CONSTITUTIONAL LAW
Foundations, Interpretations, and Commentaries©

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Excerpts from the forthcoming textbook

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CHAPTER ONE
THE ORIGINS AND DEVELOPMENT OF THE U.S. CONSTITUTION

Before studying modern American constitutional law, some foundational issues should be considered. What is a constitution? How did the idea that a constitution should govern the relationship of the government to the people develop? How have these origins influenced the U.S. Constitution? What were the underlying purposes and motivations for the U.S. Constitution, and how have these foundations impacted ongoing interpretations of the Constitution?

This chapter sheds light on these questions. The chapter traces the development of constitutionalism on the world stage from the Magna Carta to the English Bill of Rights and through the Enlightenment political philosophers. It then highlights the American experience under revolutionary state constitutions and the Articles of Confederation before focusing on the historical foundations and text of the U.S. Constitution. The chapter concludes by introducing the concept of constitutional interpretation.

The first task is distinguishing constitutions from written laws or codes. For thousands of years now, governments have adopted written codes or laws so that the people will have notice of their obligations, rights, and duties. The Code of Hammurabi and the Twelve Tables in Roman Law, along with religiously inspired texts such as the Ten Commandments, are early examples. Yet constitutions differ from the enactment of a legal code.

A constitution constrains the governing authority and limits its power. A constitution is based on the idea that the people are sovereign such that the government must obey the limitations established by the sovereign people on its operations. Typical limitations on the governing authority include separation of powers, restricted grants of authority, the guarantee of specified individual rights, and an independent judicial branch. How did this concept that the governing authority could be constrained by its subjects develop? While ancient Greece and Rome occasionally experimented with constitutional principles, an important precursor to modern constitutionalism was the Magna Carta. Lord Alfred Denning described it as "the greatest constitutional document of all times—the foundation of the freedom of the individual against the arbitrary authority of the despot."

A. THE MAGNA CARTA

The Magna Carta, or Great Charter, was forced upon King John in 1215 by revolting English barons who had entered into London by force. As might be expected, the text of the Magna Carta of 1215 bears witness to the haste and the bargaining between numerous individuals that led to its promulgation. It is a product of its times, as most of its clauses deal with specific grievances rather than with general principles of law.

In feudal society, the king's barons held their lands "in fee" from the king, for an oath to him of loyalty and obedience, and with the obligation to provide him knights whenever necessary for military service. At first the barons provided the knights by dividing their estates into smaller parcels, which they distributed to tenants able to serve as knights. But, by the time of King John, it had become typical to substitute a cash payment that was used to maintain paid armies.

Besides military service, feudal custom allowed the king to make certain other exactions from his barons. In times of emergency, and on certain special occasions, he could demand from them a financial levy. When a baron died, he could demand a succession payment from the baron's heir. If there was no heir, or if the succession was disputed, the baron's lands could be forfeited to the Crown. If the heir was under age, the king could either assume or sell the guardianship of his estates, and enjoy all the profits from them until the heir came of age. The widows and daughters of barons might also be sold in marriage. With their own tenants, the barons could deal similarly.

This system, of course, provided apt opportunities for extortion and abuse, and such abuses were a frequent cause of complaint. Moreover, before Magna Carta, there was no true avenue to obtain redress for abuses.

About two-thirds of the clauses of the Magna Carta of 1215 are concerned with limiting the misuses of power by royal officials and providing a means to obtain a fair hearing of complaints against the king, his agents, and feudal lords. But other topics are also included as well. The first clause, confirming the church's right to elect its own dignitaries without royal interference, reflects King John's dispute with the Pope over Stephen Langton's election as archbishop of Canterbury. The debt provisions were necessary because the upper and middle classes owned property rather than having ready money, often requiring their resort to money lenders. Many clauses deal with the circumstances that surrounded the making of the charter, with others being concessions to special interests.

Although King John later reneged on the Magna Carta through an agreement with Pope Innocent III, the Charter was later reissued in a shortened version in 1225 once King Henry III, King John's son, reached the age of majority. The Magna Carta of 1225 became part of English law, being reconfirmed numerous times over the centuries. In the nineteenth century, certain provisions of the Charter started being repealed, until now only a handful of the original provisions are still in force as law, most importantly the freedom of the English Church in the first clause and the protection of due process.

As you read the following translated edits of the key provisions of the Magna Carta, consider what concepts can be traced from Magna Carta to the U.S. Constitution and how the English experience with the Magna Carta influences the separation of powers and ideal of judicial independence today.

THE MAGNA CARTA OF 1215

(Clauses marked (+) were amended when the charter was reissued in 1225. In the charter itself the clauses are not numbered, and the text reads continuously.)

JOHN, by the grace of God King of England, Lord of Ireland, Duke of Normandy and Aquitaine, and Count of Anjou, to his archbishops, bishops, abbots, earls, barons, justices, foresters, sheriffs, stewards, servants, and to all his officials and loyal subjects, Greeting.

KNOW THAT BEFORE GOD, for the health of our soul and those of our ancestors and heirs, to the honour of God, the exaltation of the holy Church, and the better ordering of our kingdom, at the advice of our reverend fathers . . . and other loyal subjects:

+ (1) FIRST, THAT WE HAVE GRANTED TO GOD, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired. That we wish this so to be observed, appears from the fact that of our own free will, before the outbreak of the present dispute between us and our barons, we granted and confirmed by charter the freedom of the Church's elections—a right reckoned to be of the greatest necessity and importance to it—and caused this to be confirmed by Pope Innocent III. This freedom we shall observe ourselves, and desire to be observed in good faith by our heirs in perpetuity.

TO ALL FREE MEN OF OUR KINGDOM we have also granted, for us and our heirs for ever, all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs: . . . .

(9) Neither we nor our officials will seize any land or rent in payment of a debt, so long as the debtor has movable goods sufficient to discharge the debt. A debtor's sureties shall not be distrained upon so long as the debtor himself can discharge his debt. If, for lack of means, the debtor is unable to discharge his debt, his sureties shall be answerable for it. If they so desire, they may have the debtor's lands and rents until they have received satisfaction for the debt that they paid for him, unless the debtor can show that he has settled his obligations to them. . . .

+ (13) The city of London shall enjoy all its ancient liberties and free customs, both by land and by water. We also will and grant that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs. . . .

(17) Ordinary lawsuits shall not follow the royal court around, but shall be held in a fixed place.

(18) Inquests of *novel disseisin*, *mort d'ancestor*, and *darrein presentment* shall be taken only in their proper county court. We ourselves, or in our absence abroad our chief justice, will send two justices to each county four times a year, and these justices, with four knights of the county elected by the county itself, shall hold the assizes in the county court, on the day and in the place where the court meets.

(19) If any assizes cannot be taken on the day of the county court, as many knights and freeholders shall afterwards remain behind, of those who have attended the court, as will suffice for the administration of justice, having regard to the volume of business to be done.

(20) For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a husbandman the implements of his husbandry, if they fall upon the mercy of a royal court. None of these fines shall be imposed except by the assessment on oath of reputable men of the neighbourhood.

(21) Earls and barons shall be fined only by their equals, and in proportion to the gravity of their offence.

(22) A fine imposed upon the lay property of a clerk in holy orders shall be assessed upon the same principles, without reference to the value of his ecclesiastical benefice. . . .

(24) No sheriff, constable, coroners, or other royal officials are to hold lawsuits that should be held by the royal justices. . . .

(34) The writ called *precipe* shall not in future be issued to anyone in respect of any holding of land, if a free man could thereby be deprived of the right of trial in his own lord's court. . . .

(38) In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.

+ (39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.

+ (40) To no one will we sell, to no one deny or delay right or justice.

B. ENGLISH BILL OF RIGHTS

The Magna Carta was a product of feudal times. Additional documents were needed to combat the excesses of the Crown in the seventeenth and eighteenth centuries. These documents included the Petition of Right of 1628, the Habeas Corpus Act of 1679, and the English Bill of Rights of 1689. The Petition of Right was a petition sent by the English Parliament to King Charles I complaining of various royal abuses and seeking the Crown's recognition of limitations on royal authority, such as no taxation without Parliament's consent, no imprisoning or detaining a person without cause, no quartering soldiers in private houses without consent, and no martial law in peacetime. The Habeas Corpus Act codified and strengthened the existing concept of habeas corpus during the reign of King Charles II. The last of these seventeenth century parliamentary acts, known as the English Bill of Rights, was the most comprehensive, compiling many of the rights that the English had come to view as the rights of Englishman.

Parliament enacted the English Bill of Rights after the so-called Glorious Revolution of 1688, in which William III of Orange landed with an army to depose the reigning Stuart Catholic King of England, King James II. After King James fled, William and his wife Mary were presented a Declaration of Right drafted by the Convention Parliament, which they accepted. William and Mary were then offered the throne and shortly thereafter crowned as joint monarchs.

The Declaration they accepted was later that year embodied in the parliamentary act set out below that is known as the English Bill of Rights. The rights listed responded to perceived abuses of power by prior monarchs, predominantly with respect to the relationship between the King and Parliament. As a result, while the English Bill of Rights confined royal power, it did not constrain parliamentary authority. Which of these rights were later incorporated into the American Bill of Rights? Which of these rights were unique to those particular times?

An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown

Whereas the Lords Spiritual and Temporal and Commons assembled at Westminster, lawfully, fully and freely representing all the estates of the people of this realm, did upon the thirteenth day of February in the year of our Lord one thousand six hundred eighty-eight [old style date] present unto their Majesties, then called and known by the names and style of William and Mary, prince and princess of Orange, being present in their proper persons, a certain declaration in writing made by the said Lords and Commons in the words following, viz.:

Whereas the late King James the Second, by the assistance of divers evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom . . . [The Act then proceeds to document the abuses of the former King James, including suspending laws without consent of Parliament, establishing an ecclesiastical court, levying unauthorized taxes, raising and keeping a standing army in peacetime, disarming Protestants while allowing Catholics to be armed, interfering with free elections, imposing excessive bail, fines, and cruel punishments, and other royal interferences with proper judicial and parliamentary authority.]

All which are utterly and directly contrary to the known laws and statutes and freedom of this realm; . . . [whereas the members of Parliament do] declare:

That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal;

That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal;

That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious;

That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal;

That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal;

That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law;

That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law;

That election of members of Parliament ought to be free;

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or

questioned in any court or place out of Parliament;

That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders;

That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void;

And that for redress of all grievances, and for the amending, strengthening and preserving of the laws, Parliaments ought to be held frequently.

And they do claim, demand and insist upon all and singular the premises as their undoubted rights and liberties, and that no declarations, judgments, doings or proceedings to the prejudice of the people in any of the said premises ought in any wise to be drawn hereafter into consequence or example; to which demand of their rights they are particularly encouraged by the declaration of his Highness the prince of Orange as being the only means for obtaining a full redress and remedy therein. Having therefore an entire confidence that his said [Highness] will perfect the deliverance so far advanced by him, and will still preserve them from the violation of their rights which they have here asserted, . . . the said Lords Spiritual and Temporal and Commons assembled at Westminster do resolve that William and Mary, prince and princess of Orange, be and be declared king and queen of England, France and Ireland and the dominions thereunto belonging. . . .

C. THE POLITICAL PHILOSOPHERS

The Magna Carta, Petition of Right, Habeas Corpus Act, and English Bill of Rights were all reactionary documents to excesses of the Crown. While these documents are typically viewed as part of the uncodified or unwritten British Constitution, they fail to articulate an overarching relationship between the people and the government. Seventeenth and eighteenth enlightenment philosophers filled this void. Two of the most important works were John Locke's *Two Treatises of Government* (1690) and Baron Montesquieu's *The Spirit of the Laws* (1748).

John Locke (1632-1704) was an English philosopher and physician who originally published *Two Treatises* anonymously. As you read Locke's work, pay particular attention to the relationship between his view of the state of nature, the formation of political communities, and popular sovereignty. What was the state of nature? Why did people leave the state of nature to form political communities? What does this mean for the divine right of absolute monarchs? How does Locke's view of political societies presage the ideas of individual freedom, separation of powers, and limited government predicated on the consent of the governed?

Charles de Secondat, Baron de Montesquieu (1689–1755), a nobleman, a judge in a French court, and an influential political thinker, focused on separation of powers in his seminal work. His treatise presented numerous other theories—among the most important was respect for the role of history

and climate in shaping a nation's political structure. But our focus here will be on his views of separation of powers under the unwritten English Constitution and its preservation of liberty. Was this a realistic view? How did it come to influence later constitutions and the fundamental concept of separation of powers? How is it different than our modern understanding of the role and purposes of separation of powers and the best method to ensure that a ruler or group of rulers does not exercise despotic power?

JOHN LOCKE, TWO TREATISES OF GOVERNMENT

CHAPTER II: Of the State of Nature

Sect. 4. To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.

A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection, unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty.

Sect. 6. But though this be a state of liberty, yet it is not a state of licence: though man in that state have an uncontroulable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it. The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions: for men being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not one another's pleasure: and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us, that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for our's. Every one, as he is bound to preserve himself, and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice on an offender, take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another.

Sect. 7. And that all men may be restrained from invading others rights, and from doing hurt to one another, and the law of nature be observed, which willeth the peace and preservation of all mankind, the execution of the law of nature is, in that state, put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree, as may hinder its violation: for the law of nature would, as all other laws that concern men in this world, be in vain, if there were

no body that in the state of nature had a power to execute that law, and thereby preserve the innocent and restrain offenders. And if any one in the state of nature may punish another for any evil he has done, every one may do so: for in that state of perfect equality, where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of that law, every one must needs have a right to do. . . . EVERY MAN HATH A RIGHT TO PUNISH THE OFFENDER, AND BE EXECUTIONER OF THE LAW OF NATURE.

Sect. 13. To this strange doctrine, viz. That in the state of nature every one has the executive power of the law of nature, I doubt not but it will be objected, that it is unreasonable for men to be judges in their own cases, that self- love will make men partial to themselves and their friends: and on the other side, that ill nature, passion and revenge will carry them too far in punishing others; and hence nothing but confusion and disorder will follow, and that therefore God hath certainly appointed government to restrain the partiality and violence of men. I easily grant, that civil government is the proper remedy for the inconveniencies of the state of nature, which must certainly be great, where men may be judges in their own case, since it is easy to be imagined, that he who was so unjust as to do his brother an injury, will scarce be so just as to condemn himself for it: but I shall desire those who make this objection, to remember, that absolute monarchs are but men; . . .

CHAPTER VII: Of Political of Civil Society

Sec. 89. Where-ever therefore any number of men are so united into one society, as to quit every one his executive power of the law of nature, and to resign it to the public, there and there only is a political, or civil society. And this is done, where-ever any number of men, in the state of nature, enter into society to make one people, one body politic, under one supreme government; or else when any one joins himself to, and incorporates with any government already made: for hereby he authorizes the society, or which is all one, the legislative thereof, to make laws for him, as the public good of the society shall require; to the execution whereof, his own assistance (as to his own decrees) is due. And this puts men out of a state of nature into that of a common-wealth, by setting up a judge on earth, with authority to determine all the controversies, and redress the injuries that may happen to any member of the commonwealth; which judge is the legislative, or magistrates appointed by it. And where-ever there are any number of men, however associated, that have no such decisive power to appeal to, there they are still in the state of nature.

Sec. 90. Hence it is evident, that absolute monarchy, which by some men is counted the only government in the world, is indeed inconsistent with civil society, and so can be no form of civil-government at all: for the end of civil society, being to avoid, and remedy those inconveniencies of the state of nature, which necessarily follow from every man's being judge in his own case, by setting up a known authority, to which every one of that society may appeal upon any injury received, or controversy that may arise, and which every one of the society ought to obey; where-ever any persons are, who have not such an authority to appeal to, for the decision of any difference between them, there those persons are still in the state of nature; and so is every absolute prince, in respect of those who are under his dominion. . . .

Sec. 91. For he being supposed to have all, both legislative and executive power in himself alone, there is no judge to be found, no appeal lies open to any one, who may fairly, and indifferently, and

with authority decide, and from whose decision relief and redress may be expected of any injury or inconviency, that may be suffered from the prince, or by his order: so that such a man, however intitled, Czar, or Grand Seignior, or how you please, is as much in the state of nature, with all under his dominion, as he is with the rest of mankind: for where-ever any two men are, who have no standing rule, and common judge to appeal to on earth, for the determination of controversies of right betwixt them, there they are still in the state of nature, and under all the inconveniencies of it, with only this woful difference to the subject, or rather slave of an absolute prince: that whereas, in the ordinary state of nature, he has a liberty to judge of his right, and according to the best of his power, to maintain it; now, whenever his property is invaded by the will and order of his monarch, he has not only no appeal, as those in society ought to have, but as if he were degraded from the common state of rational creatures, is denied a liberty to judge of, or to defend his right; and so is exposed to all the misery and inconveniencies, that a man can fear from one, who being in the unrestrained state of nature, is yet corrupted with flattery, and armed with power. . . .

Sec. 92. For he that thinks absolute power purifies men's blood, and corrects the baseness of human nature, need read but the history of this, or any other age, to be convinced of the contrary. . . .

Sec. 94. [Once the people found their properties not secure under a government ruled by a chief without goodness and virtue,] as then it was, (whereas government has no other end but the preservation of property) could never be safe nor at rest, nor think themselves in civil society, till the legislature was placed in collective bodies of men, call them senate, parliament, or what you please. By which means every single person became subject, equally with other the meanest men, to those laws, which he himself, as part of the legislative, had established; nor could any one, by his own authority; avoid the force of the law, when once made; nor by any pretence of superiority plead exemption, thereby to license his own, or the miscarriages of any of his dependents. No man in civil society can be exempted from the laws of it: for if any man may do what he thinks fit, and there be no appeal on earth, for redress or security against any harm he shall do; I ask, whether he be not perfectly still in the state of nature, and so can be no part or member of that civil society . . . .

MONTESQUIEU, THE SPIRIT OF THE LAWS 221-37 (1748)

In every government there are three sorts of power; the legislative; the executive, in respect to things dependent on the law of nations; and the executive, in regard to things that depend on the civil law.

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies; establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state. . . .

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the power of judging be not separated from the legislative and executive

powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.

There would be an end of every thing were the same man, or the same body, whether of the nobles or of the people to exercise those three powers that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals. . . .

The executive power ought to be in the hands of a monarch; because this branch of government, which has always need of expedition, is better administered by one than by many: Whereas, whatever depends on the legislative power, is oftentimes better regulated by many than by a single person.

