untreated, gender dysphoria may result in severe physical and psychological harms.

In recent years, the number of minors requesting sex transition treatments has increased. This increase has corresponded with rising debates regarding the relative risks and benefits of such treatments. In the last three years, more than 20 States have enacted laws banning the provision of sex transition treatments to minors, while two have enacted near total bans.

Meanwhile, health authorities in a number of European countries have raised significant concerns regarding the potential harms associated with using puberty blockers and hormones to treat transgender minors. In 2020, Finland's Council for Choices in Health Care found that "gender reassignment of minors is an experimental practice" and that "the reliability of the existing studies" is "highly uncertain." That same year, England's National Institute for Health and Care Excellence published reports finding that the evidence for using puberty blockers to treat transgender adolescents is of "very low certainty" and that the long-term risks associated with using hormones to treat adolescents with gender dysphoria are "largely unknown." In 2022, Sweden's National Board of Health and Welfare found that "the evidence on treatment efficacy and safety is still insufficient and inconclusive" and that the "risks" of puberty blockers and hormones "currently outweigh the possible benefits." And in 2023, the Norwegian Healthcare Investigation Board concluded that the "research-based knowledge" for hormonal sex transition treatments for minors is "insufficient," while the "long-term effects are little known."

We are asked to decide whether SB1 is subject to heightened scrutiny under the Equal Protection Clause. We hold it is not. SB1 does not classify on any bases that warrant heightened review.

A

1

On its face, SB1 incorporates two classifications. First, SB1 classifies on the basis of age. Healthcare providers may administer certain medical treatments to individuals ages 18 and older but not to minors. Second, SB1 classifies on the basis of medical

use. Healthcare providers may administer puberty blockers or hormones to minors to treat certain conditions but not to treat gender dysphoria, gender identity disorder, or gender incongruence. Classifications that turn on age or medical use are subject to only rational basis review.

Neither of the above classifications turns on sex. Rather, SB1 prohibits healthcare providers from administering puberty blockers and hormones to *minors* for certain *medical uses*, regardless of a minor's sex.

This Court has never suggested that mere reference to sex is sufficient to trigger heightened scrutiny. Such an approach, moreover, would be especially inappropriate in the medical context. Some medical treatments and procedures are uniquely bound up in sex. The Food and Drug Administration itself recognizes that "[r]esearch has shown that biological differences between men and women (differences due to sex chromosome or sex hormones) may contribute to variations seen in the safety and efficacy of drugs, biologics, and medical devices." Indeed, the agency frequently approves drugs for use by only one sex. In the medical context, the mere use of sex-based language does not sweep a statute within the reach of heightened scrutiny. Under SB1, no *minor* may be administered puberty blockers or hormones to treat gender dysphoria, gender identity disorder, or gender incongruence; minors of *any* sex may be administered puberty blockers or hormones for other purposes.

2

The plaintiffs separately argue that SB1 warrants heightened scrutiny because it discriminates against transgender individuals, who the plaintiffs assert constitute a quasi-suspect class. This Court has not previously held that transgender individuals are a suspect or quasi-suspect class. And this case, in any event, does not raise that question because SB1 does not classify on the basis of transgender status.

We have explained that a State does not trigger heightened constitutional scrutiny by regulating a medical procedure that only one sex can undergo unless the regulation is a mere pretext for invidious sex discrimination. In *Geduldig v. Aiello*, 417 U.S. 484 (1974), for example, we held that a California insurance program that excluded from coverage certain disabilities resulting from pregnancy did not discriminate on the basis of sex. In reaching that holding, we explained that the program did not exclude any individual from benefit eligibility because of the individual's sex but rather "remove[d] one physical condition—pregnancy—from the list of compensable disabilities." Id. at 496 n.20. The California insurance program, we explained, divided potential recipients into two groups: "pregnant women and nonpregnant persons."

Because women fell into both groups, the program did not discriminate against women as a class. By the same token, SB1 does not exclude any individual from medical treatments on the basis of transgender status but rather removes one set of diagnoses—gender dysphoria, gender identity disorder, and gender incongruence—from the range of treatable conditions.

B

The rational basis inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Under this standard, we will uphold a statutory classification so long as there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Where there exist "plausible reasons" for the relevant government action, "our inquiry is at an end." Id. at 313–314.

SB1 clearly meets this standard. Tennessee determined that administering puberty blockers or hormones to a minor to treat gender dysphoria, gender identity disorder, or gender incongruence "can lead to the minor becoming irreversibly sterile, having increased risk of disease and illness, or suffering from adverse and sometimes fatal psychological consequences." Tenn. Code Ann. § 68–33–101(b). It further found that it was "likely that not all harmful effects associated with these types of medical procedures when performed on a minor are yet fully known, as many of these procedures, when performed on a minor for such purposes, are experimental in nature and not supported by high-quality, long-term medical studies." Ibid. Tennessee determined that "minors lack the maturity to fully understand and appreciate the life-altering consequences of such procedures and that many individuals have expressed regret for medical procedures that were performed on or administered to them for such purposes when they were minors." § 68–33–101(h). At the same time, Tennessee noted evidence that discordance between sex and gender "can be resolved by less invasive approaches that are likely to result in better outcomes for the minor." § 68–33–101(c). SB1's age- and diagnosis-based classifications are plainly rationally related to these findings and the State's objective of protecting minors' health and welfare. § 68–33–101(a).

We also decline the plaintiffs' invitation to second-guess the lines that SB1 draws. It may be true, as the plaintiffs contend, that puberty blockers and hormones carry comparable risks for minors no matter the purposes for which they are administered. But it may also be true, as Tennessee determined, that those drugs carry greater risks when administered to treat gender dysphoria, gender identity disorder, and gender incongruence. We afford States wide discretion to pass legislation in areas

where there is medical and scientific uncertainty. The fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.

This case carries with it the weight of fierce scientific and policy debates about the safety, efficacy, and propriety of medical treatments in an evolving field. The voices in these debates raise sincere concerns; the implications for all are profound. The Equal Protection Clause does not resolve these disagreements. Nor does it afford us license to decide them as we see best. Our role is not to judge the wisdom, fairness, or logic of the law before us, but only to ensure that it does not violate the equal protection guarantee of the Fourteenth Amendment. Having concluded it does not, we leave questions regarding its policy to the people, their elected representatives, and the democratic process.

Justice BARRETT concurred, joined by Justice Thomas:

Because the Court concludes that Tennessee's Senate Bill 1 does not classify on the basis of transgender status, it does not resolve whether transgender status constitutes a suspect class. I write separately to explain why, in my view, it does not.

As a practical necessity, most legislation classifies for one purpose or another. Laws distribute benefits that advantage particular groups (like in-state tuition for residents), draw lines that might seem arbitrary (like income thresholds for means-tested benefits), and set rules for specific categories of people (like a particular profession or age group). Such classifications do not usually render a law unconstitutional. Instead, as a general matter, laws are presumed to be constitutionally valid, and a legislative classification will be upheld so long as it bears a rational relation to some legitimate end.

There are only a few exceptions to this rule: classifications based on race, sex, and alienage. Racial and ethnic classifications receive strict scrutiny; to survive a constitutional challenge, they must be "narrowly tailored" to serve "compelling governmental interests." Classifications based on alienage are subject to similarly close scrutiny.[1] And laws distinguishing between men and women receive intermediate scrutiny; to survive a constitutional challenge, they must be "substantially related" to achieving an "important governmental objective."

> [1] Alienage is a unique category. Because of Congress's broad authority over immigration, we have treated it as a suspect class only vis-à-vis the States.

Beyond these categories, the set has remained virtually closed. Indeed, this Court has not recognized any new constitutionally protected classes in over four decades,

and instead has repeatedly declined to do so. So in urging us to recognize transgender status as a suspect classification, the plaintiffs face a high bar.

To determine whether a group constitutes a "suspect class" akin to the canonical examples of race and sex, we apply a test derived from the famous footnote 4 in *Carolene Products*. We consider whether members of the group in question exhibit obvious, immutable or distinguishing characteristics that define them as a discrete group, whether the group has, as a historical matter, been subjected to discrimination, and whether the group is a minority or politically powerless. The test is strict, as evidenced by the failure of even vulnerable groups to satisfy it: We have held that the mentally disabled, the elderly, and the poor are not suspect classes. In fact, as far as I can tell, we have never embraced a new suspect class under this test. Our restraint reflects the principle that when social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

The Sixth Circuit held that transgender individuals do not constitute a suspect class, and it was right to do so. To begin, transgender status is not marked by the same sort of obvious, immutable, or distinguishing characteristics as race or sex. The plaintiffs here, for instance, began to experience gender dysphoria at varying ages. Some transgender individuals "detransition" later in life. Accordingly, transgender status does not turn on an immutable characteristic.

Nor is the transgender population a discrete group, as our cases require. The World Professional Association for Transgender Health states that the term "'transgender' can describe 'a huge variety of gender identities and expressions.'" Underscoring the point, plaintiffs' counsel acknowledged at oral argument that "there are people who fall within a transgender identity who may not fit into a binary identity." The boundaries of the group, in other words, are not defined by an easily ascertainable characteristic that is fixed and consistent across the group.

Finally, holding that transgender people constitute a suspect class would require courts to oversee all manner of policy choices normally committed to legislative discretion. The question of how to regulate a medical condition such as gender dysphoria involves a host of policy judgments that legislatures, not courts, are best equipped to make. Beyond the treatment of gender dysphoria, transgender status implicates several other areas of legitimate regulatory policy—ranging from access to restrooms to eligibility for boys' and girls' sports teams. To be sure, an individual law "inexplicable by anything but animus" is unconstitutional. *Trump v. Hawaii*, 585 U.S. 667, 706 (2018). But legislatures have many valid reasons to make policy in these

areas, and so long as a statute is a rational means of pursuing a legitimate end, the Equal Protection Clause is satisfied.

The conclusion that transgender individuals do not share the obvious, immutable, or distinguishing characteristics of a discrete group is enough to demonstrate that transgender status does not define a suspect class. But the second factor—whether the group has, as a historical matter, been subjected to discrimination—also poses a problem for the plaintiffs' argument. In addressing this factor, the plaintiffs assume that a history of private discrimination may satisfy this condition. This assumption is mistaken. For purposes of the Fourteenth Amendment, the relevant question is whether the group has been subject to a longstanding pattern of discrimination *in the law*. In other words, we ask whether the group has suffered a history of *de jure* discrimination.

Existing suspect classes had such a history. Most obviously, "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving v. Virginia*, 388 U.S. 1, 10 (1967). In recognizing sex as a suspect class, we similarly emphasized that women faced more than a century's worth of discrimination in the law. And in protecting alienage, we underscored the many state laws that discriminated on that ground, typically by targeting individuals of a particular national origin.

The Fourteenth Amendment constrains state action, not private conduct. Focusing the inquiry on *de jure* state action would also clarify the test for political powerlessness, which is another factor we have used to determine whether a classification is suspect.

Because the litigants assumed that evidence of private discrimination could suffice for the suspect-class inquiry, they did not thoroughly discuss whether transgender individuals have suffered a history of de jure discrimination as a class. And because the group of transgender individuals is an insufficiently discrete and insular minority, the question is largely academic. In future cases, however, I would not recognize a new suspect class absent a demonstrated history of de jure discrimination.

Justice SOTOMAYOR dissented, joined by Justice Jackson and by Justice Kagan in relevant part:

The level of constitutional scrutiny courts apply in reviewing state action is enormously consequential. Where a state law neither "proceeds along suspect lines nor infringes fundamental constitutional rights," reviewing courts generally uphold a challenged law under the Equal Protection Clause so long as "any reasonably conceivable state of facts ... could provide a rational basis for the classification." *FCC*

v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). That lenient standard, which the majority erroneously applies today, demands hardly more than a cursory glance at the State's reasons for legislating.

This Court has long recognized, however, that a more "searching" judicial review is warranted when the rights of "discrete and insular minorities" are at stake. *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n.4 1234 (1938). Because such minorities often face systemic barriers to vindicating their interests through the political process, courts have a comparative advantage over the elected branches in safeguarding their rights. Ibid. Such judicial scrutiny is at its apex in reviewing laws that classify on the basis of race and national origin. States may not enact laws that classify on those bases unless they can pass through the "daunting two-step examination known in our cases as 'strict scrutiny.'" *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 206 (2023).

For nearly half a century, the Court has applied a different standard, known as intermediate scrutiny, to all statutory classifications that distinguish between males and females. States can differentiate on the basis of sex only to "serve important governmental objectives" and only if the sex classification is "substantially related" to the achievement of those objectives. The standard is an intermediate one because it strikes an important balance. On the one hand, there are some genuine physical differences between men and women, so not all sex-based legislation is discriminatory or constitutionally proscribed. On the other hand, sex-based legislation always presents a serious risk of invidious discrimination that relies on overbroad generalizations about the different talents, capacities, or preferences of males or females. Intermediate scrutiny is the core judicial tool to differentiate innocuous sex-based laws from discriminatory ones.

SB1 plainly classifies on the basis of sex, so the Constitution demands intermediate scrutiny. By depriving adolescents of hormones and puberty blockers only when such treatment is "inconsistent with" a minor's sex, the law necessarily deprives minors identified as male at birth of the same treatment it tolerates for an adolescent identified as female at birth (and vice versa). The Court hinges its conclusion to the contrary on the by-now infamous footnote 20 of *Geduldig v. Aiello*, 417 U.S. 484 (1974), which declared that discrimination on the basis of pregnancy is not discrimination on the basis of sex. *Geduldig* was "egregiously wrong" when it was decided, both "[b]ecause pregnancy discrimination is inevitably sex discrimination" and because discrimination against women is so "tightly interwoven with society's beliefs about pregnancy and motherhood." *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 56–57 (2012) (Ginsburg, J., dissenting). That the Court today extends

Geduldig's logic for the first time beyond pregnancy and abortion is more troubling still.

That SB1 discriminates on the basis of transgender status is yet another reason it must be subject to heightened scrutiny. Nor should there be serious dispute that transgender persons bear the hallmarks of a quasi-suspect class. Transgender people have long been subject to discrimination in healthcare, employment, and housing, and to rampant harassment and physical violence. Those searching for more evidence of *de jure* discrimination against transgender individuals need look no further than the present. The Federal Government, for example, has started expelling transgender servicemembers from the military and threatening to withdraw funding from schools and nonprofits that espouse support for transgender individuals.

Transgender persons, moreover, have a defining characteristic (incongruence between sex and gender identity) that plainly bears no relation to the individual's ability to perform or contribute to society. As a group, the class is no more large, diverse, and amorphous than most races or ethnic groups, many of which similarly include individuals with a huge variety of identities and experiences. As evidenced by the recent rise in discriminatory state and federal policies and the fact that transgender people are underrepresented in every branch of government, moreover, the class lacks the political power to vindicate its interests before the very legislatures and executive agents actively singling them out for discriminatory treatment. In refusing to say as much, the Court today renders transgender Americans doubly vulnerable to state-sanctioned discrimination.[15]

> [15] Of course, regardless of whether transgender persons constitute a suspect class, courts must strike down any law that reflects the kind of "irrational prejudice" that this Court has recognized as an illegitimate basis for government action. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985); see also ante, at —— (opinion of BARRETT, J.) (recognizing that "an individual law 'inexplicable by anything but animus' is unconstitutional").

Commentary and questions: We learned a lot about litigation strategy when we studied RBG's efforts, as the founding director of the ACLU's Women's Rights Project, to convince the all-male Supreme Court to apply heightened scrutiny to laws that discriminate based on sex. RBG took a cautious approach and started out with plaintiffs who would be the most sympathetic to her audience: men. The ACLU's

strategy in *Skrmetti* was less cautious, both in choosing to challenge the Tennessee law and in choosing to ask the Supreme Court to hear the case after the plaintiffs lost in the court of appeals. In the article below—which is an interview with Brianna Wu, a trans woman—Wu argues that it was predictable that the Court would allow states to restrict medical treatments for transgender minors and that the *Skrmetti* decision will have ripple effects that set back the rights of transgender individuals in other contexts. Although Monday morning quarterbacking may seem unfair, such concerns were aired at earlier stages too (not just after the plaintiffs lost in the Supreme Court). Imagine that you had been asked at the outset to advise the ACLU on big picture strategy. Would you encourage them to bring this case? Or might you advise them to challenge other types of laws involving transgender persons, with the view that other fact patterns might get a more sympathetic response from the swing Justices? To be fair to the ACLU, I should tell you that they were trying to build on the surprising victory of the LGBTQ advocates in *Bostock v. Clayton County*, 590 U.S. 644 (2020), which in a 5-4 decision by Justice Gorsuch held that firing people because they are transgender is a violation of Title VII of the Civil Rights Act of 1964, which makes it unlawful for an employer to fire or refuse to hire an individual "because of such individual's … sex." 42 U.S.C. § 2000e–2(a)(1). However, *Bostock* involved the interpretation of a federal statute (Title VII) and did not address the Equal Protection Clause.

Adam B. Kushner, A losing bet, N.Y. TIMES, June 19, 2025

For years, the L.G.B.T.Q. movement racked up a slate of legal victories around marriage, military service and employment rights. But a political backlash has been brewing, and yesterday brought a profound setback: The Supreme Court ruled that states can bar doctors from providing puberty blockers and cross-sex hormones to minors who identify as transgender.

It wasn't inevitable. The Supreme Court case turned on a particular argument: The plaintiffs, including three young Tennesseeans, said that when the state stopped them from taking these medications, it violated their constitutional rights. But the case was a legal and political gamble. It was rooted in uncertain science and contested ideas about sex and gender that most voters didn't grasp or support, Nicholas Confessore reports today in The Times Magazine.

The Biden administration, the A.C.L.U. and L.G.B.T.Q. groups threw their weight behind the case, United States v. Skrmetti. It was "one of the biggest mistakes in the

history of trans activism," Brianna Wu, a trans woman who serves on the board of Rebellion PAC, a Democratic political-action committee, told Nick. In today's newsletter, I asked Wu to explain why.

This case is the legal culmination of a larger cultural movement. What is that?

Many L.G.B.T.Q. activists believe that gender identity should supplant older understandings of biological sex in the public sphere. In their view, one that emerged in recent decades from academia and left-wing political circles, people have the right to determine their own gender. And that determination should guide what appears on your driver's license, what bathroom you use, what sports team you join. That goes for children, too.

When did that idea take hold?

Efforts to implement these concepts as federal policy took shape during the Obama administration. Next, in 2020, the Supreme Court ruled that employees could not be fired for being gay or transgender. Activists believed that gave them a firmer legal basis to seek expanded protections for gender identity. The Biden administration instructed federal agencies to interpret old civil rights laws against sex discrimination to include the newer concept of gender identity.

Then came the backlash. I remember an ad in the closing days of the 2024 presidential campaign that said Kamala Harris was "for they/them" and that Donald Trump was "for you."

The ads spoke to a worry among some voters that trans activists were not simply asking for acceptance but demanding that other people reimagine their own identities. Once in office, Trump's attacks went further: His policies express the view that being trans is a lie. Yet after the election, some polling showed that even most Democrats opposed allowing minors to get puberty blockers and cross-sex hormones.

That's what yesterday's ruling was about.

Right. Americans generally support protecting trans people from discrimination in areas like housing, the workplace and public spaces. But in Skrmetti, the court was asked to consider a more fraught question: Do minors have a constitutional right to treatments that halt and redirect their adolescence? A majority of the Supreme Court justices—six of the nine—said they don't.

OK, but the justices aren't supposed to concern themselves with public opinion. Why was this a risky legal argument?

The Supreme Court has never ruled that transgender status entitles people to heightened constitutional protection, the way, say, that race or nationality do. To many experts—and even some L.G.B.T.Q. activists—it was unlikely the court would do so in a case involving medical treatments for minors.

Why not?

A big reason is that the scientific debate behind gender-affirming treatments has become so heated. Relatively few American adolescents identify as transgender; even fewer seek medical care for gender dysphoria, the distress some people feel when their physical bodies do not align with their sense of gender. When judged against the strictest scientific standards, existing studies have not shown that gender-affirming treatments for adolescents reliably deliver the intended benefits, such as improved mental health. That's why some countries, such as Britain, have restricted access to these treatments.

But many doctors still prescribe blockers and hormones.

Influential groups like the World Professional Association for Transgender Health, which issues guidelines on pediatric gender medicine, assert that low-certainty studies, combined with "clinical consensus"—the real-world experience of doctors who have seen these treatments work—are a valid basis for prescribing them.

Will the Skrmetti case affect other trans rights?

Experts tell me it's likely. If the court doesn't believe that banning these treatments for minors violates the Constitution, it may hold that banning them for adults doesn't, either. The court's 2020 decision protecting trans and gay people from employment discrimination seems safe for now. But Skrmetti probably improves Trump's chances of banning trans people from the military.

West Virginia v. B.P.J., 145 S. Ct. ___ (2026)
(6-3 vote)

*[**Background:** West Virginia and Idaho laws prohibit male students from playing on female sports teams and specify that sex is determined by biology. B.P.J. and Hecox, biological males who identify as female, claimed (as relevant here) that these state laws violate the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court rejected that argument. It held that in the specific context of sports, the sex-based classification (separate teams for males and females) survives intermediate scrutiny. And, as in Skrmetti, the Court held that the state laws do not unconstitutionally discriminate against transgender individuals.]*

Justice Kavanaugh wrote the opinion for the Court, joined by Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Barrett. Justice Sotomayor dissented in relevant part, joined by Justices Kagan and Jackson.

Justice KAVANAUGH wrote the opinion for the Court:

Title IX of the Education Amendments Act of 1972 transformed American sports and American life. Enacted in 1972, that landmark law promoted equal opportunity for female student-athletes and has facilitated the extraordinary growth of women's and girls' sports over the past 54 years.

To provide equal opportunity for female athletes, schools do not merely maintain, for example, one soccer team, one basketball team, one ice hockey team, and one lacrosse team that are equally open to female and male athletes. That approach would deny equal opportunity to female athletes because, as all agree, females and males have inherent physical differences relevant to athletic performance. The differences include, among other things, height, weight, strength, speed, endurance, and jumping ability. Therefore, in contact sports, forcing female athletes to compete against males can create significant safety risks. And in virtually all competitive sports, forcing female athletes to compete against males can undermine competitive fairness.

To ensure equal opportunity for female athletes, schools therefore typically maintain separate women's and men's sports teams. Women's teams compete against other women's teams, and men's teams compete against other men's teams.

In recent years, some biological males who identify as female have sought to play on women's or girls' sports teams. That modern development has triggered national and international concerns about safety and competitive fairness for female athletes, as

well as related worries about preserving equal opportunity for women and girls to play sports. For those reasons, 27 States—as well as the International Olympic Committee, the United States Olympic and Paralympic Committee, and the NCAA—have banned all biological males from competing in women's and girls' sports.

These cases concern two of those state laws, from West Virginia and Idaho. The question before the Court is: Under Title IX and the Equal Protection Clause of the Fourteenth Amendment, may schools maintain women's and girls' sports for biological females? In other words, may schools determine eligibility for women's and girls' sports based on biological sex? The answer is yes.

III

A

B. P. J. and Hecox contend that the States violated the Equal Protection Clause by maintaining female sports teams for biological females. We respectfully disagree.

Under this Court's equal protection precedents, laws that classify by sex are subject to what is known as intermediate scrutiny: Sex-based classifications are permissible only when the classification is substantially related to achieving an important government objective.

The West Virginia and Idaho laws authorize separate female and male sports teams. And the laws limit women's and girls' sports teams to biological females. In doing so, the laws make a sex-based classification that triggers intermediate scrutiny.

So the equal protection questions become: What are the States' interests in maintaining separate teams for males and females, and in limiting female teams to biological females? And is the States' sex-based classification—that is, the limitation of women's and girls' sports teams to biological females—substantially related to those interests?

The States start with the undisputed proposition that biological males generally possess inherent physical advantages in sports—in height, weight, strength, speed, endurance, jumping ability, and the like. Therefore, the States say, limiting women's and girls' sports to biological females (i) helps prevent serious physical injuries to female athletes and (ii) preserves opportunities for female athletes to fairly compete and succeed. And more broadly, the States articulate the objective of promoting "equal athletic opportunities for the female sex"—that is, to provide opportunities for biological women and girls to compete only against other biological women and girls.

With respect to safety, the States say that allowing biological males to play on women's sports teams puts women and girls at significant risk of sometimes severe injuries. The safety risks are at their apex in contact sports, such as soccer, basketball, field hockey, lacrosse, and ice hockey, among others. (Anyone who thinks that those women's and girls' sports, and other sports like them, are not contact sports has not witnessed a game recently.) And safety concerns also exist in ostensibly non-contact sports, such as volleyball, where spiked balls can cause serious injuries, and softball, where line drives can similarly cause significant harm.

As to competitive fairness, the States contend that allowing biological males to play women's and girls' sports would put female athletes at a debilitating disadvantage. Again, sports are generally zero sum. Every biological male who makes the team takes a roster spot from a female athlete. Every biological male who earns playing time reduces the playing time of a female athlete. Every biological male who starts takes a starting position from a female athlete. Every biological male who wins a race takes the gold medal away from a female athlete. And so on. Even if only one or a few males were to play on a women's or girls' team, that would still place specific individual female athletes at a significant competitive disadvantage.

Based on all of the above, the States argue—and we agree—that the interests in safety and competitive fairness are important for purposes of equal protection analysis. And the States' sex-based classification—limiting women's and girls' sports to biological females—is substantially related to those interests. Therefore, schools may maintain women's and girls' sports for biological females. In other words, schools may determine eligibility for women's and girls' sports based on biological sex.

B

The plaintiffs agree with the States that, consistent with the Equal Protection Clause, the States may prohibit *most* biological males from women's and girls' teams. The plaintiffs' equal protection argument is narrower. They contend that safety and competitive fairness, while sufficient reasons to exclude most biological males, do not justify excluding a relatively small subclass of biological males—namely, those biological males who identify as female and have taken puberty blockers or hormones.

But none of this Court's gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance. Here, when analyzing the relationship between the classification based on biological sex and the asserted interests, the sports

context is again crucial. Sports are different from, say, a typical employment or educational opportunity where equal protection often may require that the government generally treat an individual without regard to the individual's sex. In the sports context, by contrast, everyone agrees that the States may maintain separate women's and men's teams—in other words, that the States may make distinctions based on sex—because of the inherent physical differences between women and men.

And importantly, everyone also agrees that States, in preserving separate sports teams for female athletes, need not account for the individual physical capabilities of (and differences among) every biological male who might want to play on a women's or girls' team. To spell that out: Not *every* biological male athlete is bigger, stronger, faster, or otherwise more athletically able than every biological female athlete. Some percentage of biological males who identify as *male* possess physical and athletic capabilities that fall within (or below) the range of typical female physical and athletic capabilities. But the plaintiffs acknowledge that States may still exclude those biological males from women's and girls' sports, given the *general* physical differences between males and females.

And the Equal Protection Clause does not prohibit the States from applying that same principle to all biological males, including those who identify as female. In the distinctive sports context, in other words, the States may treat all biological males the same and treat all biological females the same, given the inherent physical differences between biological males and biological females. In short, States are not required to conduct an individual-by-individual comparison of the physical and athletic capabilities of all biological males in order to satisfy intermediate scrutiny.

Especially in the sports context, moreover, an enormous practical and administrability problem would arise if courts suddenly had to make such individualized exemptions. How would courts draw those lines? Individuals come in all shapes and sizes, with different height, weight, muscle mass, heart capacity, lung capacity, strength, speed, endurance, jumping ability, and so on. Particularly in the sports context, determining the effects of the puberty blockers and hormones taken by transgender athletes—and then comparing each of those transgender athletes' abilities to those of other individual biological males and individual biological females in the relevant sport—would be an almost impossible task for a judge to perform on an equitable basis. The legislatures and the schools are better equipped—and under the Constitution, are the more appropriate entities—to assess the competing medical and scientific considerations and draw appropriate lines. Of course, no line that the States draw will satisfy everyone. But the Judiciary is not the proper institution to make what would often be arbitrary and highly intrusive athlete-by-athlete assessments.

And if those kinds of ad hoc exemptions based on physical capacity were constitutionally required, would exemptions also be required for biological males who still identify as male but contend that they, too, are no taller, no stronger, no faster than the typical females in their chosen sport? Would those males also be entitled to play on a women's or girls' team? If not, why not?

We need not belabor the point. In the sports context, starting down the road of judicially managed individualized exemptions based on physical capabilities of individual athletes could fundamentally undermine women's and girls' sports—especially if the number of biological males who seek to play women's and girls' sports increases significantly over time. The questions would be endless (and bitter) and yield few, if any, principled answers. The Equal Protection Clause and this Court's precedents do not require such a judicial quagmire.

The plaintiffs also argue that the States' laws unconstitutionally discriminate against transgender individuals—specifically, biological males who identify as female. That argument, too, is unavailing. To begin, under this Court's decision in *Skrmetti*, the laws do not classify based on gender identity or transgender status. The laws classify on the basis of biological sex. By contrast, if a school had a co-ed sports team but prohibited all transgender individuals from participating on the team, that would be a distinct transgender classification.

In these cases, we need not definitively resolve whether rational basis review or intermediate scrutiny applies to transgender classifications. In either event, the classification here readily satisfies rational basis review or intermediate scrutiny for the reasons already explained at some length above. The States' interests in ensuring safety and competitive fairness amply justify the States in maintaining women's and girls' sports for biological females. Under the Equal Protection Clause, therefore, schools may determine eligibility for women's and girls' sports based on biological sex.

CHAPTER 7. FUNDAMENTAL RIGHTS AND THE RIGHT TO TRAVEL

A. FUNDAMENTAL RIGHTS

1. Overview

Like laws that discriminate on the basis of race, laws that deprive people of a **fundamental right** are subject to **strict scrutiny**. As you know, strict scrutiny requires the government to show that the law serves a compelling interest and that it is narrowly tailored to advance that interest. As you also know, the government nearly always loses when strict scrutiny applies.

For that reason, determining *which rights* should count as fundamental—and *what methodology* the Supreme Court should use to identify a fundamental right—is one of the most controversial areas of constitutional law.

There are two big categories of fundamental rights, only one of which is controversial. First, fundamental rights include the rights that are **enumerated** (aka written) in the Constitution, such as the First Amendment right to free speech and the Fifteenth Amendment right to vote. Treating enumerated rights as fundamental is not controversial. After all, if a right was important enough to be written into the Constitution, it was meant to get special protection.

The controversial category involves **unenumerated** rights. For more than a century, the Supreme Court has issued decisions announcing that various rights are fundamental even though they are not specifically identified as rights in the Constitution. For example, the Court has held that there is a fundamental right to use contraceptives, even though the Constitution doesn't say anything about contraceptives. Likewise, the Court has held that the right to marry is fundamental, even though the Constitution doesn't say anything about marriage.

You may be wondering: Why can the Court decide that some rights are fundamental if they are not written into the Constitution? Isn't the Court supposed to be

interpreting the Constitution's text? If these questions crossed your mind, good for you! You are putting your finger on why this area of law is so controversial.

The Supreme Court has tried to ground the fundamental rights doctrine in the Constitution's text. The Court has said that the "**liberty**" protected by the **Due Process Clauses** of the Fifth and Fourteenth Amendments includes the rights that the Court has described as fundamental (marriage, contraceptives, etc.). But that reasoning raises more questions than it answers.

First, think back to what we learned about due process in Chapter 6. In general, governments are allowed to take away people's liberties as long as they provide fair procedures for doing so (such as a hearing and a fair judge). The Due Process Clauses prevent the government from depriving a person of liberty or property "without due process of law," and the term "process" ordinarily means "procedure." The fundamental rights doctrine is quite different. If the Supreme Court deems a liberty interest (such as the right to marry) to be fundamental, then strict scrutiny applies, which means the government needs a compelling reason to take away that liberty. That's a substantive requirement, rather than just a procedural issue. Imagine, for example, a state law that says a parent who is convicted of any felony (including nonviolent drug offenses) will lose child custody. If the parent challenges that state law on **procedural** due process grounds, the parent could argue that the government needs to provide a hearing before child custody can be terminated. But the parent does not simply want a hearing; the parent wants to argue that the government needs a much better reason for terminating custody, such as evidence that a parent abused or neglected the child. That's a **substantive** argument, not a procedural claim. The parent gets to make that substantive argument because the Supreme Court has long held that a parent's right to child custody counts as a **fundamental right**. Because the Supreme Court put parental custody into the fundamental rights category, the government has to have a compelling interest for terminating parental custody and also must show that it has no alternatives that would accomplish that compelling interest (the strict scrutiny test). And because those legal issues are substantive rather than procedural, the fundamental rights doctrine got tagged with the awkward name **substantive due process**.

The scholar John Hart Ely mocked the phrase "substantive due process" as an oxymoron akin to "green pastel redness" in his 1980 book *Democracy and Distrust*. But the criticisms of the doctrine go well beyond the awkward vocabulary. Critics charge that when the Supreme Court announces unenumerated fundamental rights, the unelected Justices are simply substituting their views about what liberties are important for the views of people's elected representatives, such as the legislatures

of the federal and state governments. In other words, the accusation is that the Justices are engaged in policymaking (not their job) rather than interpreting the Constitution.

As you will see in point 2 below, substantive due process doctrine got off to an especially rocky start during what is known as the ***Lochner* era**, which took its name from the Court's 1905 decision in *Lochner*. The *Lochner* era is notorious because the Justices struck down hundreds of state and federal laws that were designed to protect workers—such as minimum wage and maximum hours laws for sweatshop industries—on the theory that those laws infringed on what the Court described as fundamental **economic liberties**, such as the **freedom of contract**. The Supreme Court repudiated those *Lochner* era cases in *West Coast Hotel* (1937), and no Justice has since suggested that the Court should revive the notion of fundamental economic liberties. But as you will see in point 3, the Court has continued to treat various **personal liberties** (marriage, contraceptives, etc.) as fundamental rights. Critics have continued to charge that by doing so, the Justices again imposed their policy preferences on the country. As you will see, the Justices in the ***Dobbs* (2022)** majority echoed this concern when, overruling *Roe v. Wade* (1973), they held that abortion is not a fundamental right.

2. Unenumerated economic rights (the *Lochner* era)

Lochner v. New York, 198 U.S. 45 (1905)
(5-4 vote)

*[**Background:** Lochner was convicted for allowing his employee, a baker, to work more than 60 hours per week, in violation of a New York law that set maximum hours for bakers and certain other categories of workers. The Supreme Court declared the state law unconstitutional on the ground that it violated the "freedom of contract" that the Court deemed part of the liberty that is protected by the Due Process Clause of the Fourteenth Amendment. Four Justices dissented. The dissent by Justice Holmes that is excerpted below—which was essentially adopted by the Court in West Coast Hotel v. Parish, 300 U.S. 79 (1937)—is quite famous.]*

Justice PECKHAM wrote the opinion for the Court:

The New York statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, 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.

Justice HOLMES, dissenting:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The 14th Amendment does not enact Mr. Herbert Spencer's *Social Statics*.

Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But the Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even

shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Adkins v. Children's Hospital of the District of Columbia, 261 U.S. 525 (1923)
(5-3 vote with Justice Brandeis recused)

*[**Background:** Adkins is another Lochner era case. The challenged federal law set a minimum wage for women and children in the District of Columbia. The Supreme Court declared that federal law unconstitutional on the ground that it violated the freedom of contract that the Court deemed part of the liberty protected by the Due Process Clause of the Fifth Amendment. Chief Justice Taft and Justices Holmes and Sanford dissented.]*

Justice SUTHERLAND wrote the opinion for the Court:

The federal statute now under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment. That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause is settled by the decisions of this court and is no longer open to question. Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining.

There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.

This law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, irrespective of the ability of his business to sustain the burden. Within the limits of the minimum sum, he is precluded, under penalty of fine and imprisonment, from adjusting compensation to the differing merits of his employees. It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but

one-half of the problem. The law is not confined to the great and powerful employers but embraces those whose bargaining power may be as weak as that of the employee. It takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without adequate means of livelihood. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

Chief Justice TAFT, dissenting:

The boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty under the Fifth and Fourteenth Amendments to the Constitutions is not easy to mark. Legislatures in limiting freedom of contract between employee and employer by a minimum wage proceed on the assumption that employees are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. The evils of the sweating system and of the long hours and low wages which are characteristic of it are well known. Now, I agree that it is a disputable question in the field of political economy how far a statutory requirement of maximum hours or minimum wages may be a useful remedy for these evils, and whether it may not make the case of the oppressed employee worse than it was before. But it is not the function of this court to hold congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound.

West Coast Hotel v. Parrish, 300 U.S. 379 (1937)
(5-4 vote)

*[**Background:** This famous case repudiated the Lochner era cases. The challenged state law set a minimum wage for women and minors. Overruling Adkins, the Supreme Court upheld the state law.]*

Chief Justice Hughes wrote the opinion of the Court, joined by Justices Brandeis, Stone, Roberts, and Cardozo. Justices Sutherland, Van Devanter, McReynolds, and Butler dissented.

Chief Justice HUGHES wrote the opinion for the Court:

The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was $14.50 per week of 48 hours. The hotel challenged the state law as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The hotel relied on our decision in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), which held the federal law setting a minimum wage in the District of Columbia invalid under the due process clause of the Fifth Amendment. Our conclusion is that *Adkins v. Children's Hospital* should be, and it is, overruled.

The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the states, as the due process clause invoked in the *Adkins* case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty.

There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.

The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees, and the public. The dissent of Mr. Justice Holmes in the *Adkins* Case is pertinent: "This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. In short, the law in its character and operation is like hundreds of so-called police laws that have been upheld."

The Legislature of the state was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The Legislature was entitled to adopt measures to reduce the evils of the 'sweating system,' the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The Legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many states evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment.

Commentary: Here is some historical trivia. As you may remember from Chapter 2, the *Lochner* Court not only invalidated federal and state laws on substantive due process grounds; it also invalidated major parts of FDR's New Deal legislation as exceeding Congress's commerce power. Frustrated with the Justices who were interfering with his efforts to pull the nation out of the Great Depression, FDR unveiled his "Court-packing" plan in February 1937. If enacted, that legislation would have given FDR the power to appoint an additional Justice to the Supreme Court, up to a maximum of six, for every member of the court over the age of 70 years and 6 months. But in March 1937, the Supreme Court issued its decision in *West Coast Hotel*, which by a 5-4 vote overruled *Adkins* and emphasized that the legislatures get to decide how to address economic problems. In *West Coast Hotel*, Justice Owen J. Roberts switched sides and voted to overrule the *Lochner* era approach. His vote prompted a famous quip describing his change of heart as "**the switch in time that saved nine**." That quip suggested that Justice Roberts switched sides for political reasons—to eliminate the justification for FDR's plan to increase the number of Justices—rather than because he had reconsidered the legal rationale for the earlier

cases. But later historical research has shown that this assumption was untrue: The memos of Supreme Court proceedings that eventually were made public showed that Owen J. Roberts had changed his mind before, rather than after, the Court-packing plan was announced. (I confess to some bias because Owen J. Roberts went to my high school.)

3. Unenumerated personal rights

The *Lochner* era is almost universally regarded as overreaching by unelected Justices. Nonetheless, the Supreme Court has continued to treat various **personal liberties** as fundamental rights even though they are not enumerated in the Constitution's text. As of today, that list includes the right to marry (including same-sex marriage), to have children (meaning no forced sterilization), to direct the education and upbringing of one's children, to use contraceptives, and to be free of certain invasions of bodily integrity (such as forced stomach-pumping). The Supreme Court has rejected arguments that other personal liberties should be deemed fundamental, such as the right to physician-assisted suicide. Until recently, the list of fundamental rights included abortion, but the Supreme Court overruled *Roe v. Wade* (1973) in *Dobbs* (2022).

How does the Supreme Court decide whether a particular personal liberty qualifies as a fundamental right? The Court has said that fundamental rights are "**those personal activities and decisions that are so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty**," that they qualify as fundamental liberties under the due process clauses.

What exactly does that bolded language mean? No one really knows. And **what methodology** should the Supreme Court use to decide which personal activities and decisions qualify as fundamental rights? Again, there is no consensus. On the contrary, that question of methodology is one of the most controversial areas of constitutional law.

A central controversy is over whether the Supreme Court should look primarily to **history** to try to figure out which rights would have been regarded as fundamental when the Fifth Amendment and/or Fourteenth Amendment were ratified—an approach that is often described as **originalism**—or whether the Supreme Court should consider **evolving societal values** to try to figure out which rights should

count as fundamental—an approach that is sometimes described as the **living Constitution**. As you might imagine, both approaches have pitfalls and risks.

For example, if the Court relies too much on history, it may carry forward historical practices (such as school segregation) that have since become widely regarded as abhorrent. Also, a big question is whether judges and lawyers—who are not historians—are even equipped to figure out what was happening at the time the Constitution and Fourteenth Amendment were ratified. Furthermore, even assuming that judges and lawyers have the tools to identify historical practices accurately, what level of generality should be used to decide if such historical evidence is relevant to the interpretation of the Constitution today, given the massive real-world changes in our society that have since occurred? In Chapter 8, we will return to these questions and explore more closely the debates about when and how the Supreme Court should use history as a tool of constitutional interpretation.

Reliance on evolving social values to identify fundamental rights likewise has pitfalls and risks. If the Court relies on its perception of evolving societal values, there is a high risk that unelected Justices will substitute their own views about which values are important for the decisions made by the people's elected representatives. As we have seen, the *Lochner* era cases became notorious for exactly that reason. But critics argue that the Supreme Court's announcement of fundamental **personal** liberties is just as bad as the Court's invention of fundamental economic liberties during the *Lochner* era. The critique is that regardless of the content of an unenumerated right, the Justices are making it up and allowing their own views to trump the judgments of democratically elected legislatures. Reflect on that criticism as you read the excerpts below from some of the Court's cases involving personal liberties.

Griswold v. Connecticut, 381 U.S. 479 (1965)
(7-2 vote)

*[**Background:** The Connecticut statute at issue in this case made it a crime to use contraceptives or to assist another person in their use. Two doctors were prosecuted for prescribing contraceptives to a married woman. The Supreme Court held that the Connecticut law unconstitutionally intruded on the right to "marital privacy." But in a later case, the Court extended the right to contraceptives to unmarried people, so Griswold has come to be described as announcing the fundamental right to use of contraceptives.*

Justice Douglas, who wrote the Griswold opinion, strained to avoid relying on the substantive due process theory that had been discredited during the Lochner era. But his alternative reasoning has been equally mocked. As you will see, he derived a constitutional right to "privacy" from what he called the "penumbras" (shadows) of a string of specific clauses in the Bill of Rights. One critic said that Justice Douglas "skipped through the Bill of Rights like a cheerleader—'Give me a P . . . give me an R . . . an I . . . , and so on, and found P-R-I-V-A-C-Y as a derivative or penumbral right." Robert G. Dixon, The New Substantive Due Process and the Democratic Ethic: A Prolegomenon, 1976 B.Y.U. L. REV. 43, 84.]