But if there was no monarch, and the executive power was committed to a certain number of persons selected from the legislative body, there would be an end then of liberty; by reason the two powers would be united, as the same persons would actually sometimes have, and would moreover be always able to have, a share in both. . . .

Again, were the legislative body to be always assembled, it might happen to be kept up only by filling the places of the deceased members with new representatives; and in that case, if the legislative body was once corrupted, the evil would be past all remedy. When different legislative bodies succeed one another, the people who have a bad opinion of that which is actually sitting, may reasonably entertain some hopes of the next: But were it to be always the same body, the people, upon seeing it once corrupted, would no longer expect any good from its laws; and of course they would either become desperate, or fall into a state of indolence.

The legislative body should not assemble of itself. For a body is supposed to have no will but when it is assembled; and besides, were it not to assemble unanimously, it would be impossible to determine which was really the legislative body, the part assembled, or the other. And if it had a right to prorogue itself, it might happen never to be prorogued; which would be extremely dangerous, in case it should ever attempt to encroach on the executive power. Besides, there are seasons, some of which are more proper than others, for assembling the legislative body: It is fit therefore that the executive power should regulate the time of convening, as well as the duration of those assemblies, according to the circumstances and exigencies of state known to itself.

Were the executive power not to have a right of putting a stop to the encroachments of the legislative body, the latter would become despotic; for as it might arrogate to itself what authority it pleased, it would soon destroy all the other powers.

But it is not proper, on the other hand, that the legislative power should have a right to stop the executive. For as the execution has its natural limits, it is useless to confine it; besides, the executive power is generally employed in momentary operations. . . .

But if the legislative power in a free government ought to have no right to stop the executive, it has a right, and ought to have the means of examining in what manner its laws have been executed . . . .

But whatever may be the issue of that examination, the legislative body ought not to have a power of judging the person, nor of course the conduct of him who is intrusted with the executive power. His person should be sacred, because as it is necessary for the good of the state to prevent the legislative body from rendering themselves arbitrary, the moment he is accused or tried, there is an end of liberty.

To prevent the executive power from being able to oppress, it is requisite, that the armies, with which it is intrusted, should consist of` the people, and have the same spirit as the people, as was the case at Rome, till the time of Marius. To obtain this end, there are only two ways, either that the persons employed in the army, should have sufficient property to answer for their conduct to their fellow subjects, and be enlisted only for a year, as customary at Rome: Or if there should be a standing army, composed chiefly of the most despicable part of the nation, the legislative power should have a right to disband them as soon as it pleased; the soldiers should live in common with the rest of the people; and no separate camp, barracks, or fortress, should be suffered.

When once an army is established, it ought not to depend immediately on the legislative, but on the executive power, and this from the very nature of` the thing; its business consisting more in action than in deliberation. . . .

Whoever shall read the admirable treatise of Tacitus on the manners of the Germans, will find that it is from them the English have borrowed the idea of their political government. This beautiful system was invented first in the woods.

As all human things have an end, the state we are speaking of will lose its liberty, it will perish. Have not Rome, Sparta, and Carthage perished? It will perish when the legislative power shall be more corrupted than the executive.

D. THE EARLY AMERICAN CONSTITUTIONAL EXPERIENCE

Building on the work of political philosophers and past English experiences, America established the modern concept of a constitution as a written document defining and delimiting the powers of government and ensuring the protection of individual rights. But frequently much of the story of the origins of the U.S. Constitution is omitted. The U.S. Constitution did not spring forth from the Constitutional Convention like Athena from the head of Zeus. Instead, over a remarkable three decades, the American experience in revolting from Britain, establishing independent sovereign state governments, witnessing the defects of those governments, trying new systems, and theorizing better schemes of government led to the framers proposing—and the people ratifying—the U.S. Constitution.

American revolutionaries were strongly influenced by the natural rights philosophy espoused by John Locke, Thomas Hobbes, and other Enlightenment political theorists. Although English courts and legal commentators such as William Blackstone understood the English Bill of Rights as applying only to the King rather than to Parliament, revolutionary Americans, influenced by Enlightenment philosophy, viewed these rights as an outgrowth of natural law. The Declaration of Independence relied on the "self-evident" principle that men have inalienable natural rights that it is the purpose

of governments to safeguard. As governments derive "their just powers from the consent of the governed," the governed have a right to withdraw their consent and form a new government when necessary to secure the rights of "Life, Liberty and the pursuit of Happiness." Such newly formed governments should be based, many revolutionaries believed, on classical republican principles trusting the virtue of the citizenry, who would ensure the common good and squelch enactments outside the ideal.

After declaring their independence, the former colonies confronted the task of forming their own governments corresponding with these ideals. Within a year of the signing of the Declaration of Independence, ten states adopted new state constitutions to establish their systems of governance. These new constitutions typically did not differ greatly from the colonial charters they replaced, except that executive power was weakened and declarations of rights were usually incorporated because of concerns regarding potential tyranny from a powerful executive. These concerns arose, of course, from the colonists' experiences under colonial governors chosen by or at least identified with the British Crown. As a result, these state constitutions concentrated almost all governing power to the branch deemed most responsive to the popular will and the virtue of the people: the legislature. In fact, in all but two state constitutions adopted during this period, the legislature selected the governor who served only a one-year term, thereby subordinating the executive branch to the legislative branch.

But as Montesquieu warned, such concentrated power in a single branch turned out to be unwise and even dangerous. Still, these first state charters were important initial steps in American constitutionalism. Their defects served as important lessons for both later state constitutions and the U.S. Constitution.

Moreover, the concept that an integral aspect of a constitution was a bill or declaration of rights became more widely accepted during this time period. Although a few colonial charters had guaranteed certain rights before the revolution, this became much more common in the state constitutions adopted in the revolutionary period. Beginning with Virginia and its Declaration of Rights in 1776, many—although not all—of the states incorporated formal declarations or bills of rights as part of their fundamental law. These state declarations of rights typically preceded the provisions of the state constitution that created the departments of government and distributed powers among them. A compilation of all the various rights provisions in these revolutionary constitutions would encompass almost all the individual rights familiar to Americans today: freedom of the press, free exercise of religion, trial by jury, due process, protection against unreasonable searches and seizures, freedom of speech, double jeopardy, and protections against establishment of religion. But the inclusion of these rights was somewhat haphazard, as no state's constitution guaranteed all of them. Yet these early experiments with (even flawed) rights declarations led many early Americans by the end of the Revolutionary War to accept that one function of constitutions was to announce principles regarding the rights of the people.

The most famous of the declaration of rights in these early state constitutions was the Virginia Declaration of Rights of 1776, drafted in large measure by George Mason. As you read it, compare the rights protected by this early effort to our modern conception of protected individual rights. Also consider the impact of the political philosophers and earlier English efforts on this compilation.

VIRGINIA DECLARATION OF RIGHTS

I That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

II That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

III That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration; and that, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.

IV That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge be hereditary.

V That the legislative and executive powers of the state should be separate and distinct from the judicative; and, that the members of the two first may be restrained from oppression by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

VI That elections of members to serve as representatives of the people in assembly ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.

VII That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people is injurious to their rights and ought not to be exercised.

VIII That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land or the judgement of his peers.

IX That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual

punishments inflicted.

X That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.

XI That in controversies respecting property and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.

XII That the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments.

XIII That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and be governed by, the civil power.

XIV That the people have a right to uniform government; and therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.

XV That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.

XVI That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

Adopted unanimously June 12, 1776 Virginia Convention of Delegates drafted by Mr. Mason

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The adoption of the Virginia Declaration of Rights preceded by a couple of weeks Virginia's first state constitution. Virginia's revolutionary state constitution listed its grievances against Britain and then established the state's new form of government, which included a bicameral legislative body, a governor selected by the legislature, a separate executive privy council selected by the legislature, and a judicial system appointed primarily by the legislature. Other state revolutionary constitutions adopted during 1776 and 1777 similarly placed primary governing responsibility in the hands of the legislature.

But the American experience under these revolutionary charters revealed that an excess of democracy could be dangerous. Legislatures enacted laws for the confiscation of property and ex post facto debtor relief legislation that penalized commercial interests. The problem was that short-

term majoritarian influences could contravene the long-term public good. Such legislative excesses led many of the states to reconsider the wisdom of subordinating the executive and judicial branches to the legislative branch. The only protection from legislative abuses under these early state constitutions was "the paper parchment" of the state bill of rights, which were both incomplete and considered to be principles of good government rather than legally enforceable rights.

The drafters of a second wave of early state constitutions adopted as the Revolutionary War progressed attempted to secure some measure of gubernatorial independence from the legislature, frequently through direct popular election of the governor rather than legislative appointment. But these new state constitutions still did not meaningfully limit the boundaries of legislative authority, instead confining themselves to establishing the institutions, offices, mode of election, and foundational principles of the government.

Despite their defects, however, these early state constitutions contributed greatly to the establishment of America's modern constitutional heritage. As historian Jack Rakove observed, these states and their early constitutions "had served, in effect, as the great political laboratory upon whose experiments the framers of 1787 drew to revise the theory of representative government." In addition, two of these constitutions—at least in conjunction with their subsequent amendments—have withstood the test of time: the Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784, the two oldest written republican constitutions still in effect in the world.

In the meantime, America was also experimenting with the form of government for the nation. The first attempt was the Articles of Confederation. During the Revolutionary War, Benjamin Franklin proposed what he called the "Articles of Confederation and perpetual Union." Later, the Continental Congress appointed a committee to draft the Articles of Confederation, which was chaired by John Dickinson of Pennsylvania. Although the committee presented its draft to Congress on July 12, 1776, negotiations continued over the following sixteen months before Congress adopted the Articles of Confederation on November 15, 1777. During these negotiations, states rights proponents were able to confine the Confederation to "expressly delegated" powers. It then took another four years before all the states ratified the Articles of Confederation. Some of the major provisions of the Articles are listed below:

ARTICLES OF CONFEDERATION (1781)

Article I. The Stile of this Confederacy shall be "The United States of America."

Article II. Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and Right, which is not by this Confederation expressly delegated to the United States, in Congress assembled. . . .

Article IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall free ingress and regress to and from any other

State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them. . . . Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

Article V. [In] determining questions in the United States in Congress assembled, each State shall have one vote. . . .

Article VIII. All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.

Article IX. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances [and other listed foreign policy powers]. The United States in Congress assembled shall also be the last resort on appeal in all disputes . . . between two or more states. . . . The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coins struck by their own authority, or by that of the respective states—fixing the standard of weights and measures throughout the United States—regulating the trade and managing all affairs with the Indians . . —establishing or regulating post offices from one state to another . . . and exacting such postage on the papers passing thro' the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces, in the service of the United States, excepting regimental officers. . . .

The American experience under the Articles of Confederation revealed its many defects. The Articles of Confederation granted Congress the following powers: to make war and peace; conduct foreign affairs; request men and money from the states; coin and borrow money; regulate Indian affairs; and serve as the last appellate resort in disputes among the states. But enforcing laws, regulating commerce, administering justice, and levying taxes were powers reserved to the states.

The confederation government thus had no coercive power to enforce its edicts, being dependent on the states to do so. The Articles did not even establish an executive branch—while the chief legislative officer of the Confederation Congress was called the President, his powers were limited to presiding over Congress and performing certain administrative functions. Congress could request that the states provide funding for the nation, but it had no power itself to tax, and no enforcement

mechanism if the states refused to provide the funds. Nor did Congress have a means to require the states to comply with treaties or other agreements with foreign nations. James Madison later identified the "radical infirmity" of the Articles of Confederation as "the dependence of Congress on the voluntary and simultaneous compliance with its requisitions by so many independent communities, each consulting more or less its particular interest and convenience, and distrusting the compliance of the other." This left the public debt incurred during the Revolutionary War "without any provision for its payment," and caused America to lose respect abroad.

The Confederation Congress also had no power to regulate domestically. Congress could not regulate commerce among the states, which left each state to its own devices regarding economic matters. As James Madison detailed, this "engendered rival, conflicting, and angry regulations" by states. Some states had no convenient ports for foreign commerce, and "were subject to be taxed by their neighbors, through whose ports their commerce was carried on." The Articles provided no remedy for these difficulties, leading the states to engage in trade wars and outright discrimination against commerce from neighboring states, with several states imposing special duties or taxes on goods imported into or vessels coming within their state from sister states.

Another concern was that Congress had no ability to check the excesses of the states in their internal governance. Madison explained that, "in the internal administration of the states, a violation of contracts had become familiar, in the form of depreciated paper made a legal tender, of property substituted for money, of instalment laws, and of the occlusions of the courts of justice, although evident that all such interferences effect the rights of other states, relatively creditors, as well as citizens creditors within the state." These state passions, he believed, "forfeited the respect and confidence essential to order and good government."

Madison, along with Alexander Hamilton and many others in Congress, viewed these defects as threatening the nation's very survival. Madison believed the solution was to structure the government to recognize the short-term passions of oppressive majorities and to counteract those passions by increasing the power of the national government vis-à-vis the states and then dividing power within the national government. In this way, ambition would "be made to counteract ambition," precluding a bare majority from exercising oppressive power over minority interests.

The Confederation Congress eventually called for a convention of delegates to meet in the summer of 1787 in Philadelphia to amend the Articles of Confederation by devising "such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union." But rather than abide by the mandate, the delegates to this Convention eventually proposed an entirely new system of government for America.

The convention met from late May to September 17, 1787. The convention included many luminaries of the founding generation, including George Washington, Benjamin Franklin, James Madison, Alexander Hamilton, George Mason, Elbridge Gerry, and James Wilson, even though others, such as Thomas Jefferson, John Adams, Samuel Adams, and Patrick Henry, were not present.

The delegates that attended the convention had different views on several fundamental issues, including the optimal scope of national powers, the appropriate system of representation, and the

propriety of slavery. Splits between nationalists and localists, and representatives of large and small states, dominated the beginning months of the convention. The nationalists seized the early momentum. Because not enough delegates had arrived when the convention was supposed to open on May 14, the nationalists had the opportunity to meet amongst themselves and present a unified front. After certain procedural matters had been resolved, such as electing George Washington convention president, adopting a rule of secrecy, and providing each state delegation one vote, Edmund Randolph presented a substantive outline for a new national government, known as the Virginia Plan.

The Virginia Plan recommended a three-tiered structure of government, including a bicameral legislature and a national executive. The lower house was "to be elected by the people of the several states," while the upper house was "to be elected by those of the first." In turn, the national executive was to be selected by the new national legislature. The plan also called for a national judiciary, which would also have the power, in conjunction with the executive, to veto legislation. The national legislature would "enjoy the . . . Rights vested in Congress by the Confederation," plus it could "legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." The Virginia Plan did not enumerate specific powers, but it did grant the national legislature the authority "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union. . . ."

The delegates from the "small" states, such as Connecticut, New Jersey, and Delaware, were fearful that the Virginia Plan would destroy their interests. Under the Articles of Confederation, each state had equal voting power in Congress. But the Virginia Plan was calling for proportional representation by population, which would, the small states believed, "endanger the rights of lesser societies by the danger of usurpation in the greater." William Paterson of New Jersey proposed a contrary plan, since known as the New Jersey Plan. It called for a unicameral national legislature in which each state enjoyed equal voting strength.

The delegates debated, haggled, and harangued each other over the next month regarding the representation question. But they finally inched toward what is known as the Great Compromise, fusing together the complementary points in the Virginia and New Jersey Plans. First, they settled on a three-tiered structure of government, harking back to Montesquieu's praise of Britain's separation of powers as an essential protection of liberty. Second, they resolved that the central government was to be supreme, allowing the new national government to check democratic excesses in the states. Third, the new national government was to be granted specified powers greatly exceeding its powers under the Articles of Confederation. And fourth, representation in the House of Representatives was to be proportional to population, while the states would retain equal voting strength in the Senate.

But the idea of proportional representation raised another thorny issue: slavery. The South was particularly sensitive about the subject; a slavery ban would have driven the southern delegates from the convention and probably from the union. Because the southern delegates realized they were a minority in the union, they insisted on special constitutional protections for slavery to ensure the odious practice's survival.

The northern and southern delegates compromised on a number of these issues, although they conspicuously avoided the explicit mention of "slavery" anywhere in the original constitutional text. While import duties viewed as favoring northern interests would only need a majority vote in Congress, commercial treaties would require a two-thirds vote for ratification. The South also gained the decennial census and the counting of an enslaved individual as three-fifths of a person for purposes of calculating representation in the lower house and direct taxation. But the South conceded to Congress the right to prohibit the slave trade after twenty years. Moreover, their delegates accepted that newly imported enslaved persons could be taxed at a modest rate. Yet the South was able to obtain what is known as the Fugitive Slave Clause, which mandated the return of all runaways to enslavers.

Another area of disagreement between the delegates was the presidency. The delegates long debated the nature of the presidency, the mode of selection, the duration of office, and his appropriate powers. The one saving grace was the delegates knew who would be selected first as President, and trusted him to give life to their scheme. Not being sure exactly how the selection should occur, however, they compromised again and established the Electoral College, whose members would be chosen in such manner as each state's legislature directed.

The delegates then punted on the matter of constructing a national judiciary. In what is known as the Madisonian Compromise, they simply provided for a Supreme Court and left to Congress the task of creating a network of inferior federal courts. They also rejected a proposal made in its convention's waning days by George Mason, the author of the Virginia Declaration of Rights, to include a "bill of rights" in the Constitution.

This is the text of the Constitution that the delegates agreed upon and which was subsequently ratified through state conventions by the people of the United States. Those clauses which have since been amended, changed, or superseded are italicized:

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I.

Section 1. 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.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

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.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof* for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; *and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.*

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.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice

shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be *on the first Monday in December*, unless they shall by Law appoint a different Day.

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, 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.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. 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;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;--And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or

pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II.

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an

equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:–"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he 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.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. 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.

Article III.

Section 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–*between a State and Citizens of another State,*–between Citizens of different States,–between Citizens of the same State claiming Lands under Grants of different States, *and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects*.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV.

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

Article V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall

be as valid against the United States under this Constitution, as under the Confederation.

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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth.