Justice Douglas wrote the opinion for the Court. Various Justices wrote concurring opinions. Justices Black and Stewart dissented.

Justice DOUGLAS wrote the opinion for the Court:

We are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. State of 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. 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. Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. 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 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." We recently referred to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people."

The present case, then, concerns a relationship 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 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 broadly and thereby invade the area of protected freedoms. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The 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.

Justice BLACK dissented, joined by Justice Stewart:

I like my privacy as well 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.

Washington v. Glucksberg, 521 U.S. 702 (1997)
(unanimous bottom line)

*[**Background:** We return to the basic question of which personal liberties should be deemed fundamental and how the Court should decide. The Washington law at issue in this case made it a crime to assist another person to commit suicide. Three physicians and their terminally ill patients challenged the state law, arguing that a terminally ill, mentally competent adult has a fundamental right to commit suicide with the assistance of a physician. The Supreme Court rejected that claim. Chief Justice Rehnquist wrote the opinion of the Court, which Justices O'Connor, Scalia, Kennedy, and Thomas joined. Although the outcome was unanimous, various Justices wrote concurring opinions that disagreed with some of the Court's reasoning.*

As you read the opinion, pay close attention to the "long line of cases" that the Court describes in which it has held that certain unenumerated freedoms (such as the right to marry) count as fundamental rights. To keep this chapter fairly short, I have not given you excerpts from all these precedents. But you need to understand what the Court says about these cases to understand the evolution of the doctrine. For example, the Court rejects the patients' reliance on Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990), which involved the asserted fundamental right to refuse unwanted medical treatment. You should make sure you understand what the Court says about Cruzan and how it distinguishes that case.]

Chief Justice REHNQUIST wrote the opinion for the Court:

I.

We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices. In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States' assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life. [**Note:** A long historical discussion follows.]

In 1991, Washington voters rejected a ballot initiative which, had it passed, would have permitted a form of physician-assisted suicide. California voters rejected an assisted-suicide initiative similar to Washington's in 1993. On the other hand, in 1994, voters in Oregon enacted, also through ballot initiative, that State's "Death With Dignity Act," which legalized physician-assisted suicide for competent, terminally ill adults. Since the Oregon vote, many proposals to legalize assisted-suicide have

been and continue to be introduced in the States' legislatures, but none has been enacted. And just last year, Iowa and Rhode Island joined the overwhelming majority of States explicitly prohibiting assisted suicide. Also, on April 30, 1997, President Clinton signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibits the use of federal funds in support of physician-assisted suicide.

Thus, the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues. For example, New York State's Task Force on Life and the Law—an ongoing, blue-ribbon commission composed of doctors, ethicists, lawyers, religious leaders, and interested laymen—was convened in 1984 and commissioned with "a broad mandate to recommend public policy on issues raised by medical advances." Over the past decade, the Task Force has recommended laws relating to end-of-life decisions, surrogate pregnancy, and organ donation. After studying physician-assisted suicide, however, the Task Force unanimously concluded that "[l]egalizing assisted suicide and euthanasia would pose profound risks to many individuals who are ill and vulnerable.... [T]he potential dangers of this dramatic change in public policy would outweigh any benefit that might be achieved."

II.

The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278-279 (1990).

But we have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. By extending constitutional protection to an asserted right or

liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 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.

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," that direct and restrain our exposition of the Due Process Clause. As we stated recently in Flores, the Fourteenth Amendment "forbids the government to infringe ... 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."

The question before us is whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so. Here, as discussed, we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.

Respondents contend that the liberty interest they assert is consistent with this Court's substantive-due-process line of cases, if not with this Nation's history and practice. Pointing to *Casey* and *Cruzan*, respondents read our jurisprudence in this area as reflecting a general tradition of "self-sovereignty," and as teaching that the "liberty" protected by the Due Process Clause includes "basic and intimate exercises of personal autonomy."

The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of

another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection.

In *Casey*, the Court's opinion concluded that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." 505 U.S., at 846. We held, first, that a woman has a right, before her fetus is viable, to an abortion "without undue interference from the State"; second, that States may restrict post viability abortions, so long as exceptions are made to protect a woman's life and health; and third, that the State has legitimate interests throughout a pregnancy in protecting the health of the woman and the life of the unborn child. Ibid. In reaching this conclusion, the opinion discussed in some detail this Court's substantive-due-process tradition of interpreting the Due Process Clause to protect certain fundamental rights and "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and noted that many of those rights and liberties "involv[e] the most intimate and personal choices a person may make in a lifetime." Id., at 851.

That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.

Our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington's assisted-suicide ban be rationally related to legitimate government interests. This requirement is unquestionably met here. As the court below recognized, Washington's assisted-suicide ban implicates a number of state interests. First, Washington has an unqualified interest in the preservation of human life. The State also has an interest in protecting the integrity and ethics of the medical profession. Next, the State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes. If physician-assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end-of-life health-care costs. Moreover, the State's interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and "societal indifference." Finally, the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia. If suicide is protected as a matter of constitutional right, it is argued, every man and woman in the United States must enjoy it. Thus, it turns out that what is couched as a limited right to "physician-assisted suicide" is likely, in effect, a much broader license,

which could prove extremely difficult to police and contain. Washington's ban on assisting suicide prevents such erosion.

We need not weigh exactingly the relative strengths of these various interests. They are unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection. We therefore hold that Wash. Rev. Code § 9A.36.060(1) (1994) does not violate the Fourteenth Amendment, either on its face or "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors."

Justice O'CONNOR, concurring:

Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure. As the Court recognizes, States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues. In such circumstances, "the ... challenging task of crafting appropriate procedures for safeguarding ... liberty interests is entrusted to the 'laboratory' of the States ... in the first instance." *Cruzan*, 497 U.S. at 292 (O'Connor, J., concurring) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)).

Obergefell v. Hodges, 576 U.S. 644 (2015)
(5-4 vote)

*[**Background:** The laws of Michigan, Kentucky, Ohio, and Tennessee defined marriage as a union between one man and one woman. Same-sex couples who had been legally married in other states or who wanted to be married in the defendant States challenged the laws on equal protection and substantive due process grounds. The Supreme Court held that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."]*

Justice Kennedy wrote the opinion for the Court, which Justices Ginsburg, Breyer, Sotomayor, and Kagan joined. Chief Justice Roberts and Justices Scalia, Thomas, and Alito dissented.

Justice KENNEDY wrote the opinion for the Court:

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. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484–486 (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, has not been reduced to any formula. Rather, it requires courts to 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 this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.

The Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, 388 U.S. 1 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in *Zablocki v. Redhail*, 434 U.S. 374, 384 (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 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry.

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

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. 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. 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. 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. Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago: "There is certainly no country in the world where the tie of marriage is so much respected as in America ... [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace.... [H]e afterwards carries [that image] with him into public affairs." 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1990).

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

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), which called for a "'careful description'" of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." *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.

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

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

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always 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. This interrelation of the two principles furthers our understanding of what freedom is and must become.

Chief Justice ROBERTS dissented, joined by Justices Scalia and Thomas:

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

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.

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

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." 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 (1905) (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." Id. at 69 (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." I have no choice but to dissent.

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

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). Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022)
(6-3 vote)

*[**Background:** As you probably know, Dobbs overruled Roe v. Wade (1973) and held that abortion is not a fundamental right. In the opinion, the Supreme Court went out of its way to say it was not overruling its earlier cases that deemed the rights to contraceptives, procreation, marriage, etc., to be fundamental. But do you think the reasoning of Dobbs can be reconciled with the reasoning of earlier cases? If not, how did the Court in Dobbs distinguish them?]*

Justice Alito wrote the opinion for the Court, which Justices Thomas, Gorsuch, Kavanaugh, and Barrett joined. Chief Justice Roberts concurred in the judgment. A joint dissent was filed by Justices Breyer, Sotomayor, and Kagan.

Justice ALITO wrote the opinion for the Court:

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

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

Under this scheme, each trimester of pregnancy was regulated differently, but the most critical line was drawn at roughly the end of the second trimester, which, at the time, corresponded to the point at which a fetus was thought to achieve “viability,” i.e., the ability to survive outside the womb. Although the Court acknowledged that States had a legitimate interest in protecting “potential life,” it found that this interest could not justify any restriction on pre-viability abortions. The Court did not explain the basis for this line, and even abortion supporters have found it hard to defend *Roe*’s reasoning. One prominent constitutional scholar wrote that he “would vote for a statute very much like the one the Court end[ed] up drafting” if he were “a legislator,” but his assessment of Roe was memorable and brutal: *Roe* was “not constitutional law” at all and gave “almost no sense of an obligation to try to be.” Lawrence Tribe, Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 2 (1973).

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

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

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

As has become increasingly apparent in the intervening years, *Casey* did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. 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 reaffirm *Roe* and *Casey*, and they contend that the Mississippi law cannot stand if we do so. Allowing Mississippi to prohibit abortions after 15 weeks of pregnancy, they argue, "would be no different than overruling *Casey* and *Roe* entirely." They contend that "no half-measures" are available and that we must either reaffirm or overrule *Roe* and *Casey*.

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

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

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

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

II.

Constitutional analysis must begin with the language of the instrument, which offers a fixed standard for ascertaining what our founding document means. The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.

Roe, however, was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned. And that privacy right, *Roe* observed, had been found to spring from no fewer than five different constitutional provisions—the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. *Roe* expressed the “feel[ing]” that the Fourteenth Amendment was the provision that did the work, but its message seemed to be that the abortion right could be found somewhere in the Constitution and that specifying its exact location was not of paramount importance. The *Casey* Court did not defend this unfocused analysis and instead grounded its decision solely on the theory that the right to obtain an abortion is part of the “liberty” protected by the Fourteenth Amendment’s Due Process Clause.

We discuss this theory in depth below, but before doing so, we briefly address one additional constitutional provision that some of respondents’ amici have now offered as yet another potential home for the abortion right: the Fourteenth Amendment’s Equal Protection Clause. This theory is squarely foreclosed by our precedents, which establish that a State’s regulation of abortion is not a sex-based classification and is thus not subject to the “heightened scrutiny” that applies to such classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a mere pretext designed to effect an invidious discrimination against members of one sex or the other. And as the Court has stated, the “goal of preventing abortion” does not constitute “invidiously discriminatory animus” against women.

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.

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

The first consists of rights guaranteed by the first eight Amendments. Those Amendments originally applied only to the Federal Government, but this Court has held that the Due Process Clause of the Fourteenth Amendment "incorporates" the great majority of those rights and thus makes them equally applicable to the States. The second 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." 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," 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. A similar inquiry was undertaken in *McDonald*, which held that the Fourteenth Amendment protects the right to keep and bear arms.

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

Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the "liberty" protected by the Due Process Clause because the term "liberty" alone provides little guidance. In interpreting what is meant by the Fourteenth Amendment's reference to "liberty," we must guard against the natural

human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been reluctant to recognize rights that are not mentioned in the Constitution. Substantive due process has at times been a treacherous field for this Court, and it has sometimes led the Court to usurp authority that the Constitution entrusts to the people's elected representatives. As the Court cautioned in *Glucksberg*, "[w]e must ... exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."

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

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).

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.

III

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends. It protects the interests of those who have taken action in reliance on a past decision. It reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation. It fosters evenhanded decisionmaking by requiring that like cases be decided in a like manner. It contributes to the actual and perceived integrity of the judicial process. And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past.

We have long recognized, however, that *stare decisis* is not an inexorable command, and it is at its weakest when we interpret the Constitution. It has been said that it is sometimes more important that an issue “be settled than that it be settled right.” But when it comes to the interpretation of the Constitution, we place a high value on having the matter “settled right.” An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. See Art. V. Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.

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

In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Court overruled *Adkins v. Children’s Hospital of D.C.*, 261 U.S. 525 (1923), which had held that a law setting minimum wages for women violated the “liberty” protected by the Fifth Amendment's Due Process Clause. *West Coast Hotel* signaled the demise of an entire line of important precedents that had protected an individual liberty right against state and federal health and welfare legislation.

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.) Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country.

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.

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

The quality of the reasoning. 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. 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." 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." 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."

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. 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.

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. *Casey*'s "undue burden" test has scored poorly on the workability scale. Problems begin with the very concept of an "undue burden." As Justice Scalia noted in his *Casey* partial dissent, determining whether a burden is "due" or "undue" is "inherently standardless." The 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."

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.

Reliance interests. Traditional reliance interests arise where advance planning of great precision is most obviously a necessity. Unable to find reliance on *Roe* and *Casey* in the conventional sense, 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.

Justice THOMAS, concurring:

I join the opinion of the Court because it correctly holds that there is no constitutional right to abortion. I write separately because the Due Process Clause at most guarantees *process*. As I have previously explained, "substantive due process" is an oxymoron that lacks any basis in the Constitution. For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.

Justice KAVANAUGH, concurring:

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

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

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

The more difficult question in this case is *stare decisis*. I agree with the Court's application today of the principles of *stare decisis* and its conclusion that *Roe* should be overruled.

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.

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.

Chief Justice ROBERTS, concurring in the judgment:

We granted certiorari to decide one question: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." 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* and *Casey*. 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. 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. 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.

In support of its holding, the Court cites three seminal constitutional decisions that involved overruling prior precedents: *Brown v. Board of Education*, 347 U.S. 483 (1954), *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). The opinion in *Brown* was unanimous and eleven pages long; this one is neither. *Barnette* was decided only three years after the decision it overruled, three Justices having had second thoughts. And *West*

Coast Hotel was issued against a backdrop of unprecedented economic despair that focused attention on the fundamental flaws of existing precedent. None of these leading cases, in short, provides a template for what the Court does today.

Justices Breyer, Sotomayor, and Kagan, dissenting in a joint opinion:

For half a century, *Roe* and *Casey* have protected the liberty and equality of women. Roe held, and Casey reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be. 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.

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

Some women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo

pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does "cast[s] doubt on precedents that do not concern abortion." 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." The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, there was no support in American law for a constitutional right to obtain contraceptives. So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.

One piece of evidence on that score seems especially salient: The majority's cavalier approach to overturning this Court's precedents. *Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in today's opinion. The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives. The legal framework *Roe* and *Casey* developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed. 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." Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law.

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. The decisions 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. 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.

For overruling *Roe*, the controlling opinion in *Casey* concluded, the Court would pay a "terrible price." The Justices who wrote those words—O'Connor, Kennedy, and Souter—they were judges of wisdom. They would not have won any contests for the kind of ideological purity some court watchers want Justices to deliver. But they knew that the legitimacy of the Court is earned over time. They also would have recognized that it can be destroyed much more quickly. They worked hard to avert that outcome in *Casey*. The American public, they thought, should never conclude that its constitutional protections hung by a thread—that a new majority, adhering to a new "doctrinal school," could "by dint of numbers" alone expunge their rights. 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.

Commentary: Many people feel strongly about the outcome of *Dobbs*, one way or another. Whatever your views, it is crucial that you be able to separate questions of *policy* ("should abortion be lawful/unlawful?") from *legal reasoning* ("does the Constitution prevent the legislatures of the federal and state governments from deciding that question?"). Understanding that distinction is the essence of thinking like a lawyer, as Professor Anne-Marie Slaughter explained in the lecture to law

students that I included in the Preface to this book. (Now is a good time to reread it.) When you write your case outline on *Dobbs*, you should take care to include the strongest arguments on each side—especially the side that does not conform to your policy preferences.

B. THE RIGHT TO TRAVEL

We now shift to a topic that is far less controversial than unenumerated fundamental rights. This topic is the constitutional right to travel from state to state. Take a look again at this passage from Justice Kavanaugh's concurring opinion in *Dobbs*, which you might have skimmed over before:

> 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**.

If you search the text of the Constitution, you will not find the word "travel." So what is this constitutional right to interstate travel, and why isn't it controversial?

Oversimplifying a bit, the Supreme Court has held that the right to travel interstate is one of the "privileges" that is protected by the Privileges and Immunities Clause in Article IV and the Privileges or Immunities Clause in the Fourteenth Amendment. The right to travel has three different components that you should avoid mixing up:

> **#1.** A U.S. citizen has the right to travel about freely from state to state.
> **#2.** A citizen of one state has the right to be treated as a "welcome visitor" in other states.
> **#3.** A newly arrived state resident has the right to be treated like longer term state residents.

To understand #1, picture four friends taking a week-long road trip. They leave their home in Maine and drive across the country to South Dakota, stopping along the way to camp in national parks or stay with friends, before heading back home. They have the constitutional right to travel the country this way. Indiana, for example, can't say "we don't allow Maine residents to pass through our state" or require them to pay $25

for the privilege of driving into Indiana (though Indiana can charge everyone tolls for using the highways). As you will see in the excerpt from *Saenz* (1999) below, the Supreme Court admits that it has never identified constitutional text that is the source of this right. But, the Court explained, the Articles of Confederation expressly included such a right of "free ingress and regress to and from" other states, and the Framers unquestionably intended the new Constitution to create a Union of states that was even stronger than the league of states that had existed under the Articles of Confederation. The Court suggested that this right to travel about the new nation was so obvious to the Framers that they didn't need to write it down.

To understand #2, picture Kathryn Piper, the Vermont resident who wanted to practice law in New Hampshire. She did not simply want to travel into or through New Hampshire (the road trip hypo) but to have the privilege of working there even though she was not a New Hampshire resident. As you may remember from the *Piper* opinion that we read in Chapter 2, the Supreme Court ruled in her favor. As that opinion explained, the Supreme Court has long held that a citizen of one state generally has the right to leave and go to a different state for certain important purposes, such as to work or to obtain medical care. The medical care part is why Justice Kavanaugh wrote in his *Dobbs* concurrence that one state can't stop its residents from going to another state for an abortion. Moreover, as *Piper* explained, this component of the right to travel interstate prevents a state from treating nonresidents worse than residents (although that prohibition is not absolute). The Supreme Court has grounded this component of the right to travel in the **Privileges and Immunities Clause in Article IV**, section 2, which says: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Component #3 was at issue in *Saenz*. Basically, it means that new residents of a state have the same rights as longer term residents of that state. For example, Missouri could not say its residents must pay higher taxes for the first five years that they live in Missouri. Nor could Missouri say that certain jobs are open only to its long-term residents. The Supreme Court has said that this component of the right to travel is protected by the **opening words of the Fourteenth Amendment**, which say:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]

As you know, the Fourteenth Amendment was ratified after the Civil War. A core purpose of the first sentence quoted above was to establish that formerly enslaved persons were "citizens" of the state in which they "reside" (if they were born in the U.S.). The second sentence—which is the **Privileges or Immunities Clause**—then says that a state cannot abridge the privileges or immunities of "citizens of the United States." Although those sentences in combination might have been interpreted to provide broad protections against discrimination, the Supreme Court read the language narrowly in a decision issued soon after the Fourteenth Amendment was ratified. Indeed, it's often said that the Court "gutted" this Privileges or Immunities Clause when it issued the *Slaughter–House Cases*, 16 Wall. 36 (1872). But even in that case, the Justices agreed on one thing: this Clause protects the right of any U.S. citizen to move to a new state, become a resident there, and enjoy the same rights that existing residents have. In other words, a state can't draw distinctions among its residents based on the duration (length) of the time that they have lived in the state (known as **durational residency requirements**). That's why the Supreme Court struck down the California law that was at issue in *Saenz*.

Saenz v. Roe, 526 U.S. 489 (1999)
(7-2 vote)

*[**Background:** California typically pays welfare benefits at a level that is higher than most other states. The California law at issue in this case limited new residents, for the first year they lived in California, to the amount of welfare benefits they would have received in their prior state. The Supreme Court held that this California law violated the rights of newly arrived residents under the Privileges and Immunities Clause of the Fourteenth Amendment.]*

Justice Stevens wrote the opinion of the Court, which Justices O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer joined. Chief Justice Rehnquist and Justice Thomas dissented.

Justice STEVENS wrote the opinion for the Court:

The word "travel" is not found in the text of the Constitution. Yet the "constitutional right to travel from one State to another" is firmly embedded in our jurisprudence.

IV.

The “right to travel” discussed in our cases embraces at least three different components. It protects [#1] the right of a citizen of one State to enter and to leave another State, [#2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, [#3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

It was the right to go from one place to another [#1] that was vindicated in *Edwards v. California*, 314 U.S. 160 (1941), which invalidated a state law that impeded the free interstate passage of the indigent. We reaffirmed that right in *United States v. Guest*, 383 U.S. 745 (1966), which afforded protection to the “right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia.” Given that [the California law at issue here] imposed no obstacle to respondents’ entry into California, we think California is correct when it argues that the statute does not directly impair the exercise of the right to free interstate movement. For the purposes of this case, therefore, we need not identify the source of that particular right in the text of the Constitution. The right of “free ingress and regress to and from” neighboring States, which was expressly mentioned in the text of the Articles of Confederation, may simply have been conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.

The second component of the right to travel is, however, expressly protected by the text of the Constitution. The first sentence of Article IV, § 2, provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Thus, by virtue of a person’s state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the “Privileges and Immunities of Citizens in the several States” that he visits. This provision removes “from the citizens of each State the disabilities of alienage in the other States.” *Paul v. Virginia*, 8 Wall. 168, 180 (1868) (“[W]ithout some provision ... removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists”). It provides important protections for nonresidents who enter a State whether to obtain employment, *Hicklin v. Orbeck*, 437 U.S. 518 (1978), to procure medical services, *Doe v. Bolton*, 410 U.S. 179, 200 (1973), or even to engage in commercial shrimp fishing, *Toomer v. Witsell*, 334 U.S. 385 (1948). Those protections are not absolute, but the Clause does bar

discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.

Permissible justifications for discrimination between residents and nonresidents are simply inapplicable to a nonresident's exercise of the right to move into another State and become a resident of that State. What is at issue in this case is this third aspect of the right to travel—the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State. That right is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States. That additional source of protection is plainly identified in the opening words of the Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

The Framers of the Fourteenth Amendment modeled this Clause upon the Privileges and Immunities Clause found in Article IV. Cong. Globe, 39th Cong., 1st Sess., 1033–1034 (1866) (statement of Rep. Bingham). The Fourteenth Amendment's Privileges or Immunities Clause and Citizenship Clause guaranteed the rights of newly freed black citizens by ensuring that they could claim the state citizenship of any State in which they resided and by precluding that State from abridging their rights of national citizenship.

Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, it has always been common ground that this Clause protects the third component of the right to travel. Writing for the majority in the *Slaughter–House Cases*, Justice Miller explained that one of the privileges conferred by this Clause "is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State." Justice Bradley, in dissent, used even stronger language to make the same point.

V

It is undisputed that respondents and the members of the class that they represent are citizens of California and that their need for welfare benefits is unrelated to the length of time that they have resided in California. We thus have no occasion to consider what weight might be given to a citizen's length of residence if the bona fides of her claim to state citizenship were questioned. Moreover, because whatever benefits they receive will be consumed while they remain in California, there is no

danger that recognition of their claim will encourage citizens of other States to establish residency for just long enough to acquire some readily portable benefit, such as a divorce or a college education, that will be enjoyed after they return to their original domicile.

The classifications challenged in this case are defined entirely by (a) the period of residency in California and (b) the location of the prior residences of the disfavored class members. The favored class of beneficiaries includes all eligible California citizens who have resided there for at least one year, plus those new arrivals who last resided in another country or in a State that provides benefits at least as generous as California's. Thus, within the broad category of citizens who resided in California for less than a year, there are many who are treated like lifetime residents. And within the broad subcategory of new arrivals who are treated less favorably, there are many smaller classes whose benefit levels are determined by the law of the States from whence they came. To justify [those distinctions], California must therefore explain not only why it is sound fiscal policy to discriminate against those who have been citizens for less than a year, but also why it is permissible to apply such a variety of rules within that class.

Disavowing any desire to fence out the indigent, California has instead advanced an entirely fiscal justification for its multitiered scheme. The enforcement of [the law] will save the State approximately $10.9 million a year. The question is not whether such saving is a legitimate purpose but whether the State may accomplish that end by the discriminatory means it has chosen. An evenhanded, across-the-board reduction of about 72 cents per month for every beneficiary would produce the same result. But our negative answer to the question does not rest on the weakness of the State's purported fiscal justification. It rests on the fact that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence: That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence. It is equally clear that the Clause does not tolerate a hierarchy of subclasses of similarly situated citizens based on the location of their prior residence.

Thus [the challenged law] is doubly vulnerable: Neither the duration of respondents' California residence, nor the identity of their prior States of residence, has any relevance to their need for benefits. Nor do those factors bear any relationship to the State's interest in making an equitable allocation of the funds to be distributed among its needy citizens. As in *Shapiro v. Thompson*, 394 U.S. 618 (1969), we reject any contributory rationale for the denial of benefits to new residents:

> Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police

> and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens.

In short, the State's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens.

VI

The question that remains is whether congressional approval of durational residency requirements in the 1996 amendment to the Social Security Act somehow resuscitates the constitutionality of [challenged California law]. That question is readily answered, for we have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment. Moreover, the protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the States.

Article I of the Constitution grants Congress broad power to legislate in certain areas. Those legislative powers are, however, limited not only by the scope of the Framers' affirmative delegation, but also by the principle that they may not be exercised in a way that violates other specific provisions of the Constitution. For example, Congress is granted broad power to "lay and collect Taxes," but the taxing power, broad as it is, may not be invoked in such a way as to violate the Fifth Amendment's privilege against self-incrimination. Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation.

Citizens of the United States, whether rich or poor, have the right to choose to be citizens "of the State wherein they reside." U.S. Const., Amdt. 14, § 1. The States, however, do not have any right to select their citizens. The Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

Commentary: You may be wondering why, despite *Saenz*, a state can require students to live in-state for a certain amount of time before getting the benefit of lower in-state tuition. Isn't that discrimination against a class of state residents? The answer is likely found in the passage of the *Saenz* opinion that talks about "bona fide" residents. Sometimes, it's not clear whether a newly arrived person is a new state resident or simply a nonresident visitor. The Supreme Court's cases give states some

latitude to impose relatively short durational residency requirements as a tool to distinguish between those categories. For example, the Court has upheld a 30-day residency requirement to vote in a new state and a one-year residency requirement to get divorced in a new state. In other words, not all durational residency requirements are unconstitutional. That said, the Court has held that some such requirements were too long. For example, the Court invalidated a one-year residency requirement for getting state-subsidized medical care and a one-year residency requirement for voting.

There is one more doctrinal point that you should know about. The constitutional right to travel interstate does not extend to **international travel**. The federal government can and sometimes does put restrictions on international travel by U.S. citizens (such as travel to Cuba). Such restrictions are subject only to rational basis review.

C. BIRTHRIGHT CITIZENSHIP

I oversimplified at the start of this chapter when I said that unenumerated rights are far more controversial than enumerated rights. Although that's true as a categorical matter, disputes often arise about the *meaning* of enumerated rights.

A prime example is the recent dispute about President Trump's executive order on birthright citizenship. That executive order established new exceptions to birthright citizenship for children born to foreign citizens who were unlawfully or temporarily in the country. The constitutional question was whether such exceptions violated the opening words of the Fourteenth Amendment:

> All persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside.

This citizenship clause, like the right to travel recognized in *Saenz*, addresses who is part of our national political community. In defending President Trump's executive order, the government argued that the Framers intended to give citizenship to formerly enslaved persons. The government argued that the phrase "subject to the jurisdiction thereof" should not be interpreted to include children born to foreign citizens who were residing in the United States unlawfully or temporarily.

The plaintiffs, by contrast, argued (with support from an old Supreme Court case) that the citizenship clause provides a general right of birthright citizenship with only limited exceptions, such as for children born to occupying enemies or foreign diplomats. In *Trump v. Barbara*, 146 S. Ct. __ (2026), the Supreme Court agreed with the plaintiffs and endorsed a broad right to birthright citizenship. But on that constitutional question, four Justices dissented, illustrating that the meaning of enumerated constitutional rights can be sharply contested. In the next chapter, we will explore some other current disputes about the meaning of constitutional text.

CHAPTER 8. GUN RIGHTS AND PROPERTY RIGHTS

A. INTRODUCTION

The two topics of this chapter are individual rights that involve (1) gun rights and (2) property rights. What unites the cases on these topics? They underscore the central theme of this book, which is that principles of constitutional law—faithfully applied—should not lead to policy outcomes that are consistently "liberal" or "conservative." In other words, there is a crucial difference between legal principles and policy arguments.

That distinction is fairly easy to see in the "powers" questions that we studied in Part One of this book. Imagine asking a nonlawyer: "Do you want the President to have broad powers?" The nonlawyer might reasonably say: "It depends on who the President is." The nonlawyer might want to know, for example, if the President is a Democrat or a Republican or exactly who the President is. But as you know from our studies, the answer to legal questions about the scope of the President's powers should not change based on who happens to be occupying the White House at the time.

The distinction between law and policy can be harder to see in the area of individual rights. The individual rights that we have studied so far—such as equal protection rights and unenumerated fundamental rights—are often associated with liberal causes. Indeed, many of these individual rights were announced in decisions of the Warren Court, which is the period from 1953 to 1969 in which Earl Warren was the Chief Justice. That period is widely regarded as the most liberal in the Court's history. By contrast, Justices who are described as conservative are less likely to extend equal protection rights (as *Skrmetti* illustrates) and more skeptical of unenumerated fundamental rights (as *Dobbs* illustrates). (The labels "liberal" and "conservative" are suboptimal but they are often used to describe judges and Justices. I am using them here for want of good alternatives.)

Based on such Supreme Court decisions about equal protection and fundamental rights, some people assume that liberal Justices are more likely than conservative Justices to protect individual rights. The cases about gun rights and property rights in this chapter show that this assumption is wrong. It is the conservative Justices who

have taken a broad view of the Second Amendment's right to bear arms, often over the dissent of liberal Justices. It is likewise the conservative Justices who have taken a broad view of the Fifth Amendment's right to be compensated when the government takes private property, although there is less disagreement among Justices in this area of the law.

Does that pattern mean that Justices are simply deciding individual rights cases based on their personal policy preferences? Perhaps, but not necessarily. As you have started to learn, Justices also have different views about the *methodology* that the Supreme Court should use when it interprets the Constitution. Most notably, they disagree about the extent to which constitutional interpretation should depend on *historical* evidence about the meaning of a constitutional provision whose text is vague or ambiguous. As I explained when we studied unenumerated fundamental rights, the Justices who rely most heavily on history describe themselves as **originalists**, because they are searching for a constitutional provision's **original meaning**: how the provision was understood at the time it was written and ratified. These Justices argue that originalism keeps the Supreme Court in its lane by preventing Justices from relying on their personal values when they decide what the Constitution means.

As I previewed in the chapter on fundamental rights, excessive reliance on history has major pitfalls. If the Court relies too much on history when it interprets constitutional text, it will end up carrying forward historical practices, such as racial segregation, that have since become widely regarded as abhorrent. In this chapter, we will explore that concern as well as additional questions and problems of methodology that arise when historical evidence is central to constitutional interpretation.

For example: what do the Justices mean by "historical evidence"? As you will see in Justice Kavanaugh's concurring opinion in *Rahimi* (2024), the two big subcategories of historical evidence are **pre-ratification** evidence—meaning evidence from the time before the constitutional provision at issue was ratified—and **post-ratification evidence**, meaning evidence of how a provision was understood after it was ratified. There are questions about how far back in time to go when considering pre-ratification history and how far forward in time to go when considering post-ratification history.

Furthermore, because historical evidence can be difficult to find and difficult to understand, there are debates about whether it is even possible to use historical evidence in objective ways to determine what a constitutional provision meant. There are questions about whether lawyers and judges—who are not trained historians—

are equipped to do that work. And there are basic questions about the **level of generality** that judges should use when trying to ascertain a constitutional provision's historical meaning.

The *Bruen* (2022) and *Rahimi* (2024) cases that we are reading below are thus not just an opportunity for you to learn about the Second Amendment. They are an opportunity for you to develop a sophisticated understanding of one of the most important debates in constitutional law: the role that history should play in constitutional interpretation.

When we turn to the property cases, you will see in the 6-3 vote in *Cedar Point* (2021) that the conservative Justices tend to be more protective of property rights than the liberal Justices are. But as other property cases reproduced in that section illustrate, there is more agreement among the Justices about Fifth Amendment Takings claims than there is about Second Amendment gun rights. The Court's unanimous decision in *Tyler* (2023), which relied in part on history dating back to the 1215 Magna Carta, also illustrates the pervasive use of history in contemporary cases. Though as you'll see when you read *Tyler*, the Court's unanimity may have reflected the fact that the person whose property was taken in that case was unbelievably sympathetic: a 94-year-old woman whose condo was seized and sold by the local government, which then had the nerve to claim the right to keep $25K more than the $15K the woman owed for unpaid taxes. Of course that position got zero votes!

B. SECOND AMENDMENT GUN RIGHTS

The Second Amendment says: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Until fairly recently, it was generally assumed that the Second Amendment protected the ability of *state militias* to use firearms but did not create *individual* rights. But in 2008, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held (by a 5-4 vote) that the Second Amendment provides an individual right to possess firearms. The Court in *Heller* gave some guidance about the scope of this individual right, stating that it is "not unlimited" and that nothing in the opinion "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places

such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." In a footnote, the Court added that this list of presumptively lawful regulations was not meant to be exhaustive.

In 2010, in *McDonald v. Chicago*, 561 U.S. 742 (2010), the Court held (by a 5-4 vote) that the Second Amendment's individual right to bear arms is incorporated against the states through the Fourteenth Amendment. You may remember that we read *McDonald* when we studied incorporation doctrine in Chapter 5.

In 2016, the Court issued a short unanimous opinion stating that "stun guns" are within the scope of the "arms" protected by the Second Amendment—even though stun guns did not exist when the Second Amendment was ratified. *Caetano v. Massachusetts*, 577 U.S. 411 (2016) (per curiam).

Because those three decisions did not give lower courts much guidance about how to analyze a Second Amendment claim, they developed a two-step approach that became known as "means-ends scrutiny." Oversimplifying a bit here, that test was essentially intermediate scrutiny. At step one, a court would ask if the law regulated conduct that was protected by the Second Amendment. If yes, the court would ask if the challenged law was reasonably tailored to achieve an important government interest. If yes, the court would uphold the law.

As you will see in the excerpts below, the Supreme Court in *Bruen* (2022) rejected the two-step approach that the lower courts had been using and substituted an approach that was much more focused on history. The Supreme Court in *Rahimi* (2024) then pulled back a bit on *Bruen* and explained that a regulation of firearms can be upheld even if it is not *identical* to one that existed at the time the Second Amendment was written.

Important note: Our goal in reading these cases is not to master the details of the Supreme Court's Second Amendment doctrine. Although you should learn the two-part test that the Court now uses, the more important project is to think hard about the debates among various Justices about **how history should be used in interpreting constitutional text**. These debates matter for constitutional law in general, not just the Second Amendment. **Spoiler alert:** After the commentary that follows *Rahimi*, I ask you a series of hard questions that will require you to go back and reread the excerpts from *Rahimi*, *Bruen*, and *Brown v. Board of Education*.

New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022)
(6-3 vote)

*[**Background:** The case involved a New York law that required an applicant for a license to carry a concealed gun in public to show "proper cause." For carry unrelated to specific purposes like hunting or target practice, proper cause required the applicant to show "a special need for self-protection distinguishable from that of the general community." The applicants in Bruen had no such special need and challenged that requirement. The Supreme Court held that this requirement in the New York law violated their Second Amendment rights.]*

Justice Thomas wrote the opinion for the Court, which Chief Justice Roberts and Justices Alito, Gorsuch, Kavanaugh, and Barrett joined. Various Justices wrote concurrences. Justice Breyer dissented, joined by Justices Sotomayor and Kagan.

Justice THOMAS wrote the opinion for the Court:

In *Heller* and *McDonald*, we held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. In doing so, we held unconstitutional two laws that prohibited the possession and use of handguns in the home. In the years since, the Courts of Appeals have coalesced around a "two-step" framework for analyzing Second Amendment challenges that combines history with means-end scrutiny.

Today, we decline to adopt that two-part approach. In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.

To be sure, historical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it. But reliance on history to inform the meaning of constitutional text—especially text meant to codify a pre-existing right—is, in our view, more legitimate, and more administrable, than asking judges to make difficult empirical judgments about the costs and benefits of firearms restrictions, especially given their lack of expertise in the field.[6]

> [6] The dissent claims that [our] text-and-history test will prove unworkable compared to means-end scrutiny in part because judges are relatively ill equipped to resolve difficult historical questions or engage in searching historical surveys. We are unpersuaded. The job of judges is not to resolve historical questions in the abstract; it is to resolve legal questions presented in particular cases or controversies. Courts are thus entitled to decide a case based on the historical record compiled by the parties.

While the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. Fortunately, the Founders created a Constitution—and a Second Amendment—"intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819). Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.

We have already recognized in *Heller* at least one way in which the Second Amendment's historically fixed meaning applies to new circumstances: Its reference to "arms" does not apply "only to those arms in existence in the 18th century." *Heller*, 554 U.S. at 582. "Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." Ibid. Thus, even though the Second Amendment's definition of "arms" is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense. Cf. *Caetano v. Massachusetts*, 577 U.S. 411, 411–412 (2016) (per curiam) (stun guns).

Much like we use history to determine which modern "arms" are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding. When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy. While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense.

To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not uphold every modern law that remotely resembles a historical analogue, because doing so risks endorsing outliers that our ancestors would never have accepted. On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.

[**Note:** The Supreme Court in *Bruen* went on to invalidate the New York law. Analyzing the Second Amendment's text, the Court first held that the right to "bear" arms includes the right to carry arms in public. Then, after a very long discussion of historical evidence, the Court held that New York failed to identify a historical tradition of requiring a special showing of need to carry a concealed weapon in public. I am sparing you the opinion's long historical discussion. But to give you a flavor of it, here are two sentences:

> In one notable example, the government charged Sir John Knight, a prominent detractor of James II, with violating the Statute of Northampton because he allegedly 'did walk about the streets armed with guns, and that he went into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects.' *Sir John Knight's Case*, 3 Mod. 117, 87 Eng. Rep. 75, 76 (K. B. 1686). Chief Justice Herbert explained that the Statute of Northampton had "almost gone *in desuetudinem*," *Rex v. Sir John Knight*, 1 Comb. 38, 38–39, 90 Eng. Rep. 330 (K. B. 1686), meaning that the Statute had largely become obsolete through disuse.]

Justice BARRETT, concurring:

I join the Court's opinion in full. I write separately to highlight two methodological points that the Court does not resolve. First, the Court does not conclusively determine the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution.

Second and relatedly, the Court avoids another ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 or when the Bill of Rights was ratified in 1791. So today's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights.

Justice BREYER dissented, joined by Justices Sotomayor and Kagan:

In 2020, 45,222 Americans were killed by firearms. Since the start of this year (2022), there have been 277 reported mass shootings—an average of more than one per day. Gun violence has now surpassed motor vehicle crashes as the leading cause of death among children and adolescents. [Justice Breyer goes on to describe in detail the harms caused by gun violence.]

Many States have tried to address some of the dangers of gun violence just described by passing laws that limit, in various ways, who may purchase, carry, or use firearms of different kinds. The Court today severely burdens States' efforts to do so. It invokes the Second Amendment to strike down a New York law regulating the public carriage of concealed handguns. In my view, that decision rests upon several serious mistakes.

In my view, when courts interpret the Second Amendment, it is constitutionally proper, indeed often necessary, for them to consider the serious dangers and consequences of gun violence that lead States to regulate firearms. The question presented in this case concerns the extent to which the Second Amendment restricts different States (and the Federal Government) from working out solutions to these problems through democratic processes. The primary difference between the Court's view and mine is that I believe the Amendment allows States to take account of the serious problems posed by gun violence that I have just described. I fear that the Court's interpretation ignores these significant dangers and leaves States without the ability to address them.

How does the Court justify striking down New York's law without first considering how it actually works on the ground and what purposes it serves? The Court does so by purporting to rely nearly exclusively on history. It requires "the government to affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of 'the right to keep and bear arms.'" Beyond this historical inquiry, the Court refuses to employ what it calls "means-end scrutiny." That is, it refuses to consider whether New York has a compelling interest in regulating the concealed carriage of handguns or whether New York's law is narrowly tailored to achieve that interest. Although I agree that history can often be a useful tool in determining the meaning and scope of constitutional provisions, I believe the Court's near-exclusive reliance on that single tool today goes much too far.

The Court's near-exclusive reliance on history is not only unnecessary, it is deeply impractical. It imposes a task on the lower courts that judges cannot easily accomplish. Judges understand well how to weigh a law's objectives (its "ends")

against the methods used to achieve those objectives (its "means"). Judges are far less accustomed to resolving difficult historical questions. Courts are, after all, staffed by lawyers, not historians. Legal experts typically have little experience answering contested historical questions or applying those answers to resolve contemporary problems.

The Court's insistence that judges and lawyers rely nearly exclusively on history to interpret the Second Amendment thus raises a host of troubling questions. Consider, for example, the following. Do lower courts have the research resources necessary to conduct exhaustive historical analyses in every Second Amendment case? What historical regulations and decisions qualify as representative analogues to modern laws? How will judges determine which historians have the better view of close historical questions? Will the meaning of the Second Amendment change if or when new historical evidence becomes available? And, most importantly, will the Court's approach permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history? See S. Cornell, *Heller, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss*," 56 UCLA L. Rev. 1095, 1098 (2009) (describing "law office history" as "a results oriented methodology in which evidence is selectively gathered and interpreted to produce a preordained conclusion").

I fear that history will be an especially inadequate tool when it comes to modern cases presenting modern problems. As technological progress pushes our society ever further beyond the bounds of the Framers' imaginations, attempts at "analogical reasoning" will become increasingly tortured. In short, a standard that relies solely on history is unjustifiable and unworkable.

[**Note:** Justice Breyer goes on to argue that that the New York law should be upheld even using the majority's history-focused test.]

Commentary and questions: The *Bruen* majority envisions a deep dive into history when a gun statute is being reviewed. Assuming that is a realistic task when the case is before the Supreme Court, is that also true at the trial court level for the judge and the lawyers? Now think about the bodies that enact such legislation. Do Members of Congress need to do a deep dive into history whenever they consider a new form of gun control? What about state and local legislators, who often lack the staff and resources that Members of Congress enjoy?