After the convention delegates finished their work, the Confederation Congress submitted the proposed Constitution to the states for ratification. Opponents of the Constitution, known as Antifederalists, objected to the powers of the proposed federal government in comparison to the powers of the states. Antifederalists also objected to the failure of the Constitution to contain an enumeration of rights. Over the next year, the Federalist supporters of the Constitution and the Antifederalists debated the Constitution's merits at state ratifying conventions and in the press. The most famous defense of the Constitution was the series of essays known as *The Federalist* written by Alexander Hamilton, James Madison, and John Jay to persuade New York to ratify.

During these ratification debates, the omission of an enumerated listing of protected rights was the most resonating criticism of the Constitution. The Federalist supporters of the Constitution replied that outlining such rights, while perhaps necessary to protect citizens against the states, was unnecessary in the Federal Constitution because of the limited nature of the federal government, and perhaps even dangerous as it might serve as a pretext to assert government power over non-enumerated rights that were properly outside the federal government's constitutional powers. Yet as the majority of the ratifying states requested the inclusion of such rights and the New York and Virginia legislatures passed resolutions for another convention to address this omission, Federalists capitulated after the Constitution was ratified. James Madison, then in the House of Representatives, borrowed from the existing state bills of rights to recommend various amendments to the United States Constitution, seventeen of which were passed by the House, twelve of which were passed by the Senate, and ten of which were soon thereafter ratified by the states.

UNITED STATES CONSTITUTION BILL OF RIGHTS (1791)

Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II. 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.

Amendment III. No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X. 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.

E. THE SUBSEQUENT AMENDMENTS TO THE UNITED STATES CONSTITUTION

Article V of the Constitution provides two mechanisms for proposing and two mechanisms for ratifying constitutional amendments. The first proposal method is that Congress, with a two-thirds vote of both Houses, may propose constitutional amendments for ratification by the states. The second proposal method is that Congress, on the application of the legislatures of two-thirds of the states (currently 34 states), must call a convention for proposing amendments. In either case, Congress may direct one of two ratification methods, by three-fourths of the state legislatures or by three-fourths of state conventions (which in either case currently requires the assent of 38 states). All the amendments to date to the Constitution have been proposed by Congress, and all but one (the Twenty-First Amendment repealing prohibition) have been ratified by state legislatures.

Since the ratification of the first ten amendments that have become known as the Bill of Rights, the Constitution has been amended seventeen more times. Some amendments have been designed to overrule the United States Supreme Court's interpretation of the Constitution. Other amendments have been designed to cure structural problems in the original Constitution that became apparent later. Still other amendments have been added to reflect societal changes and protect new rights.

The most important amendments since the Bill of Rights, the Reconstruction Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments), placed the force of the Constitution behind the natural rights pronouncement of the Declaration of Independence that "all men are created equal." The Thirteenth Amendment outlawed slavery or involuntary servitude within the United States; the Fourteenth Amendment established that all persons born in the United States were citizens of the United States and the state of their residence and guaranteed that no person would be deprived of life, liberty, or property without due process of law or of the equal protection of the laws; and the Fifteenth Amendment provided that the right to vote would not be denied based on race, color, or previous condition of servitude. Other amendments have likewise expanded the American political community, such as the Nineteenth Amendment providing the right to vote to women, the Twenty-Fourth Amendment outlawing poll taxes as a prerequisite to vote in federal elections, and the Twenty-Sixth Amendment extending the franchise to those eighteen and over.

Here are the subsequent amendments to the United States Constitution and their year of ratification:

Amendment XI (1795). The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII (1804). The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be

counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. *And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.* The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII (1865).
Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV (1868).
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, *being twenty-one years of age*, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. 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.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV (1870).
Section 1. 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. The Congress shall have the power to enforce this article by appropriate legislation.

Amendment XVI (1913). The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII (1913). The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII (1919) (repealed by the Twenty-first Amendment).
Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XIX (1920). 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 sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XX (1933).
Section 1. The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3rd day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI (1933).
Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby

prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII (1951).
Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII (1961).
Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV (1964).
Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV (1967).
Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI (1971).
Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII (1992).
No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of representatives shall have intervened.

F. THE CHALLENGE OF CONSTITUTIONAL INTERPRETATION

A constant theme in constitutional law is the appropriate method to interpret the constitutional text. This problem is faced not only by judges, but also by legislators, government officials, and citizens in our democratic republic.

Several forms or types of constitutional argument are considered legitimate. Professor Philip Bobbit described six basic methods, or "modalities," of constitutional argument in his works *Constitutional Fate* and *Constitutional Interpretation*. These are rhetorical forms that are useful in ascertaining the meaning or the appropriate application of the Constitution in a given context. These modalities can be employed to analyze all constitutional questions, and even to interpret other legal texts, such as statutes, administrative regulations, or contracts. The six modalities are:

(1) Textual: arguments that consider the words and language of the text of the Constitution. Sometimes the constitutional text alone resolves a constitutional question; for example, the requirement in Article II that no person shall be eligible for the presidency who has not attained "the Age of thirty five Years" specifies a minimum age to become President. But in disputed constitutional questions, the text alone is rarely dispositive. As James Madison wrote in *The Federalist No. 37*, "No language is so copious as to supply words and phrases for every complex idea." President Abraham Lincoln, in his first inaugural address, further expounded on this principle, urging that constitutional controversies exist because "no organic law can ever be framed with a provision specifically applicable to every question which may occur in practical administration. No foresight can anticipate nor any document of reasonable length contain express provision for all possible questions." Because the Constitution's provisions are not exhaustive, and the meaning of constitutional terms is not always clear, other modalities of argument typically must be considered.

(2) Structural: arguments from the organization of the Constitution and the ordering of its provisions. Structural arguments are based upon how the Constitution's provisions fit together and how the institutions established by the Constitution intersect—in more simple terms, what the text shows but does not say. For example, "separation of powers" is nowhere mentioned explicitly in the constitutional text, yet the principle is nonetheless apparent in the organization of the Constitution in Articles I, II, and III, which separately establish, and allocate and distribute powers among, Congress, the President, and the Supreme Court. Structural arguments have also been employed in incorporating almost all the guarantees in the Bill of Rights to apply against the actions of state and local governments through the Due Process Clause of the Fourteenth Amendment and to establish fundamental precepts regarding American federalism. Yet structural arguments are often subject to conflicting interpretations, requiring the use of additional modalities.

(3) Historical: arguments from the legal, political, social, economic, and military history of the nation. Historical arguments can flow from the intention of the constitutional drafters, the events that produced the provision, the original meaning of the provision at the time of its adoption, or from the nation's ongoing traditions. As an example, the understanding that the President has the power to remove executive officials is frequently traced to founding historical practices, as the constitutional text does not mention the procedure for removing such officers. Sometimes longstanding practices, especially those traceable to the founding and reconstruction eras, can "liquidate" or place a "historical gloss" on the meaning of constitutional provisions. But some object that too much reliance on history would prevent necessary reinterpretations as the needs of society evolve.

(4) Precedential or Doctrinal: arguments that refer to the precedential implications of the Supreme Court's decisions. Doctrinal arguments are ubiquitous in most modern Supreme Court opinions, with the Court often relying on its past decisions in order to determine the appropriate application of the

Constitution in other contexts. But of course, there may not always be precedent on point, or the Court may desire to overrule precedent for being inconsistent with the Constitution's original meaning, evolving constitutional traditions, or other constitutional principles.

(5) Prudential: arguments that balance the costs and benefits of differing interpretations to ascertain their practical or pragmatic consequences. For example, an argument that allowing a particular individual to sue would open up a floodgate of similar suits is a prudential argument supporting a robust interpretation of the standing requirement to assert a constitutional claim.

(6) Ethical: arguments that rely on moral or ethical commitments reflected in the Constitution. This modality differs from the prudential one because prudential arguments emphasize the consequences of an interpretation in the practical sense, while ethical arguments emphasize the moral (or amoral) content of a particular interpretation (in other words, whether the interpretation is "right or wrong" in a moral sense). The strongest ethical arguments are those that can be traced to foundational documents espousing American national values and ethical commitments, such as "all men are created equal" in the Declaration of Independence. But Supreme Court opinions also sometimes incorporate philosophical understandings that are not as explicit, such as an argument that the death penalty is unconstitutional because it contravenes human dignity. One concern with ethical arguments is that the interpreter may be merely viewing his or her moral commitments as embodied in the Constitution.

These six modalities are extremely useful in constructing a constitutional argument, with every constitutional decision from the Supreme Court relying on one or more of them in articulating the rationale for the Court's holding. Yet a problem is that, especially in difficult cases, the modalities may point in very different directions, supporting equally legitimate—but conflicting—outcomes.

Various constitutional theories have been proposed that attempt to resolve such conflicts, frequently by prioritizing (or sometimes de-legitimizing) certain modalities. For example, originalism is the view that the Constitution should be interpreted in accord with the text of the constitutional provision in light of the original meaning or understanding of the people or framers. An originalist, then, will employ constitutional text, structure, and historical materials to ascertain the original public meaning of a constitutional provision at the time of its ratification, with the other modalities of constitutional interpretation being less important or even illegitimate. But this is not to suggest that originalists are always united in their view of the appropriate interpretation in a given case. Some originalists will follow well-established judicial precedent, even when it conflicts with the original meaning of the Constitution. Other originalists focus on the broader underpinnings of the Constitution rather than the precise original meaning, specific expected applications, or historical practices of the framing generation. Thus, the theoretical category of "originalism" may encompass original meaning originalists, moderate originalists, original intent originalists, and anticipated applications originalists, to name a few.

In contrast to originalism, living constitutionalism (or nonoriginalism) in general espouses that constitutional meaning is aspirational and evolves over time, authorizing judicial interpretations that diverge from the Constitution's original public meaning. Some living constitutionalists believe that the Constitution has underlying philosophical values—such as human dignity or the democratic

process—that must be applied to "perfect" the constitutional text to make it "the best it can be." Other nonoriginalists emphasize the evolution of what might be called "common law" constitutional precedent, allowing judges to interpret the Constitution in new ways to respond to changing social conditions. Still others rely on evolving traditions of the American people as indicated by legislative enactments and other official practices. Some contend that constitutional change flows directly from the people themselves, perhaps via popular constitutional sovereignty based on public consensus or during specifically defined constitutional "moments" achieved through the landmark electoral or legislative victories of social movements.

Other constitutional approaches target the judicial role in constitutional interpretation. Judicial minimalism, or incrementalism, contends that a judge should only address what is absolutely necessary to resolve the pending case, adopting narrow and shallow rulings that comport with precedent and traditions. A minimalist judge seeks to respect the holdings (although not necessarily the dicta) in prior decisions in order to respect longstanding underlying foundational constitutional principles.

Another judicial approach is judicial restraint, that is, passively deferring to the other branches of government on constitutional meaning. The basic concept is that courts should only intervene to invalidate government action when the government clearly exceeds permissible constitutional bounds. As long as the government makes a rational choice among the potential constitutional interpretations under the modalities listed above, judicial restraint cautions that the result should not be disturbed or "second-guessed" by the judiciary.

Other jurists view their role in largely pragmatic terms. They eschew any particular constitutional theory, and instead espouse that judges must use their reasoned judgment and the various modalities of constitutional argument to ascertain the appropriate holding under the circumstances, taking into account the constitutional text and structure, historical materials, evolving traditions, precedent, legal stability, the judicial role, and the current social, economic, and political climate.

Yet none of these (or any other) alternative constitutional theories or judicial approaches can be fairly adjudged as constitutional "truth." The debate over how to interpret the Constitution is as old as the Constitution itself, and shows no sign of abating. Proponents of each of these approaches can point to certain holdings or language in Supreme Court opinions to support their position—but other decisions are to the contrary.

Nonetheless, in arguing a case to a particular court, understanding the jurists' preferences regarding the priority of the constitutional modalities is crucial. As will be evident in the cases and materials in subsequent chapters, some Supreme Court Justices have specified the types of argument that they believe are legitimate (or illegitimate). On the current Court, Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett have all indicated an affinity for originalist constitutional interpretations. But these jurists differ on the deference to be afforded to judicial precedent allegedly in conflict with the original public meaning: Justices Thomas and Gorsuch maintain that absolutely no deference should be accorded to such decisions; Justices Alito, Kavanaugh, and Barrett pay slightly more respect to past decisions; and Chief Justice Roberts is the least likely to urge for the overruling of precedent based on the Constitution's original public

meaning. On the other hand, while the other three current Justices—Sotomayor, Kagan, and Jackson—are all living constitutionalists, they are not uniform in their views when confronted with a divergence between evolving judicial and legislative traditions and the moral commitments they believe are ingrained in the Constitution. Justice Kagan, for instance, often strictly adheres to the Court's past decisions, even if she dissented from that earlier decision. Due to these varied perspectives, the wise advocate before the current Supreme Court will emphasize all the available constitutional interpretive modalities in seeking judicial review of the constitutionality of government actions.

CHAPTER TWO
FOUNDATIONS OF JUDICIAL POWER

The foundation for American constitutional law is judicial review, the process of the judiciary ensuring that the other branches of government comply with the Constitution. This chapter traces the background of the judicial power, the limits established soon after the founding on the judicial power, and the subsequent development of judicial review.

A. ARTICLE III AND THE JUDICIAL POWER

Under the Articles of Confederation, the Confederation Congress could only establish national courts to hear cases involving "prizes" (i.e., foreign enemy ships seized by Americans) or piracy, and the only national court established was for prizes. Nonetheless, the Constitutional Convention recognized early in its proceedings that a national judiciary should be included in the new government—even though the delegates differed on its appropriate structure and powers.

While the delegates concurred on a single supreme national court, the conflict centered on the need for inferior federal courts. Some argued that it was unnecessary to establish lower federal courts as the existing state court systems, subject to review by the U.S. Supreme Court, would sufficiently protect national interests. Others distrusted that the state courts would guard national interests and feared that the Supreme Court would not have the resources to check state court intrusions on national authority. James Madison and James Wilson eventually introduced a compromise that the delegates adopted, known today as the Madisonian Compromise, which left the creation of inferior federal courts to Congress.

Article III of the Constitution thus vests the "judicial power" of the United States "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Article III defines the extent of the federal "judicial power," stating it extends "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;" to various other cases implicating national interests, such as those involving the United States as a party or affecting foreign ambassadors or public ministers; and to various defined "controversies" involving diversity of citizenship. Article III further specifies that the Supreme Court has "original jurisdiction," that is, the power to hear and decide the case in the first instance, in cases involving a state as a party or affecting ambassadors and other public ministers, with appellate jurisdiction in all other cases falling within the judicial power, "with such Exceptions, and under such Regulations as the Congress shall make."

Yet this constitutional text leaves many questions unanswered. What is the nature of a "case" or "controversy" cognizable by the federal judiciary under Article III? Can the Supreme Court declare a law properly enacted by Congress unconstitutional? Under what circumstances can the Supreme Court review a state court decision on the constitutionality of a state law? Is Congress's power to make "Exceptions and Regulations" to the Supreme Court's appellate jurisdiction absolute?

The Court began answering these questions early in its history. These foundational decisions still inform the interpretation of the judicial power in modern times.

B. EARLY LIMITS ON JUDICIAL POWER

During the new federal government's first major foreign affairs crisis, the Supreme Court recognized that not all issues are capable of judicial resolution. In 1793, France, which was at war with Britain, began seizing British ships off the American coast and refitting them as privateers on American soil to further raid British ships. Because the U.S. had proclaimed neutrality in the war between France and England, such actions raised a host of legal problems for President George Washington's administration. His cabinet divided on some of these questions, so the administration decided to refer the legal issues to the Justices of the Supreme Court. Secretary of State Thomas Jefferson sent a letter to the Supreme Court informing them that President Washington desired to ask their "advice" regarding matters "of considerable difficulty, and of greater importance to the peace of the U.S." concerning American treaty obligations under its neutrality proclamation in the war between France and England. Jefferson explained that these questions needed to be decided outside the course of specific litigation because they would arise "under circumstances which do not give a cognisance of them to the tribunals of the country." Jefferson maintained that resolving these issues would protect the nation "against errors dangerous to the peace" and "ensure the respect of all parties."

But the United States Supreme Court refused to provide the requested advisory opinion. The Justices explained in a short letter to the President that the three branches of the government, "being in certain respects checks upon each other, and our being judges of a court of last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to." They also indicated that the Constitution "*purposely* as well as expressly" limited the President's power to request opinions to the executive branch of the government. As a result, the Court politely declined the President's invitation, but "derive[d] consolation from the reflection that [his] judgment will discern what is right."

Other early decisions also indicated the limited nature of the judicial power. The Invalid Pensions Act of 1792 assigned to the circuit courts (inferior federal courts created by Congress in the Judiciary Act of 1789 that, at the time, included individual Justices of the Supreme Court) the task of determining the amount of veterans' disability pay, subject to revision by the Secretary of War and Congress. Three circuit courts refused to do so, and communicated their objections in correspondence to the President. The following excerpts from the letter of the Circuit Court for the District of New York (consisting of Supreme Court Chief Justice John Jay and Justice William Cushing, along with District Judge James Duane) illustrates their concerns:

> That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.
>
> That neither the Legislative nor the Executive branches can constitutionally assign to the Judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.
>
> That the duties assigned to the Circuit courts, by this act, are not of that description, and that the act itself does not appear to contemplate them as such; in as much as it

> subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the Secretary at War, and then to the revision of the Legislature; whereas by the Constitution, neither the Secretary at War, nor any other executive officer, nor even the Legislature, are authorized to sit as a court of errors on the opinions of this court . . .

HAYBURN'S CASE, 2 U.S. (2 Dall) 409 (1792), involved an attempt by the U.S. Attorney General to obtain a writ of mandamus from the Supreme Court to order the Circuit Court for the District of Pennsylvania to determine a veteran's disability pay under the Invalid Pensions Act. Yet because all but one of the Supreme Court Justices had been sitting on one of the circuit courts that issued correspondence refusing to do so, this mandamus proceeding had no chance of success. While *Hayburn's Case* was pending before the Supreme Court, Congress enacted and the President signed new legislation, which relieved the circuit courts of the duty of processing such pension applications, mooting the controversy.

CHISOLM v. GEORGIA, 2 U.S. (2 Dall.) 419 (1793), resulted in another limit on judicial power once the Eleventh Amendment was ratified to overturn the Court's holding. In *Chisholm*, the Supreme Court considered whether a citizen of another state could sue a state in federal court. During the Revolutionary War, Georgia purchased supplies from a South Carolina merchant, but failed to pay for the goods as promised. The merchant had been unsuccessful in his attempts to recover his debt from Georgia; after his death, his executor brought an action against Georgia in the Supreme Court. The State of Georgia declined to appear before the Court, with the state house of representatives passing resolutions while the case was pending declaring that the Constitution did not grant the federal courts the power "to compel states to answer any process" in a case filed by an individual against a state because such a concept was "totally repugnant to the smallest idea of sovereignty." Chisholm's counsel, Edmund Randolph (who was also the Attorney General of the U.S.), subsequently sought an order from the Supreme Court requiring Georgia to appear or be subject to judgment by default.