United States v. Rahimi, 144 S. Ct. 1889 (2024)
(8-1 vote)

*[**Background:** Federal law has long made it unlawful for specified categories of individuals (such as felons) to possess firearms. The statutory provision at issue in this case prohibits an individual who is subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that the person "represents a credible threat to the physical safety of [an] intimate partner," or a child of the partner or individual. 18 U.S.C. § 922(g)(8). The Supreme Court upheld this federal law after clarifying the methodology for analyzing Second Amendment claims. As you read the opinions, pay particular attention to various ways that different Justices propose to use history when interpreting the Constitution. Justice Kavanaugh's concurring opinion warrants an especially close read, including his footnotes.]*

Chief Justice Roberts wrote the opinion for the Court, which Justices Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, and Jackson joined. Various Justices wrote concurring opinions. Justice Thomas dissented.

Chief Justice ROBERTS wrote the opinion for the Court:

A federal statute prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that he "represents a credible threat to the physical safety of [an] intimate partner," or a child of the partner or individual. 18 U.S.C. § 922(g)(8). Respondent Zackey Rahimi is subject to such an order. The question is whether this provision may be enforced against him consistent with the Second Amendment.

II

When a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may—consistent with the Second Amendment—be banned from possessing firearms while the order is in effect. Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms. As applied to the facts of this case, Section 922(g)(8) fits comfortably within this tradition.

A

We have held that the right to keep and bear arms is among the "fundamental rights necessary to our system of ordered liberty." *McDonald v. Chicago*, 561 U.S. 742, 778 (2010). Derived from English practice and codified in the Second Amendment, the right secures for Americans a means of self-defense. *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1 (2022). In the aftermath of the Civil War, Congress's desire to enable the newly freed slaves to defend themselves against former Confederates helped inspire the passage of the Fourteenth Amendment, which secured the right to bear arms against interference by the States. *McDonald*, 561 U.S. at 771-776.

"Like most rights," though, "the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). In *Heller*, this Court held that the right applied to ordinary citizens within the home. Even as we did so, however, we recognized that the right was never thought to sweep indiscriminately. "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Ibid. At the founding, the bearing of arms was subject to regulations ranging from rules about firearm storage to restrictions on gun use by drunken New Year's Eve revelers. Some jurisdictions banned the carrying of "dangerous and unusual weapons." Id. at 627 (citing 4 W. Blackstone, Commentaries on the Laws of England 148–149 (1769)). Others forbade carrying concealed firearms. 554 U.S. at 626.

In *Bruen*, we directed courts to examine our "historical tradition of firearm regulation" to help delineate the contours of the right. We explained that if a challenged regulation fits within that tradition, it is lawful under the Second Amendment. We also clarified that when the Government regulates arms-bearing conduct, as when the Government regulates other constitutional rights, it bears the burden to "justify its regulation."

Nevertheless, some courts have misunderstood the methodology of our recent Second Amendment cases. These precedents were not meant to suggest a law trapped in amber. As we explained in *Heller*, for example, the reach of the Second Amendment is not limited only to those arms that were in existence at the founding. Rather, it extends, prima facie, to all instruments that constitute bearable arms, even those that were not yet in existence. By that same logic, the Second Amendment permits more than just those regulations identical to ones that could be found in 1791. Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers.

As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. A court must ascertain whether the new law is "relevantly similar" to laws that our tradition is understood to permit, "apply[ing] faithfully the balance struck by the founding generation to modern circumstances." Discerning and developing the law in this way is "a commonplace task for any lawyer or judge."

Why and how the regulation burdens the right are central to this inquiry. For example, if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations. Even when a law regulates arms-bearing for a permissible reason, though, it may not be compatible with the right if it does so to an extent beyond what was done at the founding. And when a challenged regulation does not precisely match its historical precursors, it still may be analogous enough to pass constitutional muster. The law must comport with the principles underlying the Second Amendment, but it need not be a "dead ringer" or a "historical twin."

We also recognized in *Bruen* the "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)." 597 U.S. at 37. We explained that under the circumstances, resolving the dispute was unnecessary to decide the case. The same is true here.

B

Bearing these principles in mind, we conclude that Section 922(g)(8) survives Rahimi's challenge.

The Government offers ample evidence that the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others. This Court reviewed the history of American gun laws extensively in *Heller* and *Bruen*. From the earliest days of the common law, firearm regulations have included provisions barring people from misusing weapons to harm or menace others. The [historical] laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed.

Section 922(g)(8) is by no means identical to these founding era regimes, but it does not need to be. Its prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition the surety and going armed

laws represent. This provision is "relevantly similar" to those founding era regimes in both why and how it burdens the Second Amendment right. Section 922(g)(8) restricts gun use to mitigate demonstrated threats of physical violence, just as the [historical] laws do. Unlike the regulation struck down in *Bruen*, Section 922(g)(8) does not broadly restrict arms use by the public generally.

Moreover, Section 922(g)(8)'s restriction was temporary as applied to Rahimi. Section 922(g)(8) only prohibits firearm possession so long as the defendant "is" subject to a restraining order. Finally, the penalty—another relevant aspect of the burden—also fits within the regulatory tradition. The [historical] laws provided for imprisonment, and if imprisonment was permissible to respond to the use of guns to threaten the physical safety of others, then the lesser restriction of temporary disarmament that Section 922(g)(8) imposes is also permissible.

Rahimi argues *Heller* requires us to affirm, because Section 922(g)(8) bars individuals subject to restraining orders from possessing guns in the home, and in *Heller* we invalidated an "absolute prohibition of handguns ... in the home." 554 U.S. at 636. But *Heller* never established a categorical rule that the Constitution prohibits regulations that forbid firearm possession in the home. In fact, our opinion stated that many such prohibitions, like those on the possession of firearms by "felons and the mentally ill," are "presumptively lawful."

The dissent [Justice Thomas] reaches a contrary conclusion, primarily on the ground that the historical analogues for Section 922(g)(8) are not sufficiently similar to place that provision in our historical tradition. As we said in *Bruen*, a "historical twin" is not required.

In *Heller*, *McDonald*, and *Bruen*, this Court did not undertake an exhaustive historical analysis of the full scope of the Second Amendment. Nor do we do so today. Rather, we conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment.

Justice SOTOMAYOR concurred, joined by Justice Kagan:

The Court's opinion clarifies an important methodological point that bears repeating: Rather than asking whether a present-day gun regulation has a precise historical analogue, courts applying *Bruen* "should consider whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition." Here, for example, the Government has not identified a founding-era or Reconstruction-era law that specifically disarmed domestic abusers, but it did not need to do so. Although § 922(g)(8) "is by no means identical" to the [historical] laws, it "restricts gun use to

mitigate demonstrated threats of physical violence, just as the [historical] laws did." That shared principle is sufficient.

Justice KAVANAUGH, concurring:

The Framers of the Constitution and Bill of Rights wisely sought the best of both worlds: democratic self-government and the protection of individual rights against excesses of that form of government. In justiciable cases, this Court determines whether a democratically enacted law or other government action infringes on individual rights guaranteed by the Constitution. When performing that Article III duty, the Court does not implement its own policy judgments about, for example, free speech or gun regulation. Rather, the Court interprets and applies the Constitution by examining text, pre-ratification and post-ratification history, and precedent. The Court's opinion today does just that, and I join it in full.

The concurring opinions, and the briefs of the parties and amici in this case, raise important questions about judicial reliance on text, history, and precedent, particularly in Second Amendment cases. I add this concurring opinion to review the proper roles of text, history, and precedent in constitutional interpretation.

The American people established an enduring American Constitution. The first and most important rule in constitutional interpretation is to heed the text—that is, the actual words of the Constitution—and to interpret that text according to its ordinary meaning as originally understood. The text of the Constitution is the "Law of the Land." Art. VI. As a general matter, the text of the Constitution says what it means and means what it says. And unless and until it is amended, that text controls.

In many important provisions, the Constitution is a document of majestic specificity with "strikingly clean prose." A. Amar, America's Constitution xi (2005). Two Houses of Congress. A House elected every two years. Senators serve 6-year terms. Two Senators per State. A State's equal suffrage in the Senate may not be changed without the State's consent. A two-thirds House vote to expel a Member of the House. The same for the Senate. Appropriations are made by law. Bicameralism and presentment. The Presidential veto. The Presidential pardon. The President serves a 4-year term. A maximum of two elected terms for a President. The salary of a sitting President may not be increased or decreased. A vote of a majority of the House and two-thirds of the Senate to remove a President. The President nominates and the Senate confirms principal executive officers. One Supreme Court. Tenure and salary protection for Supreme Court and other federal judges. Two-thirds of each House of Congress together with three-fourths of the States may amend the Constitution.

Congress meets at noon on January 3rd unless otherwise specified by Congress. The District of Columbia votes in Presidential elections. The list goes on.

Those and many other constitutional provisions are relatively clear. And when the "framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text." *McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

Of course, some provisions of the Constitution are broadly worded or vague—to put it in Madison's words, "more or less obscure and equivocal." The Federalist No. 37, p. 229 (C. Rossiter ed. 1961). As Chief Justice Rehnquist explained, the Constitution is in some parts "obviously not a specifically worded document but one couched in general phraseology." W. Rehnquist, *The Notion of a Living Constitution*, 54 Texas L. Rev. 693, 697 (1976).

That is especially true with respect to the broadly worded or vague individual-rights provisions. (I will use the terms "broadly worded" and "vague" interchangeably in this opinion.) For example, the First Amendment provides that "Congress shall make no law" "abridging the freedom of speech." And the Second Amendment, at issue here, guarantees that "the right of the people to keep and bear Arms" "shall not be infringed." Read literally, those Amendments might seem to grant absolute protection, meaning that the government could never regulate speech or guns in any way. But American law has long recognized, as a matter of original understanding and original meaning, that constitutional rights generally come with exceptions.

II

A recurring and difficult issue for judges, therefore, is how to interpret vague constitutional text. That issue often arises (as here) in the context of determining exceptions to textually guaranteed individual rights. To what extent does the Constitution allow the government to regulate speech or guns, for example?

In many cases, judicial precedent informs or controls the answer (more on that later). But absent precedent, there are really only two potential answers to the question of how to determine exceptions to broadly worded constitutional rights: history or policy.

Generally speaking, the historical approach examines the laws, practices, and understandings from before and after ratification that may help the interpreter discern the meaning of the constitutional text and the principles embodied in that text. The policy approach rests on the philosophical or policy dispositions of the individual judge.

History, not policy, is the proper guide. History can supply evidence of the original meaning of vague text. History is far less subjective than policy. And reliance on history is more consistent with the properly neutral judicial role than an approach where judges subtly (or not so subtly) impose their own policy views on the American people.

Judges are like umpires, as the Chief Justice has aptly explained. And in a constitutional system that counts on an independent Judiciary, judges must act like umpires. To be an umpire, the judge "must stick close to the text and the history, and their fair implications," because there "is no principled way" for a neutral judge "to prefer any claimed human value to any other." R. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 8 (1971). History establishes a "criterion that is conceptually quite separate from the preferences of the judge himself." A. Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 864 (1989). When properly applied, history helps ensure that judges do not simply create constitutional meaning "out of whole cloth." A. Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1183 (1989).[2]

> [2] The historical approach applies when the text is vague. But the text of the Constitution always controls. So history contrary to clear text is not to be followed. See, e.g., *INS v. Chadha*, 462 U.S. 919, 945–959 (1983); *Powell v. McCormack*, 395 U.S. 486, 546–547 (1969); *Brown v. Board of Education*, 347 U.S. 483, 490–495 & n 5 (1954). In some cases, there may be debate about whether the relevant text is sufficiently clear to override contrary historical practices. The basic principle remains: Text controls over contrary historical practices.

Absent precedent, therefore, history guides the interpretation of vague constitutional text. Of course, this Court has been deciding constitutional cases for about 230 years, so relevant precedent often exists. As the Court's opinions over time amply demonstrate, precedent matters a great deal in constitutional interpretation.

I now turn to explaining how courts apply pre-ratification history, post-ratification history, and precedent when analyzing vague constitutional text.

A

***Pre-ratification history*.** When interpreting vague constitutional text, the Court typically scrutinizes the stated intentions and understandings of the Framers and Ratifiers of the Constitution (or, as relevant, the Amendments). The Court also looks to the understandings of the American people from the pertinent ratification era. Those intentions and understandings do not necessarily determine meaning, but they

may be strong evidence of meaning. See generally, e.g., The Federalist (C. Rossiter ed. 1961); Records of the Federal Convention of 1787 (M. Farrand ed. 1911); Debates on the Federal Constitution (J. Elliot ed. 1836).

Especially for the original Constitution and the Bill of Rights, the Court also examines the pre-ratification history in the American Colonies, including pre-ratification laws and practices. And the Court pays particular attention to the historical laws and practices in the United States from Independence in 1776 until ratification in 1788 or 1791. Pre-ratification American history can shed light on constitutional meaning in various ways.

For example, some provisions of the Constitution use language that appeared in the Articles of Confederation or state constitutional provisions. And when the language that appeared in the Articles of Confederation or in state constitutions is the same as or similar to the language in the U. S. Constitution, the history of how people understood the language in the Articles or state constitutions can inform interpretation of that language in the U. S. Constitution. See, e.g., *Moore v. Harper*, 600 U.S. 1, 33 (2023) (the "Framers did not write the Elections Clause on a blank slate—they instead borrowed from the Articles of Confederation" as evidenced by their use of "closely parallel" language).

On the other hand, some pre-ratification history can be probative of what the Constitution does *not* mean. The Framers drafted and approved many provisions of the Constitution precisely to depart from rather than adhere to certain pre-ratification laws, practices, or understandings. The "defects" of the Articles of Confederation inspired some of the key decisions made by the Framers in Philadelphia and by the First Congress in drafting the Bill of Rights. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995) ("After the Constitutional Convention convened, the Framers were presented with, and eventually adopted a variation of, a plan not merely to amend the Articles of Confederation but to create an entirely new National Government with a National Executive, National Judiciary, and a National Legislature" (quotation marks omitted)). Likewise, reflexively resorting to English law or history without careful analysis can sometimes be problematic because America had fought a war to free itself from British law and practices and rid itself of tyrannical British rule.

The Equal Protection Clause provides another example. Ratified in 1868, that Clause sought to reject the Nation's history of racial discrimination, not to backdoor incorporate racially discriminatory and oppressive historical practices and laws into the Constitution. See generally *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Board of Education*, 347 U.S. 483 (1954).

In short, pre-ratification American history—that is, pre-ratification laws, practices, and understandings—can inform interpretation of vague constitutional provisions in the original Constitution and Bill of Rights. The same principle of looking to relevant pre-ratification history applies when interpreting broadly worded language in the later amendments, including the Fourteenth Amendment ratified in 1868. But in using pre-ratification history, courts must exercise care to rely only on the history that the Constitution actually incorporated and not on the history that the Constitution left behind.

B

***Post-ratification history*.** As the Framers made clear, and as this Court has stated time and again for more than two centuries, post-ratification history—sometimes referred to as tradition—can also be important for interpreting vague constitutional text and determining exceptions to individual constitutional rights. When the text is vague and the pre-ratification history is elusive or inconclusive, post-ratification history becomes especially important. Indeed, absent precedent, there can be little else to guide a judge deciding a constitutional case in that situation, unless the judge simply defaults to his or her own policy preferences.

After ratification, the National Government and the state governments began interpreting and applying the Constitution's text. They have continued to do so ever since. Post-ratification interpretations and applications by government actors—at least when reasonably consistent and longstanding—can be probative of the meaning of vague constitutional text. The collective understanding of Americans who, over time, have interpreted and applied the broadly worded constitutional text can provide good guidance for a judge who is trying to interpret that same text decades or centuries later.

Some important questions can arise, such as: (i) the level of generality at which to define a historical practice; (ii) how widespread a historical practice must have been; (iii) how long ago it must have started; and (iv) how long it must have endured. Although this Court's constitutional precedents routinely rely on post-ratification history, those precedents do not supply a one-size-fits-all answer to those various methodological questions. And I will not attempt to answer all of those questions here. Respected scholars are continuing to undertake careful analysis.

Importantly, the Framers themselves intended that post-ratification history would shed light on the meaning of vague constitutional text. [Justice Kavanaugh quotes Madison here.] From early on, this Court followed Madison's lead. In 1819, in one of its most important decisions ever, the Court addressed the scope of Article I's

Necessary and Proper Clause. *McCulloch v. Maryland*, 4 Wheat. 316 (1819). Writing for the Court, Chief Justice Marshall invoked post-ratification history to conclude that Congress's authority to establish a national bank could "scarcely be considered as an open question."

For more than two centuries—from the early 1800s to this case—this Court has repeatedly employed post-ratification history to determine the meaning of vague constitutional text. Reliance on post-ratification history "has shaped scores of Court cases spanning all domains of constitutional law, every era of the nation's history, and Justices of every stripe."[6]

> [6] This Court has similarly relied on history when deciding cases involving textually unenumerated rights under the Due Process Clause or the Privileges or Immunities Clause. The Court has regularly observed that the Fourteenth Amendment "specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U. S. 702 (1997); see, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) ("liberty of parents and guardians to direct the upbringing and education of children under their control").

C

***Precedent*.** With a Constitution and a Supreme Court that are both more than two centuries old, this Court and other courts are rarely interpreting a constitutional provision for the first time. Rather, a substantial body of Supreme Court precedent already exists for many provisions of the Constitution.

Precedent is fundamental to day-to-day constitutional decisionmaking in this Court and every American court. The "judicial Power" established in Article III incorporates the principle of *stare decisis*, both vertical and horizontal. Courts must respect precedent, while at the same time recognizing that precedent on occasion may appropriately be overturned. See, e.g., *Brown*, 347 U.S. 483; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). In light of the significant amount of Supreme Court precedent that has built up over time, this Court and other courts often decide constitutional cases by reference to those extensive bodies of precedent.

Even then, however, text and history still matter a great deal. When determining how broadly or narrowly to read a precedent; when determining whether to extend, limit, or narrow a precedent; or in relatively infrequent cases, when determining whether to overrule a precedent, a court often will consider how the precedent squares with the Constitution's text and history. Therefore, the text, as well as pre-ratification and post-

ratification history, may appropriately function as a gravitational pull on the Court's interpretation of precedent.

But the first stop in this Court's constitutional decisionmaking is the Court's precedents—the accumulated wisdom of jurists from Marshall and Story to Harlan and Taft; from Hughes and Black to Jackson and White; from Rehnquist and O'Connor to Kennedy and Scalia; and so on.

Justice BARRETT, concurring:

Courts have struggled with this use of history in the wake of *Bruen*. One difficulty is a level of generality problem: Must the government produce a founding-era relative of the challenged regulation—if not a twin, a cousin? Or do founding-era gun regulations yield concrete principles that mark the borders of the right?

"Analogical reasoning" under *Bruen* demands a wider lens: Historical regulations reveal a principle, not a mold. To be sure, a court must be careful not to read a principle at such a high level of generality that it waters down the right. Pulling principle from precedent, whether case law or history, is a standard feature of legal reasoning, and reasonable minds sometimes disagree about how broad or narrow the controlling principle should be.

Here, though, the Court settles on just the right level of generality: "Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." Section 922(g)(8)(C)(i) fits well within that principle; therefore, Rahimi's facial challenge fails. Harder level-of-generality problems can await another day.

Justice THOMAS, dissenting:

After *Bruen*, this Court's directive was clear: A firearm regulation that falls within the Second Amendment's plain text is unconstitutional unless it is consistent with the Nation's historical tradition of firearm regulation. Not a single historical regulation justifies the statute at issue, 18 U.S.C. § 922(g)(8). Therefore, I respectfully dissent.

Commentary: What emerged from *Bruen* and *Rahimi* is a **two-part test** that the Supreme Court now uses to analyze Second Amendment claims:

#1 First, the Court asks **whether the Second Amendment's terms cover the conduct in question**. For example, the Court said in *Heller* that "dangerous and unusual weapons" probably would not qualify as "arms" within the meaning of the Second Amendment. The Court has not applied this part of the test to reject any Second Amendment claim because it has been clear in its most recent cases that this part of the test was satisfied.

#2. Second, if the conduct falls within the Second Amendment's terms, the Constitution presumptively protects it. To overcome that presumption, **the government bears the burden of showing its regulatory efforts are "consistent with the Nation's historical tradition of firearm regulation."** The government does not have to point to a "historical twin." Instead, the government may reason by analogy, focusing on whether the modern regulation is **similar in purpose and operation** to the historical regulation.

The Supreme Court applied this second part of the test in *United States v. Hemani*, 146 S. Ct. 1677 (2026), and *Wolford v. Lopez*, 146 S. Ct. __ (2026). In *Hemani,* the Court addressed a provision of federal law that prohibits the possession of firearms by a person who is "an unlawful user" of a controlled substance. The Court held (9-0) that this provision violated the Second Amendment rights of Ali Hemani, who admitted only to the regular use of marijuana. In *Wolford*, the Court addressed a Hawaii law that made it unlawful to carry firearms on private property that is open to the public without getting the property owner's affirmative consent. The Court recognized that private property owners are unconstrained by the Second Amendment and thus may prohibit firearms on their property, but the Court held (6-3) that Hawaii could not change that default rule requiring the property owners' affirmative consent. We can expect a lot more litigation involving Second Amendment claims in the future.

Questions: We now return to the broader issue of the *methodology* that Supreme Court Justices use when interpreting constitutional text. In the preface to this book, I assured you that you will emerge with a sophisticated understanding of cutting-edge legal issues. But I also warned you that such growth requires a lot of work and that you will need to read the case excerpts multiple times. Con law is simply too hard to digest with a "one and done" approach. That warning is especially true of the cases that you just read, which address some of the most sophisticated concepts in constitutional law. As you go back and reread the excerpts from *Rahimi* and *Bruen*, here are questions that you should try to answer in your notes, using your own words:

Why does Justice Kavanaugh say that "history, not policy, is the proper guide" to interpreting vague constitutional text?