The Supreme Court's opinion addressed its jurisdiction over Georgia and held, by a 4-1 vote, that Georgia could be sued by an individual citizen of another state. In those days, the Supreme Court issued seriatim opinions, that is, each Justice wrote his own opinion explaining his vote without a singular "opinion of the Court" that is now the accepted custom (the Court first issued majority opinions during the tenure of Chief Justice Oliver Ellsworth and then it became customary after John Marshall became Chief Justice). Justice James Wilson began his seriatim opinion, which agreed with the Court's judgment, by highlighting that the presented question was one of "uncommon magnitude" regarding whether "the people of the United States form a NATION." He rejected Georgia's claim of sovereignty in no uncertain terms:

> To the Constitution of the United States the term SOVEREIGN is totally unknown. . . . In one sense, the term "sovereign" has for its correlative, [the term] "subject." In this sense, the term can receive no application; for it has no object in the Constitution of the United States. Under that Constitution there are citizens, but no subjects. . . .
>
> As a Judge of this Court, I know, and can decide upon the knowledge, that the

> citizens of Georgia, when they acted upon the large scale of the union, as part of the "People of the United States," did not surrender the supreme or sovereign power to that state; but, as to the purposes of the union, retained it to themselves. As to the purposes of the union, therefore, Georgia is not a sovereign state. . . .
>
> Whoever considers, in a combined and comprehensive view, the general texture of the Constitution, will be satisfied that the people of the United States intended to form themselves into a nation for national purposes. They instituted, for such purposes, a national government complete in all its parts, with powers Legislative, Executive, and Judiciary; and, in all those powers, extending over the whole nation. Is it congruous that, with regard to such purposes, any man or body of men, any person, natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the national Government? Would not such claims, crowned with success, be repugnant to our very existence as a nation? [We] may safely conclude, as the legitimate result of this Constitution, that the State of Georgia is amenable to the jurisdiction of this Court.
>
> But, in my opinion, this doctrine rests not upon the legitimate result of fair and conclusive deduction from the Constitution: It is confirmed, by all doubt, by the direct and explicit declaration of the Constitution itself. . . . "The judicial power of the United States shall extend to controversies, between a state and citizens of another State." [Could] this strict and appropriated language, describe, with more precise accuracy, the cause now depending before the tribunal? . . .

Chief Justice Jay likewise concluded that the Constitution emerged from the people, as indicated by the Preamble. As the people are the true sovereigns, "the citizens of America are equal as to fellow citizens, and as joint tenants in the sovereignty." The Chief Justice opined that state sovereign immunity from suits filed by individual citizens was incompatible with popular sovereignty. Moreover, he urged, as Justice Wilson had, that the Constitution's language specified that a state could be haled before a federal court. Justices Blair and Cushing filed shorter opinions that likewise focused on the text of Article III, which extended the judicial power to controversies between a state and citizens of another state. But Justice Iredell dissented, arguing in part:

> Every State in the Union in every instance where its sovereignty has not be delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them: Of course, the Part not surrendered must remain as it did before. . . .

But within two years of *Chisholm*, the requisite number of states ratified the Eleventh Amendment to the United States Constitution, which effectively overturned the Court's decision by providing:

> The Judicial power of the United States shall not be construed to extend to any suit

> in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment established, despite the original text of Article III, that the judicial power of the United States no longer extended to a suit by a citizen of another state (such as Chisholm) against a state (such as Georgia). And through decisional law, the Court has since extended the principle of state sovereign immunity in federal court to bar to any suit by citizens against states for monetary relief (although suits seeking injunctive relief against a state official are allowed) unless the state consents to the suit, Congress has validly abrogated the state's sovereign immunity through legislation relying on an appropriate constitutional power, or the structure of the original Constitution reflects a waiver of state sovereign immunity. We will study the state's sovereign immunity in more detail later in this chapter and in subsequent chapters; the important point for present purposes is that the Court's most significant assertion of judicial and sovereign power during the 1790s was nullified shortly thereafter by a constitutional amendment.

The lasting legacy of the 1790s with respect to the judicial power was thus its constraint. But with the 1800s came a new direction for the Court.

C. JUDICIAL REVIEW

The Supreme Court did not hold that any law violated the United States Constitution for the first fourteen years of its existence. Instead, the Court established several principles of restraint. Many viewed its work as not that important. The first Chief Justice, John Jay, resigned to become governor of New York, which he viewed as a promotion. After Jay served as New York's governor for six years, President John Adams nominated him to return as Chief Justice. But Jay declined and retired to his farm, in part because the Court lacked "energy, weight, and dignity."

Things have certainly changed. This is partially due to the Court's now frequent exercise of judicial review over legislative and executive actions. Yet the concept of judicial review is not specifically mentioned in the constitutional text. This has led some to argue that judicial review is illegitimate. Judicial review allows a bare majority of unelected Supreme Court Justices, appointed for life by the President with the "Advice and Consent" of the Senate, to negate the determination of the politically accountable branches regarding the constitutionality of a legislative or executive act. Alexander Bickel in his classic work *The Least Dangerous Branch* described judicial review as a "counter-majoritarian force" and "a deviant institution in the American democracy."

On the other hand, a review of the records of the Constitutional Convention reveals that the framers were envisioning that the judiciary could hold legislative acts unconstitutional. As Alexander Hamilton wrote in *Federalist No. 78*:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, . . . and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.

During the Virginia ratification convention, Antifederalists George Mason and Patrick Henry argued the Constitution should not be ratified without textual provisions protecting individual liberties because judges could employ judicial review to protect those liberties against legislative and executive encroachment if the rights were specified in the Constitution. Later, James Madison appeared to echo this reasoning as he introduced the Bill of Rights to the House of Representatives: "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardian of those rights."

A number of state courts were already exercising judicial review with respect to their state constitutions in the years before, during, and after the Constitution's ratification. State courts in at least seven different states declared state or local laws invalid under their state constitutions before the Constitutional Convention in 1787. *See* Jeff Sutton, *51 Imperfect Solutions* 13 (2018). Dean William Michael Treanor, in his article *Judicial Review Before* Marbury, identified over thirty state decisions holding legislation unconstitutional before *Marbury v. Madison* was decided. Nonetheless, *Marbury v. Madison* is paramount as it was the first instance in which the United States Supreme Court employed judicial review to hold a congressional statute unconstitutional.

SETTING THE STAGE FOR *MARBURY v. MADISON*

While the framers of the Constitution did not anticipate political parties, two political parties fought for dominance during President Washington's administration: the Federalists and the Jeffersonian Democratic-Republicans. Federalist John Adams defeated Thomas Jefferson in the presidential election of 1796 (although, since Jefferson had the second most electoral votes, he became the Vice President for Adams!). Jefferson and Adams faced each other again in the presidential election of 1800, but this time Jefferson won.

Adams remained President until the end of his term on March 4, 1801. The final months of the Adams administration were a busy period for the Federalists as they sought to retain control over one branch of the federal government, the judiciary. The Supreme Court was particularly important to Adams and the Federalists. When Oliver Ellsworth resigned as Chief Justice in December 1800, Adams attempted to reappoint John Jay, who had served as the nation's first Chief Justice. But Jay refused reappointment. Adams then turned to his Secretary of State, John Marshall. The Senate confirmed Marshall's nomination as Chief Justice on January 27, 1801, and he took office eight days later, on February 4, 1801. In addition to his new post as Chief Justice, Marshall remained Secretary of State for Adams. Thus Marshall served as both Secretary of State and Chief Justice of the United States during the last month of the Adams administration.

During this time, Congress passed legislation designed to entrench a Federalist judiciary. The more important piece of legislation, the Circuit Court Act, doubled the number of federal judges and permitted President Adams to appoint sixteen judges to the newly created Federal Circuit Court. A less important act, the Organic Act Concerning the District of Columbia, was passed on February 27, 1801, only days before Adams was to leave office. This Act allowed the President to appoint as many justices of the peace as he thought expedient for the District of Columbia. These justices of the peace served without a salary for a five-year term and were charged with keeping the peace and deciding cases with twenty dollars or less at stake.

President Adams nominated forty-two justices of the peace under the Organic Act on March 2, which the Senate confirmed the next day—one day before Jefferson was to become President. Adams signed the commissions during the day and into the evening of March 3, and Secretary of State John Marshall—with help from his younger brother James Marshall—attempted to seal and have delivered all of the commissions during the last hours of the Adams administration.

But seventeen commissions did not get delivered and were found in the state department after President Jefferson's inauguration. President Jefferson instructed his acting secretary of state not to deliver these commissions. A few months later, William Marbury and three others who did not receive their commissions brought an original action for mandamus in the Supreme Court against Secretary of State James Madison to compel their delivery. The Supreme Court ordered Madison to "show cause why mandamus should not issue." But Madison refused even to appear; the Jefferson Administration ignored the entire proceeding except in the press.

Chief Justice Marshall knew that he faced quite a political dilemma. Not only was the Executive Branch hostile, but Congress (which was now controlled by Jefferson's political party) was too. Congress even effectively abolished the Supreme Court's 1802 term at the same time that it repealed the Circuit Court Act. As a practical matter, Marshall understood that any judicial order compelling the delivery of the commissions would be ignored, and he might be impeached.

Marshall solved his dilemma by holding that the Supreme Court could not be given the original mandamus jurisdiction that Congress allegedly had conferred by Section 13 of the Judiciary Act. The reason: Section 13 violated the Constitution, and it was particularly the province of the judiciary "to say what the law is." The Court thus claimed the power of judicial review and the authority to declare unconstitutional the acts of the legislative or executive branches.

MARBURY v. MADISON
5 U.S. (1 Cranch) 137 (1803)

Mr. CHIEF JUSTICE MARSHALL

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the Secretary of State to show cause why a mandamus should not issue, directing him to deliver to William Marbury his commission as a justice of the peace . . . .

The first object of inquiry is,

1st. Has the applicant a right to the commission he demands?

His right originates in an act of congress passed in February, 1801, concerning the district of Columbia.

[It] appears, from the affidavits, that in compliance with this law, a commission for William Marbury, as a justice of peace for the county of Washington, was signed by John Adams, then President of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

[This] is an appointment made by the President, by and with the advice and consent of the Senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment, though conclusive evidence of it.

But at what stage does it amount to this conclusive evidence?

The answer to this question seems an obvious one. The appointment being the sole act of the President, must be completely evidenced, when it is shown that he has done every thing to be performed by him. . . . The last act to be done by the President is the signature of the commission. He has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the Senate concurring with his nomination, has been made, and the officer is appointed.. . . .

Mr. Marbury, then, since his commission was signed by the President, and sealed by the Secretary of State, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is,

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which entire confidence is place by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy?

That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted. . . . If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

[B]y the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive [and the] acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties: when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

[The] power of nominating to the Senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and, consequently, if the officer is by law not removable at the will of the President, the rights he has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

It remains to be inquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on,
1st. The nature of the writ applied for; and,
2dly. The power of this court.

1st. The nature of the writ.

Blackstone, in the 3d volume of his Commentaries, defines a mandamus to be “a command issuing in the King’s name from the court of King’s bench, and directed to any person, corporation, or

inferior court of judicature within the King's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of King's bench has previously determined, or at least supposes, to be consonant to right and justice."

[This,] then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the Supreme Court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The Secretary of State, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and, consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the Supreme Court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. [It] cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.

To enable this court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

[It] is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. . . . This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternative there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. . . .

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its

invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. . . .

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 that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. . . .

Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. [That] it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares "that no bill of attainder or ex post facto law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavours to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

[Why] does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?

[It] is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

Marbury's holding is a foundation of constitutional law. The Court held that Section 13 of the Judiciary Act of 1789, enacted by the First Congress, was unconstitutional for extending the original jurisdiction of the Supreme Court beyond the bounds of Article III of the Constitution, and that it was particularly the province of the judiciary to make the determination as to the constitutionality of a legislative act. This meant that the Supreme Court was without jurisdiction to issue Marbury the mandamus relief he requested to obtain his commission as a justice of the peace, even though the Court (in dicta) concluded he had a legal right to the commission. In the course of its holding, *Marbury* announced the fundamental precepts that the Constitution provides meaningful constraints on government power, that Congress cannot increase the jurisdiction of the federal courts beyond Article III limits, that the Supreme Court may compel the executive to perform ministerial duties, and that the Court may review the constitutionality of congressional legislation.

But that does not mean that *Marbury* should be accepted uncritically. There are a number of concerns with the Supreme Court's opinion in the case:

(1) Why is the judiciary entitled to determine whether a legislative act violates the Constitution? Professor William W. Van Alsytyne, in his classic article *A Critical Guide to* Marbury v. Madison, argued that *Marbury* begged a critical question—even assuming that a law repugnant to the Constitution is void, why does the Supreme Court get to make that determination instead of the legislature, the executive, or the people themselves? The text of the Constitution does not explicitly grant the federal judiciary such a power. Nor does such a power seem necessary for democratic government—many democracies (such as the United Kingdom) have robust protection of individual rights without engaging in judicial review, leaving it to the legislature to ascertain whether its laws comport with fundamental freedoms. Although Marshall compiled a number of arguments in favor of judicial review from structural inferences from the Constitution's text, couldn't similar structural arguments be marshaled against judicial review?

(2) Should the constitutional issue have been avoided by construction of the act of Congress in question? When a statute is ambiguous, a court generally should prefer a construction that will avoid the constitutional question. In construing Section 13 of the Judiciary Act, however, Marshall went out of his way to find the provision unconstitutional. Marshall concluded that Section 13 required the Supreme Court to entertain a mandamus proceeding that originated in that Court. But is that what Section 13 did? The first two sentences of Section 13 divided the Supreme Court's original jurisdiction provided in Article III, Section 2 between controversies in which the Court's jurisdiction was exclusive versus those situations when the Court possessed original but not exclusive jurisdiction. The Act then specified that the trial of factual issues before the Supreme Court in legal actions against U.S. citizens had to be by jury before turning to the Supreme Court's appellate jurisdiction in the last sentence:

> The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, . . . ; and shall have power to issue writs of prohibition to the district courts . . . and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

Couldn't the Court have avoided the alleged unconstitutionality of Section 13 by interpreting the provision to only authorize mandamus in cases within the Court's appellate jurisdiction from the circuit courts and state courts?

Consider Section 13's historical pedigree. The Judiciary Act of 1789 was enacted by the first Congress, which included James Madison and eighteen others who had been members of the Constitutional Convention, and was signed into law by President Washington, who had presided over the Constitutional Convention. Five of the eight committee members sponsoring the Judiciary Act had been members of the Constitutional Convention, including the head of the committee (and the draftsman of the Act), Oliver Ellsworth. Ellsworth had been the leading member of the Constitutional Convention's Committee of Detail, where he had primary responsibility for (among other things) drafting Article III of the Constitution. So how likely is it that Ellsworth, one of the leading lawyers of the day and a future Chief Justice of the Supreme Court, drafted Section 13 of the Judiciary Act in violation of Article III of the Constitution (which he also drafted)?

(3) Should the Court have considered jurisdiction only? It generally is considered improper for a court that concludes that it lacks jurisdiction then to proceed to render an opinion on the merits. Why, then, did Marshall consider Marbury's entitlement to the commission?

(4) Should Marshall have recused himself? Didn't his participation in the events giving rise to Marbury's claim present a high risk of bias?

Despite such concerns with the foundational case for judicial review, the concept has become accepted by the American people, and has become a traditional part of our political system. But this accepted tradition does not mean that any agreement exists regarding the appropriate reach of judicial review, that is, which laws and actions violate the Constitution.

Ortiz v. United States, 585 U.S. 427 (2018), aptly illustrates, where the Court divided on the breadth of the holding of *Marbury* itself. Recall that *Marbury*'s holding was that the Court could not exercise jurisdiction over Marbury's action because Section 13 of the Judiciary Act of 1789 was unconstitutional for extending the original jurisdiction of the Supreme Court beyond the bounds of Article III of the Constitution. *Ortiz* addressed whether Congress had similarly exceeded the bounds of Article III by authorizing the Supreme Court to consider appeals from the highest appellate court in the military court-martial system, a specialized adjudicative system for military offenses placed within the federal Executive (rather than the Judicial) Branch.

Justice Kagan's majority opinion first reasoned that, just as in *Marbury*, the Supreme Court could not exercise original jurisdiction over a court-martial proceeding because it did not fall within the Supreme Court's limited category of original jurisdiction for cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." Yet the Court held that it could exercise appellate jurisdiction over a court-martial because the proceedings were conducted by a judicial system with longstanding constitutional foundations and history, even if the system was placed under the Executive Branch. Justice Alito, joined by Justice Gorsuch dissented, arguing that Executive Branch officials cannot lawfully exercise the judicial power of any sovereign, such that no appeal to the Supreme Court could lie from its decision, any more than Marbury could appeal the decision of Madison to withhold his commission to the Supreme Court.

D. FEDERAL JUDICIAL REVIEW OF STATE LEGISLATION AND JUDGMENTS

Although *Marbury* evidenced the Court's power to subject federal statutes to judicial review, some state courts denied that the Supreme Court could invalidate state laws under the United States Constitution or review the judgments of state courts on federal issues. In many respects, the power to review state laws and state court judgments is even more important than the ability to review acts of Congress. As Justice Oliver Wendell Holmes remarked, he did not think the United States would come to an end if the Court lost its power to resolve the constitutionality of federal laws, but he did "think the Union would be imperiled if we could not make the declaration as to the laws of the several states." This issue was resolved in 1816, when the Court decided *Martin v. Hunter's Lessee.*

MARTIN v. HUNTER'S LESSEE
14 U.S. (1 Wheat.) 304 (1816)

[After the Revolutionary War, Virginia confiscated lands owned by British subjects, including land Martin inherited from his uncle, Lord Fairfax. Hunter, upon obtaining a portion of Martin's land after the confiscation, sued Martin in ejectment in a Virginia state court. Martin defended on the basis that the peace treaty between the United States and Great Britain required that the United States respect the land rights of British subjects. While the trial court found in Martin's favor, the Virginia Court of Appeals (the highest state court in Virginia) held for Hunter. The United States Supreme Court then reversed the Virginia Court of Appeals and issued a mandate directing the Virginia court to enter judgment for Martin.

The Virginia Court of Appeals refused to obey the Supreme Court's mandate with the following explanation:

> The court is unanimously of the opinion that the appellate power of the Supreme Court of the United States does not extend to this court under a sound construction of the Constitution of the United States . . . and that obedience to [the Supreme Court's] mandate [should] be declined by the court.

The United States Supreme Court then reviewed the case a second time, to determine whether its decision was binding.]

Mr. JUSTICE STORY delivered the opinion of the Court.

. . . The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the Preamble of the Constitution declares, by "the people of the United States." [T]he people had a right . . . to make the powers of the state governments, in given cases, subordinate to those of the nation. . . .

The third article of the Constitution is that which must principally attract our attention. The 1st section declares, "The judicial Power of the United States shall be vested in one supreme Court, and in such other inferior Courts as the Congress may, from time to time ordain and establish. . . ."

The language of the article throughout is manifestly designed to be mandatory upon the legislature. . . . The judicial power of the United States shall be vested (not may be vested) in one supreme Court, and in such inferior courts as Congress may, from time to time ordain and establish. . . . The judicial power must, therefore, be vested in some court, by Congress. . . .

If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to invest the whole judicial power. . . .

It being, then, established that the language of this clause is imperative, the next question is as to the cases to which it shall apply. The answer is found in the Constitution itself. The judicial power shall extend to all the cases enumerated in the Constitution. . . .

If the Constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the Constitution, be exclusive of state tribunals. How otherwise could the jurisdiction extend to all cases arising under the Constitution, laws, and treaties of the United States . . . ? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to all, but to some, cases . . . .

[If] a discretion be vested in Congress to establish, or not to establish, inferior courts at their own pleasure, and Congress should not establish such courts, the appellate jurisdiction of the Supreme Court would have nothing to act upon, unless it could act upon cases pending in the state courts. Under such circumstances it must be held that the appellate power would extend to state courts; for the Constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. . . .

[I]t is plain that the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. With this view, the sixth article declares, that "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. . . ."

It is a mistake that the Constitution was not designed to operate upon the states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some of their highest branches of their prerogative. . . .

It is further argued, that no great public mischief can result from a construction which will limit the appellate power of the United States to cases in their own courts: first, because state judges are bound by an oath to support the Constitution of the United States, and must be presumed to be men of learning and integrity; and secondly, because Congress must have an unquestionable right to remove all cases within the scope of the judicial power from the state courts to the courts of the United States. . . . As to the first reason—admitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States, (which we very cheerfully admit), it does not aid the argument. . . . The Constitution has presumed (whether rightly or wrongly, we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. . . .

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decision throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself. . . .

Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. It is an historical fact, that this exposition of the Constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies . . . . It is an historical fact, that at the time the Judiciary Act was submitted to the deliberations of the first Congress . . . the same exposition was explicitly declared and admitted . . . .

We have not thought it incumbent on us to give any opinion upon the question, whether this Court have authority to issue a writ of mandamus to the [Virginia] court of appeals to enforce the former judgments, as we do not think it necessarily involved in the decision of this cause.

It is the opinion of the whole Court, that the judgment of the court of appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the district court, held at Winchester, be, and the same is hereby affirmed.

JOHNSON, J., Concurring:

It will be observed in this case, that the court disavows all intention to decide on the right to issue compulsory process to the state courts; thus leaving us, in my opinion, where the Constitution and laws place us—supreme over persons and cases as far as our judicial powers extend, but not asserting any compulsory control over the state tribunals.

Martin v. Hunter's Lessee held, in an opinion by Justice Story (Chief Justice Marshall recused himself due to his financial interest in the case), that the Supreme Court had the power to review state court judgments resting upon the Constitution or other federal law. The Court relied predominantly on textual and structural grounds, parsing the words of Article III and its grant of appellate jurisdiction to the Supreme Court. The Court reasoned that it could not exercise appellate jurisdiction over all cases arising under the Constitution if it could not review state court cases. Moreover, since the Constitution did not create the inferior federal courts under the Madisonian compromise, the constitutional grant of appellate jurisdiction to the Supreme Court had to have been intended to cover state court cases, as otherwise the Supreme Court would have had no appellate jurisdiction at all if Congress never created lower federal courts. The Court further relied on prudential grounds, including the need for uniformity and potential state court prejudices. The Court buttressed its holding with historical arguments regarding the original meaning and intent of Article III. In its final maneuver, the Court avoided a potential constitutional crisis by withholding a second mandate and directly affirming the trial court.

Although *Martin* recognized the Supreme Court's authority to review the judgments of the state courts on federal issues, this authority brings up another question: the extent of the Court's jurisdiction over state judgments. The Court has long declined to review state judgments that rest upon "adequate and independent" state law grounds. The basic concept is that, if the state court would come to the same judgment irrespective of the resolution of the federal issues in the case, the Supreme Court will not review the state court's holding. The following case illustrates.

EUSTIS v. BOLLES
150 U.S. 361 (1893)

Mr. JUSTICE SHIRAS

On February 14, 1887, Charles H. Bolles and George F. Wilde, as surviving members of the firm of B. Collender & Co., filed a petition in insolvency in the insolvency court within and for the county of Suffolk, state of Massachusetts. On February 16, 1887, they filed in the same insolvency court a written proposal for composition with their copartnership creditors, under the so-called "composition acts" of 1884 and 1885, and they therein proposed to pay 50 cents on the dollar of their debts in money.

In July, 1887, Eustis brought an action in the supreme judicial court against Bolles and Wilde, wherein he sought to recover the balance of his note remaining unpaid after the receipt of the one-half received under the insolvency proceedings. The supreme judicial court was of opinion that Eustis, by accepting the benefit of the composition, had waived any right that he might otherwise have had to object to the validity of the composition statutes as impairing the obligation of contracts.

[It is] settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution or laws of the United States, another question, not federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment.

In this state of the law, we are met at the threshold, in the present case, with the question whether the record discloses that the supreme judicial court of Massachusetts decided adversely to the plaintiffs in error any claim arising under the constitution or laws of the United States, or whether the judgment of that court was placed on another ground, not involving federal law, and sufficient of itself to sustain the judgment.

The defendants in the trial court depended on a discharge obtained by them under regular proceedings under the insolvency statutes of Massachusetts. This defense the plaintiffs met by alleging that the statutes under which the defendants had procured their discharge had been enacted after the promissory note sued on had been executed and delivered, and that to give effect to a discharge obtained under such subsequent laws would impair the obligation of a contract, within the meaning of the constitution of the United States. Upon such a state of facts, it is plain that a federal question, decisive of the case, was presented, and that if the judgment of the supreme judicial court of Massachusetts adjudged that question adversely to the plaintiffs, it would be the duty of this court to consider the soundness of such a judgment.

The record, however, further discloses that William T. Eustis represented in this court by his executors, had accepted and receipted for the money which had been awarded him as his portion under the insolvency proceedings, and that the court below, conceding that his cause of action could not be taken away from him, without his consent, by proceedings under statutes of insolvency passed subsequently to the vesting of his rights, held that the action of Eustis, in so accepting and receipting

for his dividend in the insolvency proceedings, was a waiver of his right to object to the validity of the insolvency statutes, and that, accordingly, the defendants were entitled to the judgment.

The view of the court was that, when the composition was confirmed, Eustis was put to his election whether he would avail himself of the composition offer, or would reject it, and rely upon his right to enforce his debt against his debtors, notwithstanding their discharge.

In its discussion of this question the court below cited, and claimed to follow, the decision of this court in the case of *Clay v. Smith*, 3 Pet. 411 [(1830)], where it was held that the plaintiff, by proving his debt and taking a dividend under the bankrupt laws of Louisiana, waived his right to object that the law did not constitutionally apply to his debt, he being a creditor residing in another state. But in deciding that it was competent for Eustis to waive his legal rights, and that accepting his dividend under the insolvency proceedings was such a waiver, the court below did not decide a federal question. Whether that view of the case sound or not, it is not for us to inquire. It was broad enough, in itself, to support the final judgment, without reference to the federal question.

It's important to understand the procedural posture of this case. After accepting a partial payment on a note during an insolvency proceeding, Eustis sued Bolles and Wilde for the remaining balance due. Bolles and Wilde defended on the ground that the remainder of the balance had been discharged under the Massachusetts insolvency statutes. Eustis then argued that the state insolvency statutes violated the U.S. Constitution's Contracts Clause, which bars state laws impairing the obligation of contracts. But the Massachusetts court held that Eustis waived his right to make this argument by accepting the partial payment made during the insolvency proceeding. While Eustis presented a federal constitutional issue in his appeal to the Supreme Court as to whether the Massachusetts insolvency statutes violated the Contracts Clause, the resolution of that issue was immaterial to the judgment because the defendant was nevertheless entitled to prevail on the state-law ground that the plaintiff had waived his right to challenge the statutes by accepting payments made under them.

Eustis illustrates that it is not enough for Supreme Court review that a federal question was presented in a state court; instead, the federal issue must be material to the state court's determination of the case. The Supreme Court's power over state court judgments only extends to affirming or reversing state court *holdings* on federal rights, not to correcting erroneous state court *dicta* on federal rights. If the state court's judgment below rests on an "adequate and independent" state-law ground, the United States Supreme Court cannot review the case, as there is no possibility that a Supreme Court decision on any raised federal issue will change the outcome.

The "adequate" prong focuses on the judgment of the state court below, evaluating whether the state issue presented to the state court was outcome-determinative, which renders the federal issue in the case immaterial. In *Eustis*, the waiver issue was a matter of state law. Since the Massachusetts court held that the federal Contracts Clause challenge had been waived under state law, the Supreme Court's review could not have impacted the judgment. If the Supreme Court concluded that the state insolvency statutes violated the Contracts Clause, Eustis would still lose because that argument had been waived under state law. And, of course, if the Supreme Court concluded that the state insolvency statutes did not violate the Contracts Clause, Eustis would lose. No matter what the

Supreme Court held on the federal Contracts Clause issue, Eustis would lose. The Supreme Court therefore could not change the judgment below in deciding the federal issue. Thus, the waiver issue was an "adequate" state-law ground to support the state court's judgment.

The "independent" prong evaluates whether the state court's holding on the state-law issue was based on its own interpretation of its law, rather than being compelled by federal law. Notice in the last paragraph of *Eustis*, the Supreme Court mentions that the Massachusetts court both cited and claimed to follow an earlier decision of the Supreme Court, *Clay v. Smith*. If the Massachusetts court followed *Clay* because it was binding precedent regarding waiver, the waiver holding would not have been independent, but instead would have been compelled by federal law, and the Supreme Court could review the case. But the Supreme Court in *Eustis* concluded the waiver issue was purely a state issue, and the Massachusetts state court's holding was not compelled by federal law.

A conceptual difficulty with the "adequate and independent" doctrine, though, is that it is not uncommon for state court opinions to intermix state and federal law when adjudicating both federal and state claims in the same proceeding. State courts thus often do not make explicit whether they would have reached the same result in the absence of the federal issue, making it difficult for the United States Supreme Court to evaluate its jurisdiction over the case. For a long time, the Supreme Court struggled with this situation, sometimes deciding for itself whether the state-law holding was independent, sometimes presuming the state-law holding was independent, and sometimes asking the state court to clarify its holding.

This conceptual difficulty frequently appears when a state court addresses federal and state constitutional claims involving similar guarantees. Recall from Chapter 1 that most of the original states adopted their state constitutions and declarations of rights even before the ratification of the United States Constitution and the federal Bill of Rights. A compilation of these early rights provisions in state constitutions would encompass almost all the individual rights familiar to Americans today. James Madison borrowed from these existing state bills of rights in recommending the first amendments to the United States Constitution that we know today as the federal Bill of Rights. But the ratification of the federal Bill of Rights did not mean that the states' bills and declarations of rights became obsolete. Rather, as will be discussed in a subsequent chapter, the federal Bill of Rights originally only applied to protect citizens against the actions of the federal government, while state constitutions protected individuals against state usurpations. While most of the guarantees of the federal Bill of Rights have now been incorporated to apply against the actions of state and local governments through the Fourteenth Amendment, similar protections still exist in state constitutions. As one of many possible examples, all state constitutions protect against unreasonable searches and seizures, most in language that is very similar to the Fourth Amendment.

Under the Supremacy Clause, a state court is bound by the Supreme Court's interpretation of a provision of the United States Constitution. But a state court is not bound to interpret its *state* constitution in the same manner as the Supreme Court interprets the U.S. Constitution, even if the state constitution's language is exactly the same. Litigants in state court often raise both federal and state constitutional rights, hoping that the state court might interpret its own constitution to provide greater rights. In deciding these claims, though, the state courts do not always separately analyze the federal and state constitutional claims, especially when the constitutional provisions are similar.

For example, if a defendant in a state criminal proceeding files a motion to suppress evidence that he alleges was obtained through an unreasonable search and seizure that violated both the Fourth Amendment and a comparable state constitutional guarantee, the state court might not make clear whether its holding is based on federal or state constitutional grounds. That's exactly what happened in the following case, *Michigan v. Long*, which adopted a new presumption regarding when a state court's holding intermixing federal and state constitutional grounds is an "adequate and independent" state law ground precluding the Supreme Court's review.

MICHIGAN v. LONG
463 U.S. 1032 (1983)

JUSTICE O'CONNOR delivered the opinion of the Court . . .

[David Long was convicted for possession of marijuana found by police in the passenger compartment and trunk of the automobile that he was driving. The police searched the passenger compartment because they had reason to believe that the vehicle contained weapons potentially dangerous to the officers. Long challenged the search under the Fourth Amendment's protection against unreasonable searches and seizures and a similar protection found in article I, section 11 of the Michigan Constitution. The Michigan Supreme Court held that the deputies' search violated both the Fourth Amendment and art. 1, § 11 of the Michigan Constitution, but the state supreme court only referred one other time to the state constitution in a footnote, otherwise relying exclusively on federal law. The Supreme Court denied Long's argument that article I, section 11 of the state constitution was an "adequate and independent ground" for the decision precluding its review.]

Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. . . . Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. . . .

The principle that we will not review judgments of state courts that rest on adequate and independent state grounds is based, in part, on "the limitations of our own jurisdiction." The jurisdictional concern is that we not "render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." Our requirement of a "plain statement" that a decision rests upon adequate and independent state grounds does not in any way authorize the rendering of advisory opinions. Rather, in determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily

on federal law.

Our review of the decision below under this framework leaves us unconvinced that it rests upon an independent state ground. Apart from its two citations to the state constitution, the court below relied *exclusively* on its understanding of *Terry* and other federal cases. Not a single state case was cited to support the state court's holding that the search of the passenger compartment was unconstitutional. . . . The references to the state constitution in no way indicate that the decision below rested on grounds in any way *independent* from the state court's interpretation of federal law. Even if we accept that the Michigan constitution has been interpreted to provide independent protection for certain rights also secured under the Fourth Amendment, it fairly appears in this case that the Michigan Supreme Court rested its decision primarily on federal law.

[The Court then held that the search did not violate the Fourth Amendment. The concurring and dissenting opinions have been omitted.]

Michigan v. Long adopted a new presumption for determining whether a state-law ground interwoven with federal law was an adequate and independent ground precluding Supreme Court review. *Long* held that if the four corners of the state court opinion did not plainly reflect an independent and adequate state ground for the holding, the Court would presume that there were no such grounds and that it had jurisdiction. The Court pointed out that state courts easily could avoid this result by including a plain statement to rebut the presumption. Moreover, according to the Court, this treatment of the jurisdictional issue achieved "the consistency that is necessary," in that there is an "important need for uniformity in federal law" that goes unsatisfied "when we fail to review an opinion that rests primarily upon federal grounds . . . ."

E. CONGRESSIONAL POWER TO LIMIT JURISDICTION

Article III, Section 1of the Constitution provides that the judicial power of the United States shall be vested in one Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish." Section 2 then lists the types of cases falling within the judicial power, and which cases are within the Supreme Court's original and appellate jurisdiction. Section 2 specifies that, in all cases within the judicial power of the United States that do not fall within the Supreme Court's original jurisdiction, the Supreme Court "shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

How far does the power of Congress to establish the inferior courts, and also to make "exceptions and regulations" to the Supreme Court's appellate jurisdiction, extend? Could Congress prevent the federal courts, or the Supreme Court, from hearing cases on particular federal issues, such as the constitutionality of state laws on gun restrictions or school prayer, if it allowed such suits to be brought in state court? This question has never been definitively resolved by the Supreme Court, largely because Congress has rarely attempted to so restrict the jurisdiction of the federal courts, and never in a manner that has been interpreted to bar all Supreme Court review. Two key cases, whose meanings are still debated today, arose after the Civil War during the Reconstruction period. In *Ex parte McCardle*, the Supreme Court determined that it could not decide the case because of

Congress's authority to create exceptions and regulations to its appellate jurisdiction; however, in *United States v. Klein*, the Court came to a contrary result.

EX PARTE **McCARDLE**

74 U.S. (7 Wall.) 506 (1869)

CHIEF JUSTICE [CHASE] delivered the opinion of the Court.

[McCardle, a civilian newspaper editor and former Confederate officer, was held in military custody for publishing allegedly "incendiary and libelous" newspaper articles regarding the military reconstruction government and its governor, General Ord. These articles allegedly violated the post-Civil War Reconstruction Acts. McCardle filed a petition for a writ of habeas corpus arguing that the laws under which he was held in military custody were unconstitutional, which was denied on the basis that the Reconstruction laws in question were constitutional. McCardle then appealed the denial of his writ of habeas corpus to the Supreme Court under a congressional statute enacted in 1867 that provided for an appeal to the Supreme Court from the denial of a writ of habeas corpus by a federal circuit court. After the Supreme Court had acknowledged its jurisdiction, received briefs, and heard oral argument, but before it could decide the case, Congress passed an act (over a presidential veto) providing that the jurisdictional statute under which McCardle had appealed, "for the exercise of any such jurisdiction by the Supreme Court on any appeals which have been or may hereafter be taken, be, and the same is hereby repealed."]

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make." . . .