What is the difference between pre-ratification history and post-ratification history?

What was the specific post-ratification history that the Court relied on in *McCulloch*?

Why is Justice Barrett more skeptical of post-ratification history than pre-ratification history?

Why does Justice Breyer say that it's "troubling" and "unworkable" for judges and lawyers to rely exclusively on history? What would he do instead?

Was the majority opinion in *Rahimi* an admission that *Bruen* went overboard? Are the opinions in those cases consistent? What does *Bruen*'s author (Justice Thomas) think?

Those questions are hard! This next one is even harder, but don't panic because it has no right answer. Your goal is to sketch out some ideas about the answers that those Justices who care deeply about history might give to the question below the prompt. Here is the prompt:

As you saw in Chapter 5, the Supreme Court unanimously held in *Brown v. Board of Education*, 347 U.S. 483 (1954), that racially segregated public-school systems violate the Equal Protection Clause of the Fourteenth Amendment. Go back and take another look at the opinion in *Brown*. As you will see, the Supreme Court said that the historical evidence was "inconclusive" about whether the Fourteenth Amendment was intended to end racially segregated public schools. In answering the questions posed below, you should assume that the Court was correct in *Brown* when it said that the historical evidence was inconclusive (though historians have continued to debate that point).

What should the Justices who are in the majority in *Rahimi* and *Bruen* say to explain why the *Brown* decision is correct? Trust me when I tell you that none of them is going to say *Brown* was wrong. But how can they explain why *Brown* was correctly decided, if the historical evidence is inconclusive? Note that Justice Kavanaugh gives some hints about what he would say in the footnotes of his concurring opinion in *Rahimi*.

C. FIFTH AMENDMENT TAKINGS CLAIMS

We now turn to constitutional issues that are mostly about money: **Fifth Amendment takings claims** here in Part C, followed by a bit on Contracts Clause claims in Part D. You may be happy to hear that these doctrines are more straightforward than the concepts we just studied.

The Fifth Amendment says that **"private property" shall not "be taken for public use, without just compensation."** That restriction applies directly to the federal government, and it is one of the many rights that has been incorporated against the states through the Fourteenth Amendment. An important thing to understand is that this clause does **not** prohibit the government from taking private property; it simply requires the government to pay just compensation ($$) when it does so. The rationale that you often see in the Supreme Court's cases is that this compensation requirement is designed "to prevent the government from forcing some people alone to bear burdens that, in fairness, should be borne by the public." For example, if the government wants to bulldoze your house to make room for a highway, it can do that, but it must compensate you (spreading the cost to taxpayers) rather than make you absorb the cost by yourself.

"Private property" includes real property (such as land or a house), personal property (such as a car or farm crops), and various forms of intangible property (such as money, patent rights, and trade secrets). As you will see in the case excerpts, the Supreme Court has developed **three categories** of takings claims, with different rules that apply to each category:

#1. Physical takings (aka **per se takings**). Physical takings occur if the government appropriates private property or authorizes someone else to do so. For example, if the government bulldozes your house to build a highway, that's a physical taking. The same is true if the government floods your land to create a reservoir. Or makes you turn over a portion of your crops to the government. Or makes you give third parties an easement to walk across your land. Physical takings are called **per se** takings because they are automatically treated as a taking without any balancing test. The only issue to decide is exactly how much $$—that is, just compensation—the government owes, which is often described as the **valuation** issue.

The rule that physical takings are per se takings is sometimes described as the ***Loretto* rule** because it comes from *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Often, there are disputes about whether the challenged government action should be analyzed as a per se taking or a regulatory taking

(category #2 below). The *Cedar Point* (2021) case that is excerpted below is an example. The majority held that the challenged government action was a physical taking, but the dissent thought it should be analyzed as a regulatory taking. The government is much more likely to win if the regulatory takings test is applied.

#2. Regulatory takings (aka **use restrictions**). Regulatory takings claims challenge a government's restriction how property can be used. A zoning law is a classic example of such a restriction: for instance, a local government may say that particular property can be used for residential purposes but not for commercial purposes.

A regulatory takings claim is much harder for property owners to win because Supreme Court doctrine gives the government a lot of latitude in regulating how private property gets used. In general, the Court does not treat such regulation as a taking unless it denies the owner all economically viable use of the land. For example, if a new zoning law prevents a developer from building *anything* on its private land, that might cross the line and be deemed a regulatory taking. By contrast, other use restrictions are not treated as takings as long as they are "reasonably necessary to the effectuation of a substantial government purpose" and do not "frustrate the owner's investment-backed expectations." The designation of a building as a historic landmark that merely prevents certain changes (like preserving the façade) would not be treated as a regulatory taking. We are not reading a regulatory takings case, but this category is discussed in other cases that we are reading.

The test for evaluating a regulatory takings claim is often called the ***Penn Central* test** because it comes from *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). As the *Cedar Park* opinion explains, the *Penn Central* test is a flexible test that **balances three factors:** the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. The government often wins on the merits when the *Penn Central* test applies, meaning that the court says there was no Fifth Amendment taking (so no need to address valuation).

#3. Permit conditions. Often, the government will attach conditions to a building permit. For instance, if the property owner's new construction will significantly increase traffic, a city government might condition a construction permit on the owner's agreement to deed over land needed to widen the nearby road. Or the government might require, as a condition of a building permit, that the property owner give the public an easement across the land. Permit conditions are not treated as takings if they are related to the government's land-use interests and roughly

proportional to the development's impact on those interests. The *Sheetz* (2024) case explains why the Supreme Court developed that test for permit conditions.

Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021)
(6-3 vote)

*[**Background:** The California regulation at issue in this case gave labor organizations the right to enter the private property of agricultural employers for up to 3 hours per day, 120 days per year, in order to solicit support for unionization. The Supreme Court held that this regulation amounted to a physical (per se) taking.]*

Chief Justice Roberts wrote the opinion for the Court, which Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined. Justice Breyer dissented, joined by Justices Sotomayor and Kagan.

Chief Justice ROBERTS wrote the opinion for the Court:

A California regulation grants labor organizations a "right to take access" to an agricultural employer's property in order to solicit support for unionization. Agricultural employers must allow union organizers onto their property for up to three hours per day, 120 days per year. The question presented is whether the access regulation constitutes a *per se* physical taking under the Fifth and Fourteenth Amendments.

A.

The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: "Nor shall private property be taken for public use, without just compensation." The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, "[p]roperty must be secured, or liberty cannot exist." Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851).

When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation. The Court's physical takings jurisprudence is as old as the Republic. The government commits a physical taking when it uses its power of eminent domain to formally condemn property. The same is true when the government physically takes possession of property without acquiring title to it. And the government likewise effects a physical taking when it occupies property—say, by

recurring flooding as a result of building a dam. These sorts of physical appropriations constitute the clearest sort of taking, and we assess them using a simple, per se rule: The government must pay for what it takes.

When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), however, the Court established the proposition that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." This framework now applies to use restrictions as varied as zoning ordinances, orders barring the mining of gold, and regulations prohibiting the sale of eagle feathers. To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.

Our cases have often described use restrictions that go "too far" as "regulatory takings." But that label can mislead. Government action that physically appropriates property is no less a physical taking because it arises from a regulation. The essential question is not, as the Ninth Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property. Whenever a regulation results in a physical appropriation of property, a per se taking has occurred, and *Penn Central* has no place.

B

The access regulation appropriates a right to invade the growers' property and therefore constitutes a per se physical taking. The regulation grants union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year. Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude.

The right to exclude is "one of the most treasured" rights of property ownership. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). According to Blackstone, the very idea of property entails "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 W. Blackstone,

Commentaries on the Laws of England 2 (1766). In less exuberant terms, we have stated that the right to exclude is "universally held to be a fundamental element of the property right," and is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."

Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation. The Court has often described the property interest taken as a servitude or an easement.

In *Loretto*, we made clear that a permanent physical occupation constitutes a per se taking regardless whether it results in only a trivial economic loss. New York adopted a law requiring landlords to allow cable companies to install equipment on their properties. 458 U.S. at 423. Loretto alleged that the installation of a ½-inch diameter cable and two 1½-cubic-foot boxes on her roof caused a taking. Id. at 424. 3164. We agreed, stating that where government action results in a "permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Id. at 434–435. [The Court then discussed more recent cases here.]

The upshot of this line of precedent is that government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation. As in those cases, the government here has appropriated a right of access to the growers' property, allowing union organizers to traverse it at will for three hours a day, 120 days a year. The regulation appropriates a right to physically invade the growers' property—to literally "take access," as the regulation provides. It is therefore a per se physical taking under our precedents. Accordingly, the growers' complaint states a claim for an uncompensated taking in violation of the Fifth and Fourteenth Amendments.

The Board and the dissent contend that our decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), establishes that the access regulation cannot qualify as a per se taking. There the California Supreme Court held that the State Constitution protected the right to engage in leafleting at the PruneYard, a privately owned shopping center. Applying the *Penn Central factors*, we held that no compensable taking had occurred. The Board and the dissent argue that *PruneYard* shows that limited rights of access to private property should be evaluated as regulatory rather than per se takings. We disagree. Unlike the growers' properties, the PruneYard was open to the public, welcoming some 25,000 patrons a day. Limitations on how a business generally open to the public may treat individuals on

the premises are readily distinguishable from regulations granting a right to invade property closed to the public.

Justice BREYER dissented, joined by Justices Sotomayor and Kagan:

A California regulation provides that representatives of a labor organization may enter an agricultural employer's property for purposes of union organizing. They may do so during four months of the year, one hour before the start of work, one hour during an employee lunch break, and one hour after work. The question before us is how to characterize this regulation for purposes of the Constitution's Takings Clause.

Does the regulation *physically appropriate* the employers' property? If so, there is no need to look further; the Government must pay the employers just compensation. Or does the regulation simply *regulate* the employers' property rights? If so, then there is every need to look further; the government need pay the employers just compensation only if the regulation goes too far. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (determining whether a regulation is a taking by examining the regulation's "economic impact," the extent of interference with "investment-backed expectations," and the "character of the governmental action").

The Court holds that the provision's "access to organizers" requirement amounts to a physical appropriation of property. In its view, virtually every government-authorized invasion is an "appropriation." But this regulation does not "appropriate" anything; it regulates the employers' right to exclude others. Our prior cases make clear that the regulation before us allows only a *temporary* invasion of a landowner's property and that this kind of temporary invasion amounts to a taking only if it goes too far. In my view, the majority's conclusion threatens to make many ordinary forms of regulation unusually complex or impractical. And though the majority attempts to create exceptions to narrow its rule, the law's need for feasibility suggests that the majority's framework is wrong. With respect, I dissent from the majority's conclusion that the regulation is a per se taking.

Commentary and questions: The majority in *Cedar Point* emphasized that the law allowed the union to be there five hours a day for 120 days a year. Would the outcome have been different if it was an hour a day for 30 days? If so, doesn't that suggest that the state had gone too far, which should have made *Cedar Point* a regulatory takings case rather than a physical takings case?

Tyler v. Hennepin County, Minnesota, 598 U.S. 631 (2023)
(unanimous)

*[**Background:** Hennepin County seized Geraldine Tyler's condo and sold it to cover the $15K she owed the county for unpaid taxes. That much was ok. But, in a nervy move, the county kept the entire $40K from the sale. Writing for a unanimous Supreme Court, Chief Justice Roberts explained that the Takings Clause does not allow the government to do that!]*

Chief Justice ROBERTS wrote the opinion for the unanimous Court:

Geraldine Tyler is 94 years old. In 1999, she bought a one-bedroom condominium in Minneapolis and lived alone there for more than a decade. But as Tyler aged, she and her family decided that she would be safer in a senior community, so they moved her to one in 2010. Nobody paid the property taxes on the condo in Tyler's absence and, by 2015, it had accumulated about $2300 in unpaid taxes and $13,000 in interest and penalties. Acting under Minnesota's forfeiture procedures, Hennepin County seized the condo and sold it for $40,000, extinguishing the $15,000 debt. The County kept the remaining $25,000 for its own use. The question presented is whether keeping that $25,000 constituted a taking of property without just compensation, in violation of the Fifth Amendment.

III

A

The Takings Clause, applicable to the States through the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." U. S. Const., Amdt. 5. States have long imposed taxes on property. Such taxes are not themselves a taking, but are a mandated "contribution from individuals ... for the support of the government ... for which they receive compensation in the protection which government affords." County of Mobile v. Kimball, 102 U.S. 691, 703 (1881). In collecting these taxes, the State seize and sell property, including land, to recover the amount owed. Here there was money remaining after Tyler's home was seized and sold by the County to satisfy her past due taxes, along with the costs of collecting them. The question is whether that remaining value is property under the Takings Clause, protected from uncompensated appropriation by the State.

The Takings Clause does not itself define property. For that, the Court draws on existing rules or understandings about property rights. State law is one important source. But state law cannot be the only source. Otherwise, a State could "sidestep the Takings Clause by disavowing traditional property interests" in assets it wishes to appropriate. So we also look to traditional property law principles, plus historical practice and this Court's precedents.

Minnesota recognizes a homeowner's right to real property, like a house, and to financial interests in that property, like home equity. Historically, Minnesota also recognized that a homeowner whose property has been sold to satisfy delinquent property taxes had an interest in the excess value of her home above the debt owed. But in 1935, the State purported to extinguish that property interest by enacting a law providing that an owner forfeits her interest in her home when she falls behind on her property taxes. This means, the County reasons, that Tyler has no property interest protected by the Takings Clause.

History and precedent say otherwise. The County had the power to sell Tyler's home to recover the unpaid property taxes. But it could not use the toehold of the tax debt to confiscate more property than was due. By doing so, it effected a classic taking in which the government directly appropriates private property for its own use. Tyler has stated a claim under the Takings Clause and is entitled to just compensation.

B

The principle that a government may not take more from a taxpayer than she owes can trace its origins at least as far back as Runnymeade in 1215, where King John swore in the Magna Carta that when his sheriff or bailiff came to collect any debts owed him from a dead man, they could remove property "until the debt which is evident shall be fully paid to us; and the residue shall be left to the executors to fulfil the will of the deceased." W. McKechnie, Magna Carta, A Commentary on the Great of King John, ch. 26, p. 322 (rev. 2d ed. 1914).

That doctrine became rooted in English law. This principle made its way across the Atlantic. In collecting taxes, the new Government of the United States could seize and sell only "so much of [a] tract of land ... as may be necessary to satisfy the taxes due thereon." Act of July 14, 1798, § 13, 1 Stat. 601. Ten States adopted similar statutes shortly after the founding.

The consensus that a government could not take more property than it was owed held true through the passage of the Fourteenth Amendment. States, including Minnesota, continued to require that no more than the minimum amount of land be

sold to satisfy the outstanding tax debt. Today, thirty-six States and the Federal Government require that the excess value be returned to the taxpayer.

C

Our precedents have also recognized the principle that a taxpayer is entitled to the surplus in excess of the debt owed. [**Note:** The Court discusses its precedents here.]

D

Finally, Minnesota law itself recognizes that in other contexts a property owner is entitled to the surplus in excess of her debt. Under state law, a *private* creditor may enforce a judgment against a debtor by selling her real property, but "[n]o more shall be sold than is sufficient to satisfy" the debt, and the creditor may receive only "so much [of the proceeds] as will satisfy" the debt. Likewise, if a bank forecloses on a home because the homeowner fails to pay the mortgage, the homeowner is entitled to the surplus from the sale.

The State now makes an exception only for itself, and only for taxes on real property. But property rights cannot be so easily manipulated. Minnesota may not extinguish a property interest that it recognizes everywhere else to avoid paying just compensation when it is the one doing the taking.

Commentary: When we studied procedural due process in Chapter 6, we learned that the Due Process Clauses do not create or define property rights, which are created by other sources such as state or federal law. The same is true of the Takings Clause. But as *Tyler* explained, that principle has some limits: a state cannot "sidestep the Takings Clause" by enacting a law that defines property to carve out the interest that the state wants to appropriate.

Sheetz v. County of El Dorado, California, 601 U.S. 267 (2024)
(unanimous)

*[**Background:** A county in California charged George Sheetz a hefty fee to mitigate local traffic congestion, as a condition of a building permit. Writing for the Court, Justice Barrett explained that this fee should be analyzed under the principles that govern permit conditions.]*

Justice BARRETT wrote the opinion for the unanimous Court:

George Sheetz wanted to build a small, prefabricated home on his residential parcel of land. To obtain a permit, though, he had to pay a substantial fee to mitigate local traffic congestion. Relying on this Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), Sheetz challenged the fee as an unlawful "exaction" of money under the Takings Clause.

II

A

When the government wants to take private property to build roads, courthouses, or other public projects, it must compensate the owner at fair market value. The just compensation requirement comes from the Fifth Amendment's Takings Clause, which provides: "nor shall private property be taken for public use, without just compensation." By requiring the government to pay for what it takes, the Takings Clause saves individual property owners from bearing "public burdens which, in all fairness and justice, should be borne by the public as a whole."

The Takings Clause's right to just compensation coexists with the States' police power to engage in land-use planning. (Though at times the two seem more like in-laws than soulmates.) While States have substantial authority to regulate land use, the right to compensation is triggered if they physically appropriate property or otherwise interfere with the owner's right to exclude others from it. That sort of intrusion on property rights is a per se taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

Different rules apply to State laws that merely restrict how land is used. A use restriction that is "reasonably necessary to the effectuation of a substantial government purpose" is not a taking unless it saps too much of the property's value

or frustrates the owner's investment-backed expectations. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 798 (1992) (“[T]he Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his land”).

Permit conditions are more complicated**.** If the government can deny a building permit to further a legitimate police-power purpose, then it can also place conditions on the permit that serve the same end. Such conditions do not entitle the landowner to compensation even if they require her to convey a portion of her property to the government. Thus, if a proposed development will substantially increase traffic congestion, the government may condition the building permit on the owner’s willingness to deed over the land needed to widen a public road. We have described permit conditions of this nature as a hallmark of responsible land-use policy. The government is entitled to put the landowner to the choice of accepting the bargain or abandoning the proposed development.

The bargain takes on a different character when the government withholds or conditions a building permit for reasons unrelated to its land-use interests. Imagine that a local planning commission denies the owner of a vacant lot a building permit unless she allows the commission to host its annual holiday party in her backyard (in propertyspeak, granting it a limited-access easement). The landowner is likely to accede to the government’s demand, no matter how unreasonable, so long as she values the building permit more. So too if the commission gives the landowner the option of bankrolling the party at a local pub instead of hosting it on her land. Because such conditions lack a sufficient connection to a legitimate land-use interest, they amount to “an out-and-out plan of extortion.” Nollan, 483 U.S. at 837.

Our decisions in *Nollan* and *Dolan* address this potential abuse of the permitting process. There, we set out a two-part test modeled on the unconstitutional conditions doctrine. First, permit conditions must have an “essential nexus” to the government's land-use interest. The nexus requirement ensures that the government is acting to further its stated purpose, not leveraging its permitting monopoly to exact private property without paying for it. Second, permit conditions must have “rough proportionality” to the development’s impact on the land-use interest. A permit condition that requires a landowner to give up more than is necessary to mitigate harms resulting from new development has the same potential for abuse as a condition that is unrelated to that purpose. This test applies regardless of whether the condition requires the landowner to relinquish property or requires her to pay a monetary exaction instead of relinquishing the property.

The California Court of Appeal declined to assess the County's traffic impact fee for an essential nexus and rough proportionality based on its view that the *Nollan*/*Dolan* test does not apply to "legislatively prescribed monetary fees." That was error.

Nothing in constitutional text, history, or precedent supports exempting legislatures from ordinary takings rules.

The Constitution's text does not limit the Takings Clause to a particular branch of government. The Clause itself, which speaks in the passive voice, focuses on (and prohibits) a certain 'act': the taking of private property without just compensation. It does not single out legislative acts for special treatment. Nor does the Fourteenth Amendment, which incorporates the Takings Clause against the States. On the contrary, the Amendment constrains the power of each "State" as an undivided whole. § 1. Thus, there is "no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Just as the Takings Clause "protects 'private property' without any distinction between different types," *Horne v. Department of Agriculture*, 576 U. S. 350 (2015), it constrains the government without any distinction between legislation and other official acts. So far as the Constitution's text is concerned, permit conditions imposed by the legislature and other branches stand on equal footing.

The same goes for history. In fact, special deference for legislative takings would have made little sense historically, because legislation was the conventional way that governments exercised their eminent domain power.

Precedent points the same way as text and history. A legislative exception to the Nollan/Dolan test conflicts with the rest of our takings jurisprudence, which does not otherwise distinguish between legislation and other official acts. That is true of physical takings, regulatory takings, and the unconstitutional conditions doctrine in which the Nollan/Dolan test is rooted.

Start with our physical takings cases. We have applied the per se rule requiring just compensation to both legislation and administrative action. In *Loretto*, we held that a state statute effected a taking because it authorized cable companies to install equipment on private property without the owner's consent. 458 U.S. at 438. In *Horne*, we held that an administrative order effected a taking because it required farmers to give the Federal Government a portion of their crop to stabilize market prices. 576 U.S. at 358. The branch of government that authorized the appropriation did not matter to the analysis in either case. Nor should it have. As we have explained: "The essential question is not ... whether the government action at issue

comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else." *Cedar Point*, 594 U.S. at 149.