[W]hile "the appellate powers of this court are not given by the judicial act, but are given by the Constitution," they are, nevertheless, "limited and regulated by that act, and by such other acts as have been passed on the subject." [The Judiciary Act of 1789] was an exercise of the power given by the Constitution to Congress "of making exceptions to the appellate jurisdiction of the Supreme Court." [The 1789 Judiciary Act's] "affirmative description [of this Court's jurisdiction] has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other appellate jurisdiction. . . . The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the legislature. We can only examine into its

power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. . . .

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

The appeal of the petitioner in this case must be dismissed for want of jurisdiction.

While *McCardle* may appear to sanction extensive congressional authority to curtail the Court's appellate jurisdiction, the case only sustained the repeal of a provision of an 1867 habeas corpus statute that authorized appeals to the Supreme Court from certain habeas corpus rulings of the federal circuit courts. As the last sentence of *McCardle* indicates, the repeal did "not affect the jurisdiction which was previously exercised" under the Court's interpretation of the Judiciary Act of 1789, which authorized habeas review under writs of certiorari. In fact, shortly after *McCardle*, the Court reaffirmed its power to review habeas corpus rulings through certiorari despite the repeal of portions of the 1867 habeas corpus statute, noting that the Constitution prohibits the suspension of the writ of habeas corpus. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869). And the Court also, a few years later, indicated that Congress could go too far in making "exceptions and regulations" to its jurisdiction.

UNITED STATES v. KLEIN

80 U.S. (13 Wall.) 128 (1872)

CHIEF JUSTICE [CHASE] delivered the opinion of the Court.

[An 1863 federal statute provided that individuals whose property was seized during the Civil War could obtain a remedy in the newly established Court of Claims upon proof that they had not offered aid or comfort to the enemy during the war. The Supreme Court subsequently held, in *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870), that all those southerners accepting the offer of a full presidential pardon established the requisite proof of loyalty to the Union to secure the return of their property. In response, Congress added a statutory proviso to an appropriations bill to fund judgments in the Court of Claims providing that no pardon was admissible in evidence against the federal government in that court. Under this proviso, proof of loyalty had to be made without a pardon, or the case was to be dismissed for lack of jurisdiction. Klein, the administrator of Wilson's estate, sought to recover in the Court of Claims for property that had been seized from Wilson during the Civil War. Although Wilson had provided aid or comfort to the Confederacy, he had been pardoned by the President, which Klein relied upon as proof of loyalty. The U.S. government maintained that his case had to accordingly be dismissed for lack of jurisdiction, but the Supreme Court disagreed.]

[The] legislature has complete control over the organization and existence of [the Court of Claims] and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make "such exceptions from the appellate jurisdiction" as should seem to it expedient.

But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this Court had adjudged them to have. The proviso declares that pardons shall not be considered by this Court on appeal. We had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty. It provides that whenever it shall appear that any judgment of the Court of Claims shall have been founded on such pardons, without other proof of loyalty, the Supreme Court shall have not further jurisdiction of the case and shall dismiss the same for want of jurisdiction. The proviso further declares that . . . on proof of pardon or acceptance . . . , the jurisdiction of the court shall cease and the suit shall be forthwith dismissed.

It is evident . . . that the denial of jurisdiction . . . is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power. . . .We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument . . . provides that in all cases other than those of original jurisdiction, "the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.

The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.

It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit.

. . .

Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. . . . This certainly impairs the executive authority and directs the court to be instrumental to that end.

[The dissenting opinion of Justice Miller, joined by Justice Bradley, has been omitted.]

There remains, after *McCardle* and *Klein*, a great deal of uncertainty regarding the extent of congressional authority to regulate the appellate jurisdiction of the Supreme Court. *McCardle* held that Congress could withdraw jurisdiction in that case, in circumstances where another avenue of federal review existed, while *Klein* held that Congress invaded separation of powers by enacting a supposed jurisdictional rule that attempted to direct the result in cases governed by a pardon when the Constitution entrusted the pardon power solely to the President.

The Supreme Court subsequently noted, in *United States v. Bitty*, 208 U.S. 393, 399–400 (1908), that in establishing "exceptions," Congress must have "due regard to all the provisions of the Constitution." Thus, in addition to any limits of *Klein*, Congress apparently could not violate another constitutional provision when establishing "exceptions" to the Supreme Court's appellate jurisdiction. Moreover, it appears likely that the Due Process Clause of the Fifth Amendment, including its equal protection component, might impose constitutional constraints on "exceptions and regulations" legislation that is invidiously discriminatory or without a rational basis.

The Roberts Court has struggled with the implications of these post-Civil War decisions. *Patchak v. Zinke*, 583 U.S. 244 (2018), considered a congressional statute intended to dismiss a pending suit challenging the Secretary of the Interior's taking of land into trust for a Native American tribe; the statute provided that suits relating to the land "shall not be filed or maintained in a Federal Court and shall be promptly dismissed." The Supreme Court upheld the statute, but without a majority opinion.

A plurality opinion authored by Justice Thomas reasoned that, while Congress cannot compel findings and results under old law, it can change the law and apply the change retroactively to pending suits, including retroactively stripping federal courts of jurisdiction over pending suits. The plurality determined that the Court's prior precedent limited *Klein*'s holding to those cases where Congress attempts to direct the result in a pending case through a jurisdictional rule that it did not have a substantive power to enact. The plurality also concluded that *McCardle*'s core holding was that Congress does not violate the judicial power when it strips jurisdiction over a class of cases, which meant the statute under review was constitutional.

Chief Justice Roberts, in a dissent joined by Justices Kennedy and Gorsuch, concluded Congress had violated *Klein* by manipulating jurisdictional rules to decide the outcome of a pending case, and that the facts and circumstances of *McCardle* supported a more limited understanding of Congress's power to divest the courts of jurisdiction than adopted by the plurality. Justices Ginsburg and Sotomayor, concurring in the judgment, avoided the *Klein* and *McCardle* issue entirely by interpreting the statute to be a reassertion of sovereign immunity rather than a jurisdiction-stripping

provision. Thus, although the Justices all agreed that Congress can go too far in stripping jurisdiction, the Court deeply split on when such a limit is transgressed.

Yet there is arguably some advantage to this uncertainty. It provides an incentive for both the judicial and legislative branches to minimize inter-branch conflicts. The Court has typically been upholding more limited jurisdiction-stripping statutes, while creating uncertainty if Congress was to attempt a more aggressive jurisdiction-stripping statute seeking to control constitutional outcomes.

F. STATE SOVEREIGN IMMUNITY IN FEDERAL COURT

As highlighted earlier in this chapter, the Eleventh Amendment was adopted to overturn the Court's holding in *Chisolm v. Georgia* that diversity jurisdiction extended to a suit by a citizen of another state against a sovereign state. *Chisolm* reasoned that, under the constitutional text in Article III, Section 2, the "judicial power" of the United States extended "to controversies . . . between a State and citizens of another State . . . and between a State, or the citizens thereof, and foreign states, citizens, or subjects." The Court held that this text established that federal diversity jurisdiction authorized a South Carolina executor of an estate to sue the sovereign state of Georgia in federal court to obtain payment on a Revolutionary War debt.

The backlash against this decision led to the Eleventh Amendment, which provides:

> The judicial power of the United States shall not be construed to extend to any suit . . . against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

This text appears, on its face, to be inapplicable to a suit by a citizen of a state against his or her own state if the suit is founded on federal-question jurisdiction. Rather, the Eleventh Amendment textually only bars out-of-state citizens from suing a state, especially in cases relying on diversity jurisdiction.

But despite the apparent textual limitation to diversity actions or other actions brought by out-of-state citizens, the Court held below that a citizen of a state cannot sue her own state in federal court, even under federal-question jurisdiction for a claimed violation of the United States Constitution.

HANS v. LOUISIANA
134 U.S. 1 (1890)

Mr. JUSTICE BRADLEY delivered the opinion of the Court.

[Hans, a citizen of Louisiana, filed suit in federal circuit court against the State of Louisiana to recover the amount of state-issued bond coupons, alleging that the State's failure to pay these bond coupons violated the Contract Clause of the United States Constitution, which provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." The attorney general of Louisiana filed an exception to the action on the basis that a State could not be sued without its permission. The circuit court sustained the exception and dismissed the suit.]

[The question] is whether a State can be sued in a Circuit Court of the United States by one of its own citizens [if the case] arises under the Constitution or laws of the United States.

The ground taken is that under the Constitution, as well as under the act of Congress passed to carry it into effect, a case is within the jurisdiction of the federal courts, without regard to the character of the parties, if it arises under the Constitution or laws of the United States, or, which is the same thing, if it necessarily involves a question under said Constitution or laws. The language relied on is that clause of the third article of the Constitution, which declares that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and the corresponding clause of the act conferring jurisdiction upon the Circuit Court. . . .

It is said that these jurisdictional clauses make no exception arising from the character of the parties, and therefore that a state can claim no exemption from suit, if the case is really one arising under the Constitution, laws, or treaties of the United States. It is conceded that, where the jurisdiction depends alone upon the character of the parties, a controversy between a State and its own citizens is not embraced within it; but it is contended that, though jurisdiction does not exist on that ground, it nevertheless does exist if the case itself is one which necessarily involves a federal question; and, with regard to ordinary parties, this is undoubtedly true. The question now to be decided is whether it is true where one of the parties is a State, and is sued as a defendant by one of its own citizens.

[The plaintiff] contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign state. It is true the amendment does so read, and, if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that, in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts. If this is the necessary consequence of the language of the Constitution and the law, the result is no less startling and unexpected than was the original decision of this Court, that, under the language of the Constitution and of the judiciary Act of 1789, a State was liable to be sued by a citizen of another State or of a foreign country. That decision was made in the case of *Chisholm v. Georgia*, and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. . . .

[The passage of this amendment] shows that, on this question of the suability of the States by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of *Chisholm v. Georgia*; and this fact lends additional interest to the able opinion of Mr. Justice IREDELL on that occasion. The other justices were more

swayed by a close observance of the letter of the Constitution, without regard to former experience and usage; and because the letter said that the judicial power shall extend to controversies "between a State and citizens of another State;" and "between a State and foreign states, citizens or subjects," they felt constrained to see in this language a power to enable the individual citizens of one state, or of a foreign state, to sue another state of the Union in the federal courts. Justice IREDELL, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals (which he conclusively showed was never done before,) but only, by proper legislation, to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts. . . .

[Any] such power as that of authorizing the federal judiciary to entertain suits by individuals against the States had been expressly disclaimed, and even resented, by the great defenders of the Constitution while it was on its trial before the American people. [The] eighty-first number of the Federalist, written by Hamilton, has the following profound remarks: "It has been suggested that an assignment of the public securities of one state to the citizens of another would enable them to prosecute that state in the federal courts for the amount of those securities, a suggestion which the following considerations prove to be without foundation: It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. . . ."

[James Madison, during the Virginia ratification debates on the Constitution,] said: "Its jurisdiction [the federal jurisdiction] in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court. The only operation it can have is that, if a State should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens on whom a State may have a claim being dissatisfied with the State courts. * * * It appears to me that this [clause] can have no operation but this: to give a citizen a right to be heard in the federal courts, and, if a State should condescend to be a party, this Court may take cognizance of it."

[John] Marshall [during the same debates added]: "With respect to disputes between a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of the federal court. * * * It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. * * * But, say they, there will be partiality in it if a State cannot be a defendant; if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant which does not prevent its being plaintiff."

It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just, and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain

the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own State in the federal courts, while the idea of suits by citizens of other States, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States, can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

The truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. . . . [The] judgment of the circuit court is affirmed.

[The concurring opinion of Justice Harlan has been omitted].

As the *Hans* Court concedes, the Eleventh Amendment textually does not limit a federal court's jurisdiction over actions brought by state citizens against their own states. Instead, the text only bans those damage actions against a state which are brought by non-citizens of the state.

Nevertheless, *Hans* held that underlying structural constitutional principles, along with a historical analysis of the constitutional ratification debates and the swift overruling of *Chisolm v. Georgia* by the Eleventh Amendment, meant that states retained an immunity from being sued in federal court by a private citizen. This precludes citizens from suing states and "arms of states," such as state agencies or universities, in federal court for monetary damages, although cities, counties and other distinct entities do not share this immunity, even if they are created by the state. To illustrate, the State of Texas, the University of Texas, and the Texas Department of Public Safety are entitled to sovereign immunity from suit in federal court, but Houston, Harris County, or the Harris County Toll Road Authority are not.

Yet this immunity of a state from suit in federal court creates an obvious problem: how is the supremacy of federal law and the United States Constitution to be maintained if a state cannot be held accountable in federal court for constitutional violations? The Supreme Court accordingly has recognized several exceptions to a state's sovereign immunity from suit in federal court.

The most common method to avoid the state sovereign immunity bar is to name the pertinent state official, rather than the state, as the defendant. This brings into play the doctrine established in the case below, which authorizes a suit for prospective injunctive relief by those citizens facing an imminent threat of sanction against the state official charged with enforcing an allegedly unconstitutional state law.

EX PARTE YOUNG
209 U.S. 123 (1908)

Mr. JUSTICE PECKHAM delivered the opinion of the Court.

[Shareholders of the Northern Pacific Railway Company sued the railway company, Minnesota Attorney General Edward T. Young, members of the Minnesota Railroad and Warehouse Commission, and private shippers in federal court seeking an injunction to prevent compliance with allegedly confiscatory and unconstitutional rates set under Minnesota law for a railroad to transport passengers and commodities. The federal circuit court issued a temporary injunction, restraining Young, as Minnesota's attorney general, from taking any action against the railway company or its agents to enforce the penalties and remedies specified in the allegedly unconstitutional act. Young objected that, because he was being sued in his official role as attorney general, the suit violated the Eleventh Amendment.

The day after the temporary injunction issued, the State of Minnesota, "on the relation of Edward T. Young, Attorney General," commenced, in blatant violation of the injunction, a state-court mandamus proceeding against the Northern Pacific Railway Company to require its compliance with Minnesota rate laws. The federal circuit court thereafter ordered that Young show cause why he should not be punished for contempt. He urged that the federal circuit court had no jurisdiction to prevent him, as Minnesota's attorney general, from enforcing state law under the Eleventh Amendment. The federal circuit court disagreed, fining him $100 and committing him to federal custody until he dismissed the state-court mandamus proceeding.

Young sought a writ of habeas corpus from the Supreme Court to challenge his contempt. The Supreme Court first held that the circuit court did have federal-question subject matter jurisdiction over the case and that the Minnesota law was unconstitutional. The Court then turned to Young's Eleventh Amendment defense.]

We have, therefore, upon this record, the case of an unconstitutional act of the state legislature and an intention by the Attorney General of the State to endeavor to enforce its provisions, to the injury of the company, in compelling it, at great expense, to defend legal proceedings of a complicated and unusual character, and involving questions of vast importance to all employees and officers of the company, as well as to the company itself. The question that arises is whether there is a remedy that the parties interested may resort to, by going into a Federal court of equity, in a case involving a violation of the Federal Constitution, and obtaining a judicial investigation of the problem, and, pending its solution, obtain freedom from suits, civil or criminal, by a temporary injunction, and, if the question be finally decided favorably to the contention of the company, a permanent injunction restraining all such actions or proceedings.

This inquiry necessitates an examination of the [] objection . . . that the suit is, in effect, one against the State of Minnesota, and that the injunction issued against the Attorney General illegally prohibits state action, either criminal or civil, to enforce obedience to the statutes of the State. . . . The Eleventh Amendment prohibits the commencement or prosecution of any suit against one of the United States by citizens of another State or citizens or subjects of any foreign state. . . .

[The Eleventh Amendment] applies to a suit brought against a State by one of its own citizens, as well as to a suit brought by a citizen of another State. *Hans v. Louisiana.* It was adopted after the decision of this court in *Chisolm v. Georgia*, where it was held that a State might be sued by a citizen of another State. Since that time, there have been many cases decided in this court involving the Eleventh Amendment, among them being *Osborn v. United States Bank* (1824), which held that the Amendment applied only to those suits in which the State was a party on the record. In the subsequent case of *Governor of Georgia v. Madrazo* (1828), that holding was somewhat enlarged, and Chief Justice Marshall . . . said that, where the claim was made . . . against the Governor of Georgia as Governor, and the demand was made upon him not personally, but officially (for moneys in the treasury of the State . . .), the State might be considered as the party on the record, and therefore the suit could not be maintained. . . .

The various authorities . . . furnish ample justification for the assertion that individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action. . . .

The act to be enforced is alleged to be unconstitutional, and, if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a State official in attempting, by the use of the name of the State, to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is, in that case, stripped of his official or representative character, and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity. . . .

The question remains whether the Attorney General had, by the law of the State, so far as concerns these rate acts, any duty with regard to the enforcement of the same. By his official conduct, it seems that he regarded it as a duty connected with his office to compel the company to obey the commodity act, for he commenced proceedings to enforce such obedience immediately after the injunction issued, at the risk of being found guilty of contempt by so doing. . . .

It is proper to add that the right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against a State court would be a violation of the whole scheme of our government. If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or

jury can proceed without incurring any penalty on that account. . . .

The rule to show cause is discharged and the petition for writs of habeas corpus and certiorari is dismissed.

[The dissenting opinion of Justice Harlan has been omitted.]

Under *Ex parte Young*, a state official acts ultra vires and commits an illegal act when the official attempts to enforce an allegedly unconstitutional or federally preempted statute. The official "is stripped of his official or representative character and is subject in his person to the consequences of his individual conduct." A federal court sitting in equity can restrain the state official from subsequently enforcing an unconstitutional or illegal law against those being imminently threatened with sanction under the law. The Court specified the injunction must be against the state official; the federal courts possess no "power to restrain a court from acting in any case brought before it, either of a civil or criminal nature."

Ex parte Young applies only to suits that seek prospective injunctive relief or personal damages against the individual state official. If the suit seeks retrospective relief from the state treasury, such as past damages, the *Ex parte Young* "fiction" dissipates and the state official resumes "his official or representative character," rendering the state the real party in interest. *Ex parte Young* discusses this has long been the rule; as early as 1828, in *Governor of Georgia v. Madrazo*, the Supreme Court held Georgia was the real party in interest, and entitled to claim sovereign immunity, when the governor of Georgia was sued in an official capacity to recover funds and property from the state.

The government of the United States, which is created by the Constitution and includes the federal judiciary, also enjoys sovereign immunity, but its officers and officials can likewise be sued for prospective injunctive relief to prevent enforcement of unconstitutional or illegal acts under the same theory employed in *Ex parte Young*. Many of the cases where a federal law or regulation is being challenged as unconstitutional or illegal are brought against the executive officer charged with enforcing the statute or law, just as with the cases challenging state laws.

In addition to the *Ex parte Young* exception to sovereign immunity, there are other situations where a state or an arm of the state may be sued in federal court despite the Eleventh Amendment and pre-existing principles of state sovereign immunity:

Consent of the State. A state may "consent" to a waiver of its sovereign immunity from suit in federal court. Sometimes this is done as a condition to receiving funds under a federal program. For example, a condition on a state's acceptance of federal funds to assist with educating intellectually and physically disabled students is to waive sovereign immunity for suits by such individuals; when a state accepts such funds, it thereby consents to being sued in federal court by special needs students who are not being provided the opportunities required by the federal program. Other times this occurs in the context of a particular lawsuit, such as when the state removes a suit pending against it in state court to federal court, or when a state sues an individual in federal court and the defendant files a compulsory counterclaim.

Structural waivers under the "plan of the Convention." States may be sued in federal court if the structure of the original Constitution that the states ratified implicitly reflects that their sovereignty would yield to the exercise of a particular federal power under the "plan of the Convention." The idea is that the states, by ratifying the Constitution, implicitly agreed to waive their sovereign immunity with respect to certain powers granted to the federal government.

A longstanding principle of structural waiver is that states may be sued by another U.S. sovereign in federal court. This means that the federal government can sue a state in federal court despite the state's sovereign immunity. *See United States v. Texas*, 143 U.S. 621 (1892). Also, a state can sue another state in federal court, although these cases fall within the original jurisdiction of the United States Supreme Court under Article III. *See South Dakota v. North Carolina*, 192 U.S. 286 (1904).

In the twenty-first century, the Supreme Court has also found structural waivers when Congress exercises powers that are complete in themselves, and that the states implicitly consented the federal government could exercise in their entirety under the original Constitution. *Torres v. Texas Dep't of Public Safety*, 597 U.S. 580 (2022). So far, the Court has found three such structural waivers: (1) suits by private parties under federal bankruptcy laws, *Central Va. Community College v. Katz*, 546 U.S. 356 (2006); (2) suits by private parties authorized by the federal government to enforce federally approved condemnations under the federal eminent domain power, *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482 (2021); and (3) private suits authorized under the federal war power to build and maintain the armed forces. *Torres*, 597 U.S. at 590-99.

Congressional abrogation of state sovereign immunity. Congress may "abrogate" a state's sovereign immunity under a proper exercise of an appropriate constitutional power. For example, in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court held that Congress properly abrogated, under its power to enforce the Fourteenth Amendment, state immunity for purposes of attorneys' fees awards against the state for civil rights violations. See 42 U.S.C. § 1988. An abrogation necessitates that Congress (1) decrees unambiguously in the legislation that the State has no sovereign immunity, and (2) employs an appropriate congressional power for the abrogation.

Most of the powers granted to Congress are not, however, appropriate powers to employ for abrogating a state's sovereign immunity. The Supreme Court's decisions to date have focused on the Fourteenth Amendment, and likely a similar analysis would apply to the enforcement of other civil rights amendments enacted after the Eleventh Amendment that provide that Congress may enforce the provisions of the amendment through appropriate legislation. We will further study the powers that Congress can use to abrogate a state's sovereign immunity during our coverage of congressional power in a subsequent chapter.

One final caveat: remember that the Eleventh Amendment and state sovereign immunity apply only when a state or arm of the state *is sued* in a federal district court; it does not preclude the Supreme Court from exercising appellate jurisdiction over a case originally filed in another tribunal in which a state was a proper party. As an example, the Supreme Court often exercises certiorari review over criminal proceedings or other enforcement proceedings brought by a state in state court when defendants claim their federal rights are violated. The Eleventh Amendment and state sovereign immunity do not apply unless the action proceeded originally in the federal courts.

CHAPTER THREE
JUSTICIABILITY LIMITATIONS ON JUDICIAL POWER

The Supreme Court's foundational decisions in the last chapter recognized that constraints exist on the federal judicial power in Article III, which extends only to certain categories of "cases" and "controversies." One set of these constraints consists of judicially-created doctrines known as the justiciability doctrines. These doctrines have several purposes, including ensuring that the federal courts will not intrude on the spheres of authority entrusted to the other branches of the federal government and limiting the federal courts to issues presented in an adversary context, the context historically viewed as appropriate for judicial resolution. Because the Supreme Court views these doctrines as implicating the court's subject matter jurisdiction, they cannot be waived and must be raised by federal courts *sua sponte*. These doctrines apply to all cases, not just constitutional ones.

The federal justiciability doctrines include the prohibition on advisory opinions, standing, ripeness, mootness, and the political question doctrine. The core doctrine is the prohibition on advisory opinions, which prevents the federal courts from resolving cases in which there is no concrete controversy between the parties that can be resolved by the judiciary. The essence of standing is whether the plaintiff has the appropriate personal stake in the litigation as a result of suffering an injury that is fairly traceable to the defendant's conduct and is likely to be redressed by a favorable judicial decree. Ripeness and mootness address the timing of the lawsuit: ripeness ensures that the suit is not filed too prematurely before a concrete adversary context exists, and mootness prevents the continuation of the lawsuit after the injury has ceased. Finally, the political question doctrine carves out certain subjects that the federal courts believe are inappropriate for judicial resolution because the decisions should be made by the politically accountable branches of government. Although these doctrines emanating from the "case" or "controversy" requirement are easy enough to state, the Supreme Court recognized in *Flast v. Cohen*, 392 U.S. 83, 94 (1968), that they "have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." Each doctrine is examined below.

A. THE PROHIBITION ON ADVISORY OPINIONS

The federal courts will not issue advisory opinions. *Flast v. Cohen* explained that this rule against advisory opinions stems from the "implicit policies embodied in Article III," including separation of powers concerns and the prudential recognition "that such suits often are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests."

As discussed in Chapter 2, a famous early precursor of this principle was the refusal of the Supreme Court in 1793 to issue an opinion in response to the request for advice from Secretary of State Thomas Jefferson, at the behest of President George Washington, on twenty-nine questions regarding American treaty obligations under its neutrality proclamation in the war between France and England. The following Supreme Court decision likewise refused to decide a presented cause on the basis that it sought a nonjusticiable advisory opinion from the Court.

MUSKRAT v. UNITED STATES
219 U.S. 346 (1911)

Mr. JUSTICE DAY delivered the opinion of the Court.

[In 1902, Congress distributed to certain individual Cherokees lands owned by the Cherokee tribe. In 1906, however, it passed an Act that increased the number of persons entitled to share in the distribution, thereby changing the original distribution. Since it was concerned that the change might be unconstitutional, Congress provided in the 1906 Act that four named individuals could file suit against the United States in the Court of Claims on behalf of all claimants under the 1902 Act, with a right of appeal to the Supreme Court. The Court of Claims upheld the constitutionality of the changed distribution. Muskrat and the other named claimants then appealed to the Supreme Court in accordance with the 1906 Act.]

The first question in these cases, as in others, involves the jurisdiction of this court to entertain the proceeding, and that depends upon whether the jurisdiction conferred is within the power of Congress, having in view the limitations of the judicial power, as established by the Constitution of the United States. . . .

[The Court first highlighted prior examinations of the judicial power conferred by the Constitution, including *Hayburn's Case* and the Justices' refusal in 1793 to answer the questions propounded at the behest of President Washington, both discussed in Chapter 2.]

[By] the express terms of the Constitution, the exercise of the judicial power is limited to "cases" and "controversies." Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred. . . .

A "case" was defined by Mr. Chief Justice Marshall as early as the leading case of *Marbury v. Madison* to be a suit instituted according to the regular course of judicial procedure. . . .

[There] is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.

[I]t is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the

constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. . . .

Muskrat involved a statutory scheme intended to allow Congress to determine whether one of its legislative acts was constitutional. Under this scheme, Congress authorized four individuals to file suit against the United States to test the constitutional validity of its redistribution of Cherokee lands. But notice the suit was against the United States, which did not have an adverse interest to the claimants, rather than against those who received the redistributed lands. The Court held that the judicial power only extended to "actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." Because such an actual controversy did not exist, the Court dismissed the case for want of jurisdiction.

The prohibition against advisory opinions ensures that there is both (1) an actual dispute between adverse litigants and (2) a substantial likelihood that a decision in favor of the claimant will have some effect (or, in the words of *Muskrat*, that the court's judgment is conclusive and can be executed).

The first requirement of an "actual dispute" precludes the federal judiciary from resolving a formal request for advice from another branch of government on a contemplated action, even though approximately ten states have state constitutional provisions or laws authorizing their highest state courts to issue such advisory opinions under specified circumstances.

The "actual dispute" requirement also prevents the federal courts from resolving suits where the parties do not have actual adverse interests, as in *Muskrat*. This same concern arises in collusive or feigned suits, where the parties have concocted a friendly suit or one in which one entity controls the entire proceeding against an uninterested but named party in order to obtain a judicial decision on a legal issue. In *Lord v. Veazie*, 49 U.S. (8 How.) 251 (1850), for example, Veazie deeded 250 shares of stock and associated rights to his brother-in-law Lord for $6000 and warranted that the rights and stock were his to convey. The purpose of the conveyance, though, was to obtain a judicial decision on the ownership of the stock and associated rights that were claimed by third parties in another pending action against the Veazie family. These third parties were not notified of the suit that Lord filed against Veazie, which was quickly resolved on agreed facts in favor of Veazie that Lord then sought to have the Supreme Court review. When the third parties learned of the Supreme Court proceeding, they filed a motion to dismiss supported by their affidavits detailing the scheme. The Supreme Court then dismissed the case:

> The court is satisfied, upon examining the record in this case, and the affidavits filed in the motion to dismiss, that the contract set out in the pleadings was made for the purpose of instituting this suit, and there is no real dispute between the plaintiff and defendant. . . . [T]heir interest in the question brought here for decision is one and the same, and not adverse, and that in these proceedings the plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not

> parties to this suit . . . . [A]ny attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court.

The second requirement, necessitating the likelihood that a favorable judgment will be effectual, ensures that judicial resolution of the issue is meaningful. If the plaintiff wins, the world cannot be the same for the plaintiff after the ruling. A final federal judicial determination in favor of a party should not be subject to review in a non-judicial proceeding by any other branch of government (as occurred in *Hayburn's Case*), but instead the determination must be conclusive and binding.

The Supreme Court over the last several decades has developed extensive case law regarding the more specific justiciability doctrines, including standing, ripeness, mootness, and the political question doctrine. But this does not detract from the importance of the prohibition on advisory opinions. As will be evident in the following sections, the requirements to satisfy the prohibition on advisory opinions overlap to some extent with the elements for standing, ripeness, and mootness. The Supreme Court has even occasionally stated that deciding a case on the merits when a party lacks standing or the claim is either unripe or moot would constitute an impermissible advisory opinion. *E.g.*, *Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947). While modern decisions typically describe the various justiciability doctrines as related but distinct, they all share similar underlying purposes to serve Article III's "case or controversy" requirement.

B. STANDING

Standing ascertains whether a particular plaintiff is the proper person to bring suit. In constitutional cases, the issue boils down to whether the plaintiff has suffered a personal injury caused by government action that can be redressed by the courts, or whether the plaintiff is merely acting to promote principles of good government or to rectify some abstract, undifferentiated harm to the general public.

MASSACHUSETTS v. MELLON, 262 U.S. 447 (1923), illustrates the concern. Both the State of Massachusetts and an individual citizen, Ms. Frothingham, challenged the constitutionality of the federal Maternity Act of 1921—which provided for federal payments to the states for programs designed to reduce maternal and infant mortality—on the ground that the Act exceeded the constitutional powers of Congress.

Massachusetts argued that its rights and powers as a sovereign and the rights of its citizens had been invaded by Congress usurping its powers and intruding upon the local concerns of a state. But the Supreme Court held that this question was "not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power." The state had not established that it suffered a direct injury to its property, finances, or physical domain, but instead presented only "abstract questions of political power, of sovereignty, of government." Such questions, the Court determined, were not within its province to decide.

Frothingham alleged that she was injured as a taxpayer, in that the Act would increase the taxes she would pay to the federal government and thereby take her property without due process of law. But the Court held that Frothingham, as a federal taxpayer, could not show the requisite kind of injury when challenging a spending program:

> [A taxpayer's] interest in the moneys of the treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation . . . [is] so remote, fluctuating, and uncertain that no basis is afforded [for judicial decision]. . . .
>
> We have no power per se to review and annul acts of Congress on the ground they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. . . . The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with the people generally. . . Here the parties plaintiff have no such case. . . .

This principle that the plaintiff must show a particular type of injury has been repeatedly emphasized in modern decisions. Although, as will be discussed later, the Supreme Court has recognized a very narrow exception to the *Mellon* rule in Establishment Clause cases that allows taxpayer status to be sufficient to confer standing to challenge government expenditures under specified conditions, the requirement of a sufficient "injury" that is concrete and particularized rather than abstract or hypothetical has become the centerpiece of the Court's approach to standing.

The Supreme Court's modern approach to standing differentiates between two sets of requirements: Article III requirements and prudential or discretionary requirements. The Article III requirements are premised on separation of powers principles and therefore cannot be waived or altered by statute. The three Article III requirements are: (1) the plaintiff must show some actual or imminently threatened injury, which is concrete and particularized; (2) the injury must be fairly traceable to the actions of the government defendant, rather than being the result of the independent act of a third party; and (3) the injury must be likely to be redressed by a decision favorable to the plaintiff.

The discretionary or prudential requirements supplement the Article III baseline in certain contexts. Although the Supreme Court has at times recognized additional prudential requirements, the predominant prudential requirement that must be satisfied is that the injured plaintiff must normally assert personal legal rights, not those of third parties.

1. THE CONSTITUTIONAL REQUIREMENTS OF STANDING

The following two cases introduce the three modern constitutional requirements for standing flowing from Article III of the Constitution and the judiciary's role in the separation of powers. In studying these cases, pay attention to each harm alleged by the plaintiffs and the Court's rationales for holding these allegations were insufficient to confer standing.

ALLEN v. WRIGHT
468 U.S. 737 (1984)

JUSTICE O'CONNOR delivered the opinion of the Court.

Parents of black public school children allege in this nationwide class action that the Internal Revenue Service (IRS) has not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools. They assert that the IRS thereby harms them directly and interferes with the ability of their children to receive an education in desegregated public schools. The issue before us is whether plaintiffs have standing to bring this suit. We hold that they do not.

I

The IRS denies tax-exempt status under §§ 501(a) and (c)(3) of the Internal Revenue Code—and hence eligibility to receive charitable contributions deductible from income taxes—to racially discriminatory private schools. The IRS policy requires that a school applying for tax-exempt status show that it "admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs." To carry out this policy, the IRS has established guidelines and procedures for determining whether a particular school is in fact racially nondiscriminatory. Failure to comply with the guidelines "will ordinarily result in the proposed revocation of" tax-exempt status. . . .

In 1976 respondents challenged these guidelines and procedures in a suit filed in Federal District Court against the Secretary of the Treasury and the Commissioner of Internal Revenue. The plaintiffs named in the complaint are parents of black children who, at the time the complaint was filed, were attending public schools in seven States in school districts undergoing desegregation. They brought this nationwide class action "on behalf of themselves and their children, and . . . on behalf of all other parents of black children attending public school systems undergoing, or which may in the future undergo, desegregation . . . ."

Respondents allege in their complaint that many racially segregated private schools were created or expanded in their communities at the time the public schools were undergoing desegregation. According to the complaint, many such private schools, including 17 schools or school systems identified by name in the complaint (perhaps some 30 schools in all), receive tax exemptions either directly or through the tax-exempt status of "umbrella" organizations that operate or support the schools. Respondents allege that, despite the IRS policy of denying tax-exempt status to racially discriminatory private schools and despite the IRS guidelines and procedures for implementing that policy, some of the tax-exempt racially segregated private schools created or expanded in desegregating districts in fact have racially discriminatory policies. . . .

Respondents allege that the challenged Government conduct harms them in two ways. The challenged conduct

> (a) constitutes tangible federal financial aid and other support for racially segregated educational institutions, and
>
> (b) fosters and encourages the organization, operation and expansion of institutions providing racially segregated educational opportunities for white children avoiding attendance in desegregating public school districts and thereby interferes with the efforts . . . to desegregate public school districts . . . .

Thus, respondents do not allege that their children have been the victims of discriminatory exclusion from the schools whose tax exemptions they challenge as unlawful. Indeed, they have not alleged at any stage of this litigation that their children have ever applied or would ever apply to any private school. Rather, respondents claim a direct injury from the mere fact of the challenged Government conduct and, as indicated by the restriction of the plaintiff class to parents of children in desegregating school districts, injury to their children's opportunity to receive a desegregated education. The latter injury is traceable to the IRS grant of tax exemptions to racially discriminatory schools, respondents allege, chiefly because contributions to such schools are deductible from income taxes . . . and the "deductions facilitate the raising of funds to organize new schools and expand existing schools in order to accommodate white students avoiding attendance in desegregating public school districts."

[The District Court dismissed for lack of standing, but the Court of Appeals reversed,] holding that respondents have standing to bring this lawsuit. We granted certiorari, and now reverse.

II

Article III of the Constitution confines the federal courts to adjudicating actual "cases" and "controversies." [The] "case or controversy" requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. . . .

The Art. III doctrine that requires a litigant to have "standing" to invoke the power of a federal court is perhaps the most important . . . . The requirement of standing [has] a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. . . .

1

Respondents' first claim of injury can be interpreted in two ways. It might be a claim simply to have the Government avoid the violation of law alleged in respondents' complaint. Alternatively, it might be a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race. Under neither interpretation is this claim of injury judicially cognizable.

This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court. . . . Respondents here have no standing to complain simply that their Government is violating the law.

Neither do they have standing to litigate their claims based on the stigmatizing injury often caused

by racial discrimination. There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. Our cases make clear, however, that such injury accords a basis for standing only to "those persons who are personally denied equal treatment" by the challenged discriminatory conduct. . . .

The consequences of recognizing respondents' standing on the basis of their first claim of injury illustrate why our cases plainly hold that such injury is not judicially cognizable. If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school. All such persons could claim the same sort of abstract stigmatic injury respondents assert in their first claim of injury. . . . Recognition of standing in such circumstances would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders." Constitutional limits on the role of the federal courts preclude such a transformation.