This principle is evident in our regulatory takings cases too. We have examined land-use restrictions imposed by both legislatures and administrative agencies to determine whether the restriction amounted to a taking. In *Pennsylvania Coal Co. v. Mahon*, we held a state statute effected a taking because it prohibited the owner of mineral rights from mining coal beneath the surface estate, thus depriving the mineral rights of practically all economic value. And in *Palazzolo v. Rhode Island*, we remanded for the lower courts to determine whether an agency decision effected a taking when it denied the owner permission to build a beach club on the wetland portion of his property but allowed him to build a home on the upland portion.

In sum, there is no basis for affording property rights less protection in the hands of legislators than administrators. The Takings Clause applies equally to both—which means that it prohibits legislatures and agencies alike from imposing unconstitutional conditions on land-use permits.

We do not address the parties' other disputes over the validity of the traffic impact fee, including whether a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development. The California Court of Appeal did not consider this point—or any of the parties' other nuanced arguments—because it proceeded from the erroneous premise that legislative permit conditions are categorically exempt from the requirements of *Nollan* and *Dolan*. Whether the parties' other arguments are preserved and how they bear on Sheetz's legal challenge are for the state courts to consider in the first instance.

Commentary: The paragraph above left open various issues for the California Court of Appeal to decide. In case you're curious about what happened, the state court ended up saying that the *Nollan/Dolan* test applied, but that there was no taking because the county's traffic impact fee satisfied that test's requirements of an essential nexus and rough proportionality. *See Sheetz v. County. of El Dorado*, 113 Cal. App. 5th 113 (2025).

D. THE CONTRACTS CLAUSE

We close this chapter with one more doctrine that falls in the "property" category: the Contracts Clause of the Constitution. The Contracts Clause is in Article 1, section 10—not in the Bill of Rights or later constitutional amendments—and it is one of the few provisions of the original Constitution that restricts action by states. It provides that no state shall enact a law "impairing the Obligation of Contracts."

The Contracts Clause does not apply to the federal government. And even as to states, it is less restrictive than it sounds. The Supreme Court has interpreted the clause to limit a state's power to enact legislation that (1) breaches or modifies the state's own contracts; or (2) regulates existing contracts between private parties. That limit is not absolute, however: states can regulate existing contracts if the regulation of such contracts is reasonably designed and appropriately tailored to achieve a legitimate public purpose. This short excerpt from ***Sveen*** **(2018)** illustrates that principle.

Sveen v. Melin, 584 U.S. 811 (2018)
(8-1 vote)

*[**Background:** A life insurance policy is a contract with an insurer that designates the beneficiary who will be paid when the insured dies. The Minnesota law at issue in this case provided that divorce automatically revokes a designation of the former spouse. Writing for the Court, Justice Kagan rejected the argument that this state law violates the Contracts Clause. Justice Gorsuch dissented.]*

Justice KAGAN wrote the opinion for the Court:

A Minnesota law provides that "the dissolution or annulment of a marriage revokes any revocable beneficiary designation made by an individual to the individual's former spouse." Minn. Stat. § 524.2–804, subd. 1 (2016). That statute establishes a default rule for use when Minnesotans divorce. If one spouse has made the other the beneficiary of a life insurance policy or similar asset, their divorce automatically revokes that designation—on the theory that the policyholder would want that result. But if he does not, the policyholder may rename the ex-spouse as beneficiary.

We consider here whether applying Minnesota's automatic-revocation rule to a beneficiary designation made before the statute's enactment violates the Contracts Clause of the Constitution. We hold it does not.

The Contracts Clause restricts the power of States to disrupt contractual arrangements. It provides that "[n]o state shall ... pass any ... Law impairing the Obligation of Contracts." U.S. Const., Art. I, § 10, cl. 1. The origins of the Clause lie in legislation enacted after the Revolutionary War to relieve debtors of their obligations to creditors. But the Clause applies to any kind of contract. That includes, as here, an insurance policy.

At the same time, not all laws affecting pre-existing contracts violate the Clause. To determine when such a law crosses the constitutional line, this Court has long applied a two-step test. The threshold issue is whether the state law has operated as a substantial impairment of a contractual relationship. In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights. If such factors show a substantial impairment, the inquiry turns to the means and ends of the legislation. In particular, the Court has asked whether the state law is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose.

Here, we may stop after step one because Minnesota's revocation-on-divorce statute does not substantially impair pre-existing contractual arrangements. True enough that in revoking a beneficiary designation, the law makes a significant change. As Melin says, the "whole point" of buying life insurance is to provide the proceeds to the named beneficiary. But three aspects of Minnesota's law, taken together, defeat Melin's argument that the change it effected "severely impaired" her ex-husband's contract. First, the statute is designed to reflect a policyholder's intent—and so to support, rather than impair, the contractual scheme. Second, the law is unlikely to disturb any policyholder's expectations because it does no more than a divorce court could always have done. And third, the statute supplies a mere default rule, which the policyholder can undo in a moment. Indeed, Minnesota's revocation statute stacks up well against laws that this Court upheld against Contracts Clause challenges as far back as the early 1800s.

CHAPTER 9. CONGRESS'S POWER TO PROTECT INDIVIDUAL CONSTITUTIONAL RIGHTS

A. INTRODUCTION

Congratulations, you have reached the last chapter of this book! This chapter introduces new material and also provides an opportunity for some review, because the topic lies at the intersection of government powers and individual rights.

As we learned in Part One of the book, the federal government has only enumerated powers, that is, only those powers that the Constitution gives it (explicitly or implicitly). In Part One, our focus was on the powers that the **original Constitution** gave the federal government back when it was ratified in 1788, such as the commerce power, the taxing power, the spending power, and various foreign affairs powers. Those powers are found in Article I.

In this chapter, we study the additional enumerated powers that Congress gained after the Civil War. The **Thirteenth, Fourteenth, and Fifteenth Amendments** were ratified in 1865, 1868, and 1870, respectively, and are collectively known as the **Civil War Amendments**. Many people know that these amendments imposed new restrictions on state governments, such as by prohibiting states from denying people equal protection under the law. Fewer people know that these amendments also gave Congress the affirmative power "to enforce" the new restrictions "through appropriate legislation." Why did the drafters of the Civil War Amendments give these additional powers to Congress? In essence, they had lost some confidence in states as protectors of individual liberties and were shifting to Congress new responsibility for protecting individual rights. The Civil War Amendments thus altered the balance of power between the federal and state governments: a **federalism** issue.

What exactly did these new enforcement powers allow Congress to do? At a minimum, they allowed Congress to enact penalties and remedies for actual violations of constitutional rights. But as you will see in the case excerpts, the Supreme Court has interpreted Congress's enforcement powers more broadly than that. In this chapter, we will learn about the scope of Congress's enforcement powers. We also will learn some

details about the new individual rights that the Civil War Amendments created, such as voting rights.

B. THE THIRTEENTH AMENDMENT

Section 1 of the Thirteenth Amendment provides: "Neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Section 2 of the Thirteenth Amendment provides: "Congress shall have the power to enforce this article by appropriate legislation."

Let's start with section 1. An important thing to know is that, in contrast with other constitutional amendments, the Thirteenth Amendment restricts **private action** as well as **state action**. It says that slavery and involuntary servitude shall not "exist" in the United States. That makes sense because the goal was to abolish slavery. Because private actors such as Southern plantation owners were the ones who had implemented the institution of slavery, it could not have been abolished without prohibiting private (as well as state) action.

Section 1 of the Thirteenth Amendment was "self executing," meaning that it took effect without need for additional legislation. But the authors anticipated that it might be ignored. So they included section 2, which authorized Congress "to enforce" the Thirteenth Amendment through "appropriate legislation."

What did that power allow Congress to do? At a minimum, it enabled Congress to enact penalties and remedies for slavery and involuntary servitude. But as previewed in the introduction above, the Supreme Court has interpreted Congress's enforcement power to let Congress do more than that. In cases such as *Jones* (1968) and *Runyon* (1976), the Supreme Court held that Congress can enact legislation that **removes** what the Court described as the "**badges and incidents of slavery**." What are the badges and incidents of slavery? We don't know exactly, but the Supreme Court held that they included race-based restrictions on entering into (1) real estate transactions and (2) other contracts. In *Jones*, the Court upheld a federal statute that said that "all citizens" have the same right to engage in real estate transactions as "white citizens." And in *Runyon*, the Court upheld a federal statute that said that "all persons" in the United States shall have the same right to make and enforce contracts as "white persons."

Jones v. Alfred H. Mayer Co., 392 U.S. 440 (1968)
(7-2 vote)

*[**Background:** The federal statute at issue in this case (42 U.S.C. § 1982) is known as Section 1982. It provides that "all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." In this case, the Supreme Court interpreted this statute to prohibit private actors (as well as state actors) from discriminating against Black Americans in real estate transactions. The Court further held that this prohibition falls within Congress's power to enforce the Thirteenth Amendment.]*

Justice Stewart wrote the opinion for the Court. Justices Harlan and White dissented.

Justice STEWART wrote the opinion for the Court:

In this case we are called upon to determine the scope and constitutionality of an Act of Congress, 42 U.S.C. § 1982, which provides that:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

On September 2, 1965, the petitioners filed a complaint in the District Court for the Eastern District of Missouri, alleging that the respondents had refused to sell them a home in the Paddock Woods community of St. Louis County for the sole reason that petitioner Joseph Lee Jones is a Negro. Relying in part upon § 1982, the petitioners sought injunctive and other relief. The District Court sustained the respondents' motion to dismiss the complaint, and the Court of Appeals for the Eighth Circuit affirmed, concluding that § 1982 applies only to state action and does not reach private refusals to sell. For the reasons that follow, we reverse the judgment of the Court of Appeals. We hold that § 1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.

We begin with the language of the statute itself. In plain and unambiguous terms, § 1982 grants to all citizens, without regard to race or color, "the same right" to purchase and lease property "as is enjoyed by white citizens." That right can be impaired as effectively by those who place property on the market as by the State itself.

For, even if the State and its agents lend no support to those who wish to exclude persons from their communities on racial grounds, the fact remains that, whenever property is placed on the market for whites only, whites have a right denied to Negroes. So long as a Negro citizen who wants to buy or rent a home can be turned away simply because he is not white, he cannot be said to enjoy "the *same* right *** as is enjoyed by white citizens *** to *** purchase (and) lease *** real and personal property." 42 U.S.C. § 1982. (Emphasis added.)

On its face, therefore, § 1982 appears to prohibit all discrimination against Negroes in the sale or rental of property—discrimination by private owners as well as discrimination by public authorities. Indeed, even the respondents seem to concede that, if § 1982 "means what it says"—to use the words of the respondents' brief—then it must encompass every racially motivated refusal to sell or rent and cannot be confined to officially sanctioned segregation in housing. Stressing what they consider to be the revolutionary implications of so literal a reading of § 1982, the respondents argue that Congress cannot possibly have intended any such result. Our examination of the relevant history, however, persuades us that Congress meant exactly what it said. [The Court goes on here to examine the history of § 1982, which was originally enacted as part of the Civil Rights Act of 1866.]

The remaining question is whether Congress has power under the Constitution to do what § 1982 purports to do: to prohibit all racial discrimination, private and public, in the sale and rental of property. Our starting point is the Thirteenth Amendment, for it was pursuant to that constitutional provision that Congress originally enacted what is now § 1982. The Amendment consists of two parts. Section 1 states:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereby the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2 provides:

> Congress shall have power to enforce this article by appropriate legislation.

As its text reveals, the Thirteenth Amendment "is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Civil Rights Cases*, 109 U.S. 3, 20. It has never been doubted, therefore, "that the power vested in Congress to enforce the article by appropriate legislation," ibid., includes the power to enact laws "direct and

primary, operating upon the acts of individuals, whether sanctioned by state legislation or not." Id., at 23. So it was, for example, that this Court unanimously upheld the power of Congress under the Thirteenth Amendment to make it a crime for one individual to compel another to work in order to discharge a debt. *Clyatt v. United States*, 197 U.S. 207. Thus, the fact that § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem.

The constitutional question in this case, therefore, comes to this: Does the authority of Congress to enforce the Thirteenth Amendment "by appropriate legislation" include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes.

"By its own unaided force and effect," the Thirteenth Amendment "abolished slavery, and established universal freedom." *Civil Rights Cases*, 109 U.S. 3, 20 (1883). Whether or not the Amendment itself did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." Ibid.

Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say that the determination Congress has made is an irrational one. For this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its "burdens and disabilities"—included restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." *Civil Rights Cases*, 109 U.S. 3, 22. When racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

Runyon v. McCrary, 427 U.S. 160 (1976)
(7-2 vote)

*[**Background:** Whereas Jones involved Section 1982, this case involved the parallel statute known as Section 1981. It provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts … as is enjoyed by white citizens." 42 U.S.C. § 1981. Tracking the reasoning of Jones, the Supreme Court held that this statute prohibits discrimination against Black Americans in making or enforcing private contracts—including the contracts for private school admissions that were at issue in Runyon—and that this prohibition is within Congress's power to enforce the Thirteenth Amendment.]*

Justice Stewart wrote the opinion for the Court. Justices White and Rehnquist dissented.

Justice STEWART wrote the opinion for the Court:

The principal issue presented by these consolidated cases is whether a federal law, namely, 42 U.S.C. § 1981, prohibits private schools from excluding qualified children solely because they are Negroes.

It is now well established that section 1 of the 1866 Civil Rights Act, 42 U.S.C. § 1981, prohibits racial discrimination in the making and enforcement of private contracts. In ***Jones***, the Court held that the portion of section 1 of the 1866 Act presently codified as 42 U.S.C. § 1982 prohibits private racial discrimination in the sale or rental of real or personal property. Relying on the legislative history of section 1 of the 1866 Act, from which both Section 1981 and Section 1982 derive, the Court concluded that Congress intended to prohibit "all racial discrimination, private and public, in the sale . . . of property," and that this prohibition was within Congress' power under section 2 of the Thirteenth Amendment "rationally to determine what are the badges and the incidents of slavery, and . . . to translate that determination into effective legislation."

That holding necessarily implied that the portion of section 1 of the 1866 Act presently codified as 42 U.S.C. § 1981 likewise reaches purely private acts of racial discrimination. The statutory holding in *Jones* was that the 1866 Act "was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein including the right to purchase or lease property," One of the "rights enumerated" in § 1 is "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." Just as a

Negro's section 1 right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser solely because he was a Negro, so also a Negro's section 1 right to "make and enforce contracts" is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees.

The racial exclusion practiced by the Fairfax-Brewster School and Bobbe's Private School amounts to a classic violation of § 1981. The educational services of both schools were advertised and offered to members of the general public. But neither school offered services on equal basis to white and nonwhite students.

Section 1981, as applied to the conduct at issue here, constitutes a valid exercise of federal legislative power under Section 2 of the Thirteenth Amendment. The prohibition of racial discrimination that interferes with the making and enforcement of contracts for private educational services furthers goals closely analogous to those served by Section 1981's elimination of racial discrimination in the making of private employment contracts and, more generally, by Section 1982's guarantee that "a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." *Jones*, 392 U.S. at 443.

C. THE FOURTEENTH AMENDMENT

Section 1 of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 5 of the Fourteenth Amendment provides: "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

As we learned when we studied the incorporation doctrine in Chapter 5, the Supreme Court has interpreted Section 1 of the Fourteenth Amendment to incorporate nearly all of the provisions of the original Bill of Rights. Thus, Congress's Section 5 power to enforce the Fourteenth Amendment includes the power to enforce essentially all of the protections in the Bill of Rights (such as the First Amendment rights to free speech and

free exercise of religion) as well as the protections in the Fourteenth Amendment itself (such as its Equal Protection Clause).

Because the Fourteenth Amendment and these incorporated individual rights are protections against **state action**—as opposed to private action—the Supreme Court has held that Congress's section 5 enforcement power likewise must target state action. But the question remains: What types of state conduct can Congress regulate with this power? We learned in the Thirteenth Amendment context that Congress can do more than simply prohibit or remedy an actual violation of the Thirteenth Amendment. Is the same true of Congress's power to enforce the Fourteenth Amendment? It is! The Supreme Court has held that Congress can enact legislation to prevent constitutional violations, even if the regulated conduct is not itself a constitutional violation.

Here is a concrete example. In 1959, the Supreme Court held that literacy tests for voting were not, on their face, unconstitutional. Nonetheless, in a 1966 decision, the Supreme Court upheld Congress's ban on literacy tests for voting because Congress had found that state and local governments were using literacy tests as a means to suppress registration and voting by Black Americans. In other words, Congress's section 5 enforcement power allows it to prohibit state conduct that does not by itself violate individual constitutional rights, if Congress enacted the statute as a means of preventing constitutional violations.

Still, as you may have predicted, the Supreme Court has said that Congress's section 5 power is not unlimited. In *City of Boerne* (1997), the Court held that there must be a **congruence and proportionality** between the federal legislation and the constitutional violations that the federal law is supposedly meant to prevent. The Court invalidated the federal statute at issue in that case because the Court concluded that it swept too broadly. By contrast, the Court upheld the federal statute at issue in *Hibbs* (2003) because the Court concluded that the *City of Boerne* test was satisfied. How that test works in practice should become clearer when you read the excerpts below from *City of Boerne* and *Hibbs*.

City of Boerne v. Flores, 521 U.S. 507 (1997)
(6-3 vote)

*[**Background:** To understand this case, you need to know a bit about the First Amendment's protection for the free exercise of religion, even though this book generally does not cover the First Amendment. Here is what you need to know. In Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), the Supreme Court held that a **generally applicable law** does not violate a person's rights under the Free Exercise Clause simply because the law imposes a substantial burden on the person's religious exercise. For example, if a law generally makes marijuana illegal, a person does not have a Free Exercise Clause right to an exemption to smoke marijuana as part of a religious ritual. Instead, Smith held that only laws that **disfavor** religious practices violate the Free Exercise Clause. For example, a law that allows peyote use for various nonreligious purposes but prohibits peyote use for religious rituals would violate the Free Exercise Clause.*

The Smith decision was quite unpopular because many people thought the Supreme Court was not doing enough to protect religious exercise. In response to Smith, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA). As relevant here, RFRA made it unlawful for state and local governments to impose a substantial burden on a person's religious exercise unless challenged government action satisfied strict scrutiny. Because strict scrutiny is so hard to satisfy, the upshot was that RFRA required state and local governments to give religious exemptions from zoning regulations and other generally applicable laws. Various state and local governments challenged RFRA in suits around the country. In this case, the Supreme Court held that RFRA exceeded Congress's power to enforce the Fourteenth Amendment. Justice Kennedy wrote the opinion for the Court, which Chief Justice Rehnquist and Justices Stevens, Thomas, Ginsburg, and Scalia joined. Various concurrences were filed. Justices O'Connor, Souter, and Breyer dissented.]

Justice KENNEDY wrote the opinion for the Court:

A decision by local zoning authorities to deny a church a building permit was challenged under the Religious Freedom Restoration Act of 1993 (RFRA or Act), 107 Stat. 1488, 42 U.S.C. § 2000bb et seq. The case calls into question the authority of Congress to enact RFRA. We conclude the statute exceeds Congress' power.

Under our Constitution, the Federal Government is one of enumerated powers. Congress relied on its Fourteenth Amendment enforcement power in enacting the most

far-reaching and substantial of RFRA's provisions, those which impose its requirements on the States.

In defense of the Act, respondent the Archbishop contends, with support from the United States, that RFRA is permissible enforcement legislation. Congress, it is said, is only protecting by legislation one of the liberties guaranteed by the Fourteenth Amendment's Due Process Clause, the free exercise of religion, beyond what is necessary under *Smith*.

All must acknowledge that § 5 is a positive grant of legislative power to Congress. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976). For example, the Court upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the Fifteenth Amendment as a measure to combat racial discrimination in voting, *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966), despite the facial constitutionality of the tests.

It is also true, however, that as broad as the congressional enforcement power is, it is not unlimited. In assessing the breadth of § 5's enforcement power, we begin with its text. Congress has been given the power "to enforce" the "provisions of this article." We agree with respondent, of course, that Congress can enact legislation under § 5 enforcing the constitutional right to the free exercise of religion. The "provisions of this article," to which § 5 refers, include the Due Process Clause of the Fourteenth Amendment. Congress' power to enforce the Free Exercise Clause follows from our holding in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), that the "fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment."

Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial." Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment. [The Court went on to review that history and precedent.]

We now turn to consider whether RFRA can be considered enforcement legislation under § 5 of the Fourteenth Amendment. Respondent contends that RFRA is a proper exercise of Congress' remedial or preventive power. The Act, it is said, is a reasonable means of protecting the free exercise of religion as defined by *Smith*. It prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible").

While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years. The absence of more recent episodes stems from the fact that, as one witness testified, "deliberate persecution is not the usual problem in this country." Rather, the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion.

This lack of support in the legislative record, however, is not RFRA's most serious shortcoming. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.

Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest. Requiring a State to

demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion.

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003)
(6-3 vote)

*[**Background:** This case challenged the Family and Medical Leave Act's requirement that employers allow their employees to take 12 weeks of unpaid annual leave to take care of a new baby or seriously ill family member. It was undisputed that the FMLA's requirement is a valid exercise of Congress's commerce power. But for reasons having to do with state sovereign immunity, this case presented the question whether that requirement—as applied to state employers—is also a valid exercise of Congress's power to enforce the Fourteenth Amendment. If the answer was yes, then employees could seek damages from state employers for FMLA violations (not just injunctions against state officials), because Congress can abrogate (override) state sovereign immunity when it enacts legislation using its Fourteenth Amendment power. The Supreme Court said yes: It upheld the challenged FMLA requirement as a valid exercise of Congress's power to enforce the Fourteenth Amendment.]*

Chief Justice Rehnquist wrote the opinion of the Court, to which Justices O'Connor, Souter, Ginsburg, and Breyer joined. Justice Stevens concurred in the judgment. Justices Scalia, Kennedy, and Thomas dissented.

Chief Justice REHNQUIST wrote the opinion for the Court:

The Family and Medical Leave Act of 1993 (FMLA or Act) entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a "serious health condition" in an employee's spouse, child, or parent. 29 U.S.C. § 2612(a)(1)(C) (the family-care provision). The Act creates a private right of action to seek both equitable relief and money damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," should that employer "interfere with, restrain, or deny the exercise of" FMLA rights. We

hold that state employees may recover money damages in the event of the State's failure to comply with the family-care provision of the Act.

We granted certiorari to resolve a split among the Courts of Appeals on the question whether an individual may sue a State for money damages in federal court for violation of § 2612(a)(1)(C).

In enacting the FMLA, Congress relied on two of the powers vested in it by the Constitution: its Article I commerce power and its power under § 5 of the Fourteenth Amendment to enforce that Amendment's guarantees. Congress may not abrogate the States' sovereign immunity pursuant to its Article I power over commerce. Congress may, however, abrogate States' sovereign immunity through a valid exercise of its § 5 power.

This case turns, then, on whether Congress acted within its constitutional authority when it sought to abrogate the States' immunity for purposes of the FMLA's family-leave provision. Two provisions of the Fourteenth Amendment are relevant here: Section 5 grants Congress the power "to enforce" the substantive guarantees of § 1—among them, equal protection of the laws—by enacting "appropriate legislation." Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional. Congress' power "to enforce" the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct. We distinguish appropriate prophylactic legislation from "substantive redefinition of the Fourteenth Amendment right at issue," by applying the test set forth in *City of Boerne*: Valid § 5 legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."

The FMLA aims to protect the right to be free from gender-based discrimination in the workplace.[2]

> [2] The text of the Act makes this clear. Congress found that, "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the

> working lives of men." 29 U.S.C. § 2601(a)(5). In response to this finding, Congress sought "to accomplish the [Act's other] purposes ... in a manner that ... minimizes the potential for employment discrimination *on the basis of sex* by ensuring generally that leave is available ... *on a gender-neutral basis*[,] and to promote the goal of equal employment opportunity for women and men," §§ 2601(b)(4) and (5) (emphasis added).

We have held that statutory classifications that distinguish between males and females are subject to heightened scrutiny. For a gender-based classification to withstand such scrutiny, it must serve important governmental objectives, and the discriminatory means employed [must be] substantially related to the achievement of those objectives. *United States v. Virginia*, 518 U.S. 515, 533 (1996). The State's justification for such a classification must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. We now inquire whether Congress had evidence of a pattern of constitutional violations on the part of the States in this area.

The history of the many state laws limiting women's employment opportunities is chronicled in—and, until relatively recently, was sanctioned by—this Court's own opinions. Such laws were based on the related beliefs that (1) a woman is, and should remain, the center of home and family life and (2) a proper discharge of a woman's maternal functions—having in view not merely her own health, but the well-being of the race—justifies legislation to protect her from the greed as well as the passion of man. Until our decision in *Reed v. Reed*, 404 U.S. 71 (1971), "it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any 'basis in reason'"—such as the above beliefs—"could be conceived for the discrimination." *Virginia*, supra, at 531.

Congress responded to this history of discrimination by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a), and we sustained this abrogation in *Fitzpatrick*. But state gender discrimination did not cease. "It can hardly be doubted that ... women still face pervasive, although at times more subtle, discrimination ... in the job market." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). According to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits. Reliance on such stereotypes cannot justify the States' gender discrimination in this area. The persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic § 5 legislation.

As the FMLA's legislative record reflects, a 1990 Bureau of Labor Statistics (BLS) survey stated that 37 percent of surveyed private-sector employees were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies. S. Rep. No. 103–3, pp. 14–15 (1993), U.S. Code Cong. & Admin. News 1993, p. 3. The corresponding numbers from a similar BLS survey the previous year were 33 percent and 16 percent, respectively. While these data show an increase in the percentage of employees eligible for such leave, they also show a widening of the gender gap during the same period. Thus, stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread.[3]

> [3] While this and other material described leave policies in the private sector, a 50–state survey also before Congress demonstrated that "[t]he proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees." The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor–Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 33 (1986) (hereinafter Joint Hearing) (statement of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project). See also id., at 29–30.

Congress also heard testimony that "[p]arental leave for fathers ... is rare. Even ... [w]here child-care leave policies do exist, men, *both in the public and private sectors*, receive notoriously discriminatory treatment in their requests for such leave." Joint Hearing 147 (Washington Council of Lawyers) (emphasis added). Many States offered women extended "maternity" leave that far exceeded the typical 4– to 8–week period of physical disability due to pregnancy and childbirth, but very few States granted men a parallel benefit: Fifteen States provided women up to one year of extended maternity leave, while only four provided men with the same. M. Lord & M. King, The State Reference Guide to Work–Family Programs for State Employees 30 (1991). This and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work.[5]

> [5] Evidence pertaining to parenting leave is relevant here because state discrimination in the provision of both types of benefits is based on the same gender stereotype: that women's family duties trump those of the workplace. Justice Kennedy's dissent ignores this common foundation that, as Congress found, has historically produced discrimination in the

> hiring and promotion of women. Consideration of such evidence does not, as the dissent contends, expand our § 5 inquiry to include "general gender-based stereotypes in employment." To the contrary, because parenting and family leave address very similar situations in which work and family responsibilities conflict, they implicate the same stereotypes.

Finally, Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways. It was aware of the "serious problems with the discretionary nature of family leave," because when "the authority to grant leave and to arrange the length of that leave rests with individual supervisors," it leaves "employees open to discretionary and possibly unequal treatment." H.R. Rep. No. 103–8, pt. 2, pp. 10–11 (1993). Testimony supported that conclusion, explaining that "[t]he lack of uniform parental and medical leave policies in the work place has created an environment where [sex] discrimination is rampant." 1987 Senate Labor Hearings, pt. 2, at 170 (testimony of Peggy Montes, Mayor's Commission on Women's Affairs, City of Chicago).

The impact of the discrimination targeted by the FMLA is significant. Congress determined:

> Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be.

Joint Hearing 100.

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

We believe that Congress' chosen remedy, the family-care leave provision of the FMLA, is "congruent and proportional to the targeted violation." By creating an across-the-

board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.

Unlike the statute at issue in *City of Boerne*, the FMLA is narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship. We also find significant the many other limitations that Congress placed on the scope of this measure. The FMLA requires only unpaid leave, and applies only to employees who have worked for the employer for at least one year. Employees in high-ranking or sensitive positions are simply ineligible for FMLA leave; of particular importance to the States, the FMLA expressly excludes from coverage state elected officials, their staffs, and appointed policymakers. Employees must give advance notice of foreseeable leave, and employers may require certification by a health care provider of the need for leave. Moreover, the cause of action under the FMLA is a restricted one: The damages recoverable are strictly defined and measured by actual monetary losses, and the accrual period for backpay is limited by the Act's 2–year statute of limitations (extended to three years only for willful violations).

For the above reasons, we conclude that § 2612(a)(1)(C) is congruent and proportional to its remedial object, and can "be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*.

Commentary: I'm sharing some personal history that bears on the practice of law. Although I did not work on the federal government's Supreme Court brief in *Hibbs* (which was briefed while I was out on leave with a new baby!), I helped to develop those legal arguments in earlier lower court cases. Taking a cue from RBG's litigation strategy, I spent several months reading through the FMLA's lengthy legislative history to identify instances in which men (as well as women) suffered because of stereotypes about which parent should have principal childcare responsibilities. It was gratifying to see that the Supreme Court included much of that evidence in the *Hibbs* opinion. One of my former colleagues used to say that "practicing law isn't rocket science; it rewards hard work." I found that idea reassuring and hope it gives you the same comfort.

D. THE FIFTEENTH AMENDMENT

We will end our study of con law with a short examination of the Fifteenth Amendment, which protects the right to vote. Voting rights are very important but also quite complicated. Election law is often the subject of an entire upper-level course, and my goal is simply to give you an introduction to some fundamentals.

Let's start with an overview of various provisions in the Constitution that address elections. (This is not an exhaustive list.)

Article I sets out who is eligible to be a candidate for the U.S. Senate and the U.S. House of Representatives. For example, to run for the U.S. Senate, a person must be at least 30 years old, must have been a U.S. citizen for at least nine years, and must live in the state where the person is running. As you may remember from *Term Limits* (1995), the Supreme Court held that a state cannot add to these qualifications. The Court distinguished a state's broad power to set qualification for *state* office (such as state senate) from qualifications for *federal* office. Similarly, Article II sets out the qualifications to run for President and, in *Trump v. Anderson* (2024), the Court held that a state does not have the power to decide if a presidential candidate should be disqualified for allegedly having engaged in an insurrection.

Despite these constraints, states have significant powers over elections for federal (as well as state) offices. Article I, section 4, which is known as the **Elections Clause**, gives each state the power to decide the "times, places and manner" of holding elections for U.S. Senators and members of the U.S. House of Representatives. However, the Election Clause then goes on to say that Congress can enact laws that make or alter (override) such state regulations (except the places for choosing U.S. Senators).

Various constitutional amendments address voting rights. For example, the Nineteenth Amendment made it unconstitutional to deny the right to vote on the basis of sex, and the Twenty-Sixth Amendment lowered the national voting age to 18.

The Fourteenth and Fifteenth Amendments created voting rights overlap to some extent. As you know, the Fourteenth Amendment prohibits states from denying a person equal protection of the laws. The Supreme Court has interpreted the Equal Protection Clause to provide certain protections for voting rights, including but not limited to protections against race discrimination. In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court held that when a state draws geographic lines that divvy up its residents to vote for U.S. House members, the population of each district must be substantially equal. That requirement is known as the "**one person, one vote**" principle. (States have more

flexibility when they draw lines for elections for state offices, but the Equal Protection Clause puts some limits in that context too.)

The Fifteenth Amendment specifically addressed race discrimination in the context of voting:

Section 1 of the Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Section 2 of the Fifteenth Amendment provides: "The Congress shall have power to enforce this article by appropriate legislation."

There is no doubt that section 1 prohibits state laws that *explicitly* discriminate on the basis of race, such as the state laws that were in place at the end of the Civil War that prohibited Black Americans from voting or registering to vote. The Supreme Court has also held that section 1 prohibits states from doing other things that are intended to suppress voting rights on the basis of race. But it can be quite difficult to prove that a state law was intended to abridge voting rights on the basis of race, rather than for some other permissible reason.

The Supreme Court has recognized that section 2 of the Fifteenth Amendment gives Congress some latitude to prohibit state laws that do not on their face abridge voting rates on the basis of race, if the legislation is designed to prevent states from abridging voting rights based on race. But as in the context of section 5 of the Fourteenth Amendment, the Supreme Court has said that the prophylactic legislation must be targeted at actual Fifteenth Amendment violations and congruent and proportional to those violations. Very important cases involved the **Voting Rights of 1965**, which (among other things) required certain "covered jurisdictions" (mostly in the South) to obtain preclearance from the U.S. Department of Justice before making any changes to their voting laws.

The Supreme Court upheld that preclearance requirement in *South Carolina v. Katzenbach* (1966) as a valid exercise of Congress's power to enforce the Fifteenth Amendment. But in *Shelby County v. Holder* (2013), which is excerpted below, the Court concluded that there was no longer enough empirical evidence of voting discrimination in the covered jurisdictions to justify the preclearance requirement.

Shelby County, Alabama v. Holder, 570 U.S. 529 (2013)
(5-4 vote)

*[**Background:** Long after the Civil War Amendments were ratified, various state and local governments continued to discriminate on the basis of race in their voting laws and practices. In 1965, Congress enacted the Voting Rights Act. Section 2 prohibited any state from imposing a standard, practice, or procedure "to deny or abridge the right of any citizen of the United States to vote on account of race or color." Section 2 is permanent legislation that applies nationwide and was not at issue in this case. The parts of the Act that were at issue in this case are Section 4 and Section 5, which together required certain "covered jurisdictions" (mostly in the South) to obtain preclearance from the U.S. Department of Justice before making any changes to their voting laws. In 1966, the Supreme Court upheld that preclearance requirement in South Carolina v. Katzenbach. In this 2013 case, however, the Court concluded that there was no longer enough empirical evidence of voting discrimination in the covered jurisdictions to justify the preclearance requirement.*

The dissenting Justices strongly disagreed, arguing that there was still lots of recent evidence of voting discrimination by covered jurisdictions and that, to the extent such discrimination had fallen, the preclearance requirement itself was the reason. RBG argued that "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."]

Chief Justice Roberts wrote the opinion for the Court, which Justices Scalia, Kennedy, Thomas, and Alito jointed. Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan.

Chief Justice ROBERTS wrote the opinion for the Court:

The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Sections 4 and 5 of the Act required certain "covered jurisdictions" to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). As we explained in upholding the law, "exceptional conditions can justify legislative measures not otherwise appropriate."

Reflecting the unprecedented nature of these [preclearance] measures, they were scheduled to expire after five years. See Voting Rights Act of 1965, § 4(a), 79 Stat. 438. Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031. There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, the racial gap in voter registration and turnout was lower in the States originally covered by § 5 than it [was] nationwide. Since that time, Census Bureau data indicate that African–American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent.

At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements.

I.

The Fifteenth Amendment was ratified in 1870, in the wake of the Civil War. It provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and it gives Congress the "power to enforce this article by appropriate legislation."

The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure. In the 1890s, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia began to enact literacy tests for voter registration and to employ other methods designed to prevent African–Americans from voting. Congress passed statutes outlawing some of these practices and facilitating litigation against them, but litigation remained slow and expensive, and the States came up with new ways to discriminate as soon as existing ones were struck down. Voter registration of African–Americans barely improved.

Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act. Section 2 was enacted to forbid, in all 50 States, any "standard, practice, or procedure ... imposed or applied ... to deny or abridge the right of any citizen of the United States to vote on account of race or color." Section 2 is permanent, applies nationwide, and is not at issue in this case.

Other sections targeted only some parts of the country. At the time of the Act's passage, these "covered" jurisdictions were those States or political subdivisions that had

maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election. Such tests or devices included literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters, and the like. In 1965, the covered States included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. The additional covered subdivisions included 39 counties in North Carolina and one in Arizona. Section 5 provided that no change in voting procedures could take effect until it was approved by federal authorities in Washington, D.C.—either the Attorney General or a court of three judges. A jurisdiction could obtain such "preclearance" only by proving that the change had neither "the purpose [nor] the effect of denying or abridging the right to vote on account of race or color."

The preclearance requirement was intended to be temporary; it was set to expire after five years. In *South Carolina v. Katzenbach*, we upheld the 1965 Act against constitutional challenge, explaining that it was justified to address "voting discrimination where it persists on a pervasive scale."

[Congress reauthorized the Voting Rights Act multiple times.] In 2006, Congress again reauthorized the Voting Rights Act for 25 years, again without change to its coverage formula for the preclearance requirement.

II.

The Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections. Of course, the Federal Government retains significant control over federal elections. For instance, the Constitution authorizes Congress to establish the time and manner for electing Senators and Representatives. Art. I, § 4, cl. 1. But States have broad powers to determine the conditions under which the right of suffrage may be exercised. And each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen. Drawing lines for congressional districts is likewise primarily the duty and responsibility of the State.

The Voting Rights Act sharply departs from these basic principles. It suspends all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C. States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own, subject of course to any injunction in a § 2 action. The Attorney General has 60 days to object to a preclearance request, longer if he requests more information. If a State seeks preclearance from a three-judge court, the process can take years.

And despite the tradition of equal sovereignty [among states], the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process. Even if a noncovered jurisdiction is sued, there are important differences between those proceedings and preclearance proceedings; the preclearance proceeding not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation.

In 1966, we found these departures from the basic features of our system of government justified. The "blight of racial discrimination in voting" had "infected the electoral process in parts of our country for nearly a century." *Katzenbach*, 383 U.S. at 308. Several States had enacted a variety of requirements and tests "specifically designed to prevent" African–Americans from voting. Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States "merely switched to discriminatory devices not covered by the federal decrees," "enacted difficult new tests," or simply "defied and evaded court orders." Shortly before enactment of the Voting Rights Act, only 19.4 percent of African–Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. Those figures were roughly 50 percentage points or more below the figures for whites.

In short, we concluded that "[u]nder the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner." We also noted then and have emphasized since that this extraordinary legislation was intended to be temporary, set to expire after five years.

At the time, the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense. We found that "Congress chose to limit its attention to the geographic areas where immediate action seemed necessary." The areas where Congress found "evidence of actual voting discrimination" shared two characteristics: "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average." We explained that "tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." We therefore concluded that "the coverage formula [was] rational in both practice and theory." It accurately reflected those jurisdictions uniquely characterized by voting discrimination "on a pervasive

scale," linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement. The formula ensured that the "stringent remedies were aimed at areas where voting discrimination had been most flagrant."

Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels. The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years.

Those conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that "significant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." § 2(b)(1), 120 Stat. 577. The House Report elaborated that "the number of African–Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982," and noted that "[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters." H.R. Rep. 109–478, at 12 (2006), 2006 U.S.C.C.A.N. 618, 627. That Report also explained that there have been "significant increases in the number of African–Americans serving in elected offices"; more specifically, there has been approximately a 1,000 percent increase since 1965 in the number of African–American elected officials in the six States originally covered by the Voting Rights Act. Id., at 18.

Respondents do not deny that there have been improvements on the ground, but argue that much of this can be attributed to the deterrent effect of § 5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should § 5 be struck down. Under this theory, however, § 5 would be effectively immune from scrutiny; no matter how "clean" the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior.

The preclearance requirement of § 5 applies only to those jurisdictions singled out by § 4. We now consider whether that coverage formula is constitutional in light of current conditions. Coverage today is based on decades-old data and eradicated practices. The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better

future. To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past.

Striking down an Act of Congress "is the gravest and most delicate duty that this Court is called on to perform." We do not do so lightly. But the formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance. Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2.

Justice GINSBURG dissented, joined by Justices Breyer, Souter, and Sotomayor:

In the Court's view, the very success of § 5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, § 5 remains justifiable, this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments "by appropriate legislation." With overwhelming support in both Houses, Congress concluded that, for two prime reasons, § 5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those assessments were well within Congress' province to make and should elicit this Court's unstinting approbation.

I begin with the evidence on which Congress based its decision to continue the preclearance remedy in 2006. The surest way to evaluate whether that remedy remains in order is to see if preclearance is still effectively preventing discriminatory changes to voting laws. On that score, the record before Congress was huge. In fact, Congress found there were more DOJ objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490). All told, between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory. H.R. Rep. No. 109–478, at 21. Congress found that the majority of DOJ objections included findings of discriminatory intent, and that the changes blocked by preclearance were "calculated decisions to keep minority voters from fully participating in the political process." On top of that, over the same time period the DOJ and private plaintiffs succeeded in more than 100 actions to enforce the § 5 preclearance requirements.

Congress also received evidence that litigation under § 2 of the Act was an inadequate substitute for preclearance in the covered jurisdictions. Litigation occurs only after the

fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency.

Although covered jurisdictions account for less than 25 percent of the country's population, the Katz study revealed that they accounted for 56 percent of successful § 2 litigation since 1982. Controlling for population, there were nearly four times as many successful § 2 cases in covered jurisdictions as there were in noncovered jurisdictions.

The Court strikes § 4(b)'s coverage provision because, in its view, the provision is not based on "current conditions." It discounts, however, that one such condition was the preclearance remedy in place in the covered jurisdictions, a remedy Congress designed both to catch discrimination before it causes harm, and to guard against return to old ways. Volumes of evidence supported Congress' determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.

Commentary: The dissent in *Shelby County* cited evidence that between 1982 and 2006, when Congress reauthorized the preclearance requirement, voting discrimination was significantly more prevalent in covered jurisdictions than elsewhere. The majority did not regard that evidence as sufficient to uphold the preclearance requirement, even though in *Hibbs* (2003), the Court had relied on relatively sparse evidence of state sex discrimination in family leave policies to uphold the FMLA as an exercise of Congress's power to enforce the Fourteenth Amendment. Moreover, *Shelby County* did not cite the "congruence and proportionality" standard that it had applied in *Hibbs* and *City of Boerne*. Was *Shelby County* applying a different test? The Court did not say exactly, but there is reason to think that it was. In another part of the *Shelby County* opinion (not excerpted here), the Court expressed particular concern that the preclearance requirement violated the "principle of equal sovereignty" by singling out certain states for preclearance in an area of law (voting) that the Court saw as a fundamental matter of state concern.

I chose to end this book with the *Shelby* case because it brings together the three major topics that we have studied: federalism, the separation of powers, and individual rights. Federalism was a core issue because *Shelby* involved a clash between the federal government and certain states, which by an Act of Congress were required to get the OK from the federal government before making changes to their state election laws. Individual rights were in play because the purpose of the Voting Rights Act was to protect the right to vote that is essential to a functioning democracy. Finally, the

separation of powers lies at the heart of the Supreme Court's disposition of the case: From the time the Supreme Court announced its power of judicial review in *Marbury v. Madison* (1803), the Justices have been steadfast in their view that the Supreme Court—rather than Congress or the President—has the final word on the Constitution's meaning. On that bedrock structural question of *judicial* supremacy, there has been no dissent.