2

It is in their complaint's second claim of injury that respondents allege harm to a concrete, personal interest that can support standing in some circumstances. The injury they identify—their children's diminished ability to receive an education in a racially integrated school—is, beyond any doubt, not only judicially cognizable but, as shown by cases [such as] *Brown v. Board of Education*, one of the most serious injuries recognized in our legal system. Despite the constitutional importance of curing the injury alleged by respondents, however, the federal judiciary may not redress it . . . because the injury alleged is not fairly traceable to the Government conduct respondents challenge as unlawful.

The illegal conduct challenged by respondents is the IRS's grant of tax exemptions to some racially discriminatory schools. The line of causation between that conduct and desegregation of respondents' schools is attenuated at best. From the perspective of the IRS, the injury to respondents is highly indirect and "results from the independent action of some third party not before the court[.]" . . .

The diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration. Respondents have made no such allegation. It is, first, uncertain how many racially discriminatory private schools are in fact receiving tax exemptions. Moreover, it is entirely speculative, as respondents themselves conceded [below], whether withdrawal of a tax exemption from any particular school would lead the school to change its policies. It is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status. It is also pure speculation whether, in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools.

The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing. In *Simon v. Eastern Kentucky Welfare Rights Org.*, the Court held that standing to challenge a Government grant of a tax exemption to hospitals could not be founded on the asserted connection between the grant of tax-exempt status and the hospitals' policy concerning the provision of medical services to indigents. The causal connection depended on the decisions hospitals would make in response to withdrawal of tax-exempt status, and those decisions were sufficiently uncertain to break the chain of causation between the plaintiffs' injury and the challenged Government action. The chain of causation is even weaker in this case. It involves numerous third parties (officials of racially discriminatory schools receiving tax exemptions and the parents of children attending such schools) who may not even exist in respondents' communities and whose independent decisions may not collectively have a significant effect on the ability of public school students to receive a desegregated education.

The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that respondents' alleged injury "fairly can be traced to the challenged action" of the IRS. That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication. . . . The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to "take Care that the Laws be faithfully executed." U. S. Const., Art. II, § 3. We could not recognize respondents' standing in this case without running afoul of that structural principle. . . .

JUSTICE BRENNAN, dissenting.

. . . Viewed in light of the injuries they claim, the respondents have alleged a direct causal relationship between the Government action they challenge and the injury they suffer: their inability to receive an education in a racially integrated school is directly and adversely affected by the tax-exempt status granted by the IRS to racially discriminatory schools in their respective school districts. Common sense alone would recognize that the elimination of tax-exempt status for racially discriminatory private schools would serve to lessen the impact that those institutions have in defeating efforts to desegregate the public schools.

The Court admits that "[t]he diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions . . . if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration," but concludes that "[r]espondents have made no such allegation." With all due respect, the Court has either misread the complaint or is improperly requiring the respondents to prove their case on the merits in order to defeat a motion to dismiss. For example, the respondents specifically refer by name to at least 32 private schools that discriminate on the basis of race and yet continue to benefit illegally from tax-exempt status. Eighteen of those schools—including at least 14 elementary schools, 2 junior high schools, and 1 high school—are located in the city of Memphis, Tenn., which has been the subject of several court orders to desegregate. . . .

More than one commentator has noted that the causation component of the Court's standing inquiry is no more than a poor disguise for the Court's view of the merits of the underlying claims. The Court today does nothing to avoid that criticism. What is most disturbing about today's decision, therefore, is not the standing analysis applied, but the indifference evidenced by the Court to the detrimental effects that racially segregated schools, supported by tax-exempt status from the Federal Government, have on the respondents' attempt to obtain an education in a racially integrated school system. I cannot join such indifference, and would give the respondents a chance to prove their case on the merits.

[The separate dissenting opinion of Justice Stevens, joined by Justice Blackmun, has been omitted. Justice Marshall was recused and took no part in the decision.]

LUJAN v. DEFENDERS OF WILDLIFE
504 U.S. 555 (1992)

JUSTICE SCALIA delivered the opinion of the Court.

[Under section 7(a)(2) of the Endangered Species Act, each federal agency had to consult with the Secretaries of the Interior and of Commerce to ensure that the actions it funded did not likely jeopardize endangered or threatened species. Both Secretaries during the Carter Administration promulgated a joint regulation extending this requirement to actions taken in foreign nations, but the Secretaries during the Reagan Administration subsequently issued a joint rule limiting its coverage to the United States and to the high seas. Defenders of Wildlife and other environmental organizations sued for declaratory and injunctive relief, on the theory that the new regulation, omitting coverage of species in foreign territory, was inconsistent with the governing statutes.

Defenders of Wildlife claimed standing on several bases. First, it alleged standing on the basis of the affidavits of two of its members, Joyce Kelly and Amy Skilbred. Kelly's affidavit claimed that she would "suffer harm in fact" because of the American role in overseeing the rehabilitation of the Aswan High Dam on the Nile and in developing Egypt's master water plan, which she alleged would threaten the endangered Nile crocodile, whose habitat she had observed and intended to do so again. Skilbred's affidavit alleged that she had observed habitats of endangered species in Sri Lanka whose habitat would be reduced by agency-funded projects, injuring her because she intended to go back to Sri Lanka but had no current plans: "I don't know [when]." Defenders of Wildlife also claimed standing because of the interconnection of ecosystems across the globe and its members' interest in animals. Finally, Defenders of Wildlife claimed standing under a provision of the Endangered Species Act authorizing "any person" to file suit to enjoin its violation.]

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be

"redressed by a favorable decision." The party invoking federal jurisdiction bears the burden of establishing these elements. . . .

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably on whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily very little questions that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. . . . Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish. *Allen*; *Simon*. . . .

[The] desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing. *See Sierra Club v. Morton*, 405 U.S. 727 (1972). "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.*. . .

[The affidavits in this case] contain no facts . . . showing how damage to the species will produce "imminent" injury to Mses. Kelly and Skilbred. That the women "had visited" the areas of the projects before the projects commenced proves nothing[:] "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." And the affiants' profession of an "inten[t]" to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the "actual or imminent" injury that our cases require.

[Plaintiffs also] propose a series of novel standing theories. The first . . . proposes that any person who uses *any part* of a "contiguous ecosystem" adversely affected by a funded activity has standing even if the activity is located a great distance away. This approach . . . is inconsistent with our [prior holding] that a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly "in the vicinity" of it. . . .

[Plaintiff's] other theories [propose that] anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing [and that] anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing . . . . This is beyond all reason. . . . It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible—though it goes to the outermost limits of plausibility—to think that a person who observes or works with animals of a particular species in the very areas of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist. It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes

or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection. . . .

[The lower] court held that . . . the citizen-suit provision creates a "procedural righ[t]" to consultation in all "persons"—so that *anyone* can file suit in federal court . . . . [The] court held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, non-instrumental "right" to have the Executive observe the procedures required by law. We reject this view.

We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy. For example, in . . . *Massachusetts v. Mellon*, we dismissed for lack of Article III standing a taxpayer suit challenging the propriety of certain federal expenditures. We said:

> The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. . . . Here the parties plaintiff have no such case. . . . [T]heir complaint . . . is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess.

. . . More recent cases are to the same effect. . . . To be sure, our generalized-grievance cases have typically involved Government violation of procedures assertedly ordained by the Constitution rather than the Congress. But there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches. "The province of the court," as Chief Justice Marshall said in *Marbury v. Madison*, "is, solely, to decide on the rights of individuals." Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the

President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," *Massachusetts v. Mellon*, and to become "'virtually continuing monitors of the wisdom and soundness of Executive action.'" *Allen*. We have always rejected that vision of our role . . .

Nothing in this contradicts the principle that "[t]he . . . injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" [As] we said in *Sierra Club v. Morton*, "[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." [Nevertheless,] it is clear that in suits against the Government, at least, the concrete injury requirement must remain.

* * *

We hold that respondents lack standing to bring this action . . . .

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR joins, dissenting.

[A] reasonable finder of fact could conclude, based not only upon their statements of intent to return, but upon their past visits to the project sites, as well as their professional backgrounds, that it was likely that Kelly and Skilbred would make a return trip to the project areas. . . . I fear the Court's demand for detailed descriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not. More likely, it will resurrect a code-pleading formalism in federal court summary judgment practice, as federal courts, newly doubting their jurisdiction, will demand more and more particularized showings of future harm. Just to survive summary judgment, for example, . . . a Federal Torts Claims Act plaintiff alleging loss of consortium should make sure to furnish this Court with a "description of concrete plans" for her nightly schedule of attempted activities. . . .

[Determining] "injury" for Article III standing purposes is a fact-specific inquiry. . . . There may be factual circumstances in which a congressionally imposed procedural requirement is so insubstantially connected to the prevention of substantive harm that it cannot be said to work any conceivable injury to an individual litigant. But, as a general rule, the courts owe substantial deference to Congress' substantive purpose in imposing a certain procedural requirement. . . . There is no room for a per se rule or presumption excluding injuries labeled "procedural" in nature.

. . . I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing. . . .

[The concurring opinion of Justice Kennedy, joined by Justice Souter, and the concurring opinion of Justice Stevens, have been omitted.]

As *Allen* and *Lujan* demonstrate, the Court considers three elements to be the "irreducible constitutional minimum" for standing: (1) injury in fact; (2) traceability; and (3) redressability. In

both *Allen* and *Lujan*, the Court held that the plaintiffs had not established, under any of their proposed theories, a sufficient injury traceable to the government's conduct. Why not? What, if anything, would have been sufficient for the plaintiffs to be able to maintain these suits?

The discussion below provides additional guidance regarding the elements of constitutional standing.

(1) Injury in Fact: An injury in fact is one that is "concrete and particularized" and "actual or imminent." Thus, the injury must be both (a) of a sufficient type and (b) of a sufficient likelihood.

(a) Type of injury: An injury in fact must be both concrete and particularized. The Supreme Court clarified in *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339-40 (2016), that these are two separate requirements, each of which must be satisfied. A "particularized" injury impacts the plaintiff "in a personal and individual way." *Id.* at 339 (quotations omitted). A collective injury to the public (that is, one suffered in an undifferentiated manner by the public at large) is not suffered personally and is thus not sufficiently particularized.

The Supreme Court has held in several contexts that harms suffered by others do not satisfy the particularized requirement. In *Allen v. Wright*, for example, the Court held that a claim based on discrimination suffered by others (but not the plaintiff) provided no basis to establish standing. In *Lujan v. Defenders of Wildlife*, the Court rejected the "novel standing theories" that an individual using another ecosystem or studying or working with an endangered species had a particularized harm from a project allegedly harming that species in another part of the world. Similarly, the Court has required, in order to have standing for a challenge to a gerrymandered legislative district on the basis of race or partisanship, that the challenger actually live in the gerrymandered district (rather than another legislative district), thereby showing that his or her own vote was diluted. *See, e.g.*, *Gill v. Whitford*, 585 U.S. 48 (2018) (holding plaintiffs failed to prove the impact of an allegedly partisan gerrymander on their individual votes in their districts); *United States v. Hays*, 515 U.S. 737 (1995) (holding that a claim by a voter in one district that another district in which he did not reside had been unconstitutionally gerrymandered by race was an insufficient injury for standing purposes).

To be concrete, the injury must be real, rather than abstract. A concrete injury does not necessarily have to be tangible, but the Court will more closely scrutinize an alleged intangible harm to determine its relationship to harms traditionally afforded judicial cognizance. The Court has recognized that certain kinds of claimed injuries are simply not concrete enough to constitute an injury in fact. In particular, the Court has determined that "ideological injuries" do not satisfy the standing requirement. An example of an ideological injury is a claim of standing based merely on the alleged "harm" that the government is not following the law, such as presented in *Mellon*, *Allen*, and *Lujan*. The Court held in these cases that such ideological injuries should be rectified in the political process rather than through the judicial process.

HOLLINGSWORTH v. PERRY, 570 U.S. 693 (2013), provides another illustration, where the Supreme Court held that the official proponents of a state ballot initiative had no standing to appeal a district court's judgment that the initiative violated the U.S. Constitution. After the California Supreme Court held that limiting marriage to opposite-sex couples violated the state constitution, a group of California citizens proposed a ballot initiative known as Proposition 8 to amend the state

constitution to ban same-sex marriage. Once Proposition 8 passed, two same-sex couples desiring to marry sued various state officials in federal district court claiming Proposition 8 violated the Fourteenth Amendment. The state officials, while continuing to enforce Proposition 8, refused to defend it, so the district court allowed the official proponents of Proposition 8 to intervene. After a bench trial, the district court declared Proposition 8 unconstitutional. Although the state defendants chose not to appeal, the official proponents of Proposition 8 did, eventually seeking review from the Supreme Court.

But the Court held, in a 5-4 decision by Chief Justice Roberts, that the Proposition 8 proponents did not have standing. They had not been ordered to do or refrain from doing anything by the district court's judgment. As a result, their only interest was to vindicate the constitutional validity of a generally applicable California law. But the Court reasoned this was insufficient:

> We have repeatedly held that such a "generalized grievance," no matter how sincere, is insufficient to confer standing. A litigant "raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly benefits him than it does the pubic at large—does not state an Article III case or controversy." *Lujan v. Defenders of Wildlife*; *Allen v. Wright*; *Massachusetts v. Mellon*.

Although the proponents had a distinct role in enacting Proposition 8 under California law, this role did not extend to enforcing Proposition 8 after its enactment. Enforcement responsibility belonged to the state, and the Court found no basis for allowing the proponents to assert the state's interests. Justice Kennedy, joined by Justices Thomas, Alito, and Sotomayor, dissented, urging that the California law had adequately authorized the proponents to appear in court and defend the initiative when public officials refused to do so.

RAINES v. BYRD, 521 U.S. 811 (1997), involved an analogous issue, legislative standing. In 1996, Congress enacted, and the President signed into law, the Line Item Veto Act, which authorized the President to cancel certain spending and tax benefit measures after signing them into law. Six sitting members of Congress who voted against the Act filed suit the day after the Act went into effect (but before it had been used by the President). They alleged the Act unconstitutionally expanded presidential power at the expense of Congress by eliminating the typical requirements for legislation, instead granting the President the power to amend legislation on his own accord. They urged that the Act thus harmed them in their official capacities as members of Congress by diluting the effect of their votes, divesting them of their role in the repeal of legislation, and altering the constitutional balance of power between the executive and legislative branches of government.

The Court, in an opinion by Chief Justice Rehnquist, held that these Senators and Representatives did not have standing. First, they had not alleged that they had been personally singled out for unfavorable treatment as compared to other members of Congress, nor did they claim any loss of a private right that was not shared with every member of Congress: "If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, . . . not as a prerogative

of personal power." This meant any alleged injury was institutional rather than suffered by the plaintiffs personally.

The Court recognized that it had upheld standing for state legislators claiming an institutional injury in a prior case, *Coleman v. Miller*, 307 U.S. 433 (1939), but that case was distinguishable. The *Coleman* state senators claimed that their votes were sufficient to defeat the ratification of a federal constitutional amendment, but the allegedly unconstitutional vote of the lieutenant governor broke the tie. Here, though, the Line Item Veto Act was passed by substantial majorities in both Houses, so the plaintiffs could not claim their votes were not given the proper effect—instead, they merely lost the vote in Congress. Their only claims were harms to the alleged balance of power between the President and Congress, but that was too abstract to be considered a personal injury. The Court continued that historically Congress and the President had resolved such disputes either through the political process or when the alleged constitutional violation caused a concrete and particularized injury to a particular plaintiff:

> [Plaintiffs] have alleged no injury to themselves as individuals . . . , the institutional injury they allege is wholly abstract and widely dispersed (contra, *Coleman*), and their attempt to litigate this dispute at this time and in this form is contrary to historical experience. We attach some importance to the fact that [plaintiffs] have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit. We also note that our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act).

United States v. Texas, 599 U.S. 670 (2023), provides another example of an insufficient injury allegation for standing. Texas and Louisiana sued in federal court challenging immigration-enforcement guidelines adopted by President Biden's Secretary of Homeland Security that prioritized the arrest and removal of certain noncitizens, such as suspected terrorists, dangerous criminals, and recent unlawful entrants. Texas and Louisiana urged that the federal government's failure to arrest and deport more noncitizens—which the states argued was required by federal law—increased the number of noncitizens in their states and resulted in increased financial costs to the states. While acknowledging that monetary costs are typically a sufficient injury, the Court, in an opinion by Justice Kavanaugh, highlighted the *Raines* requirement that the injury also must be "judicially cognizable" and "traditionally thought to be capable of resolution through the judicial process." The majority reasoned that federal courts have not traditionally entertained lawsuits seeking to challenge an executive branch decision *not* to arrest or prosecute, as the executive does not exercise coercive power in declining to arrest or prosecute and such suits may encroach on the President's Article II authority over enforcement choices and priorities. Justice Gorsuch, joined by Justices Thomas and Barrett, concurred only in the judgment, contending the real standing difficulty was not injury but redressability, as the federal judiciary could not issue binding relief. Justice Alito dissented.

So what types of injuries are sufficient to be concrete and particularized? The vast majority of cases filed in federal court satisfy the requirement. It is met for harms to rights recognized at common law

(such as property, contract, or tort law), invasions of constitutional rights that cause a particular harm to the plaintiff (such as the diminished ability to receive an education in a racially integrated school in *Allen*), and deprivations of statutory rights that have been granted to the plaintiff and have a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts. These statutory rights can include procedural rights that are granted to protect concrete interests that would be impacted if the procedures were not followed, such as a requirement that the government provide an environmental impact statement before constructing a dam that would impact land owned by the plaintiff.

(b) Timing of Injury: Assuming the appropriate type of injury exists, the plaintiff must also show that the harm is actual or at least imminent. As *Lujan* held, "some day" intentions are not enough to establish standing. Instead, there must be a substantial likelihood that the plaintiff will be wronged.

SUMMERS v. EARTH ISLAND INSTITUTE, 555 U.S. 488 (2009), illustrates. A federal statute required the Forest Service to provide an extensive notice, comment, and appeal process before implementing land and resource management plans, but the Forest Service adopted regulations that exempted certain fire rehabilitation activities and salvage timber sales from this process. Several environmental organizations filed suit shortly after the Forest Service used these regulations to approve, without providing for notice, comment, or appeal, the salvage sale of timber from a portion of Sequoia National Forest damaged by a fire. Members of the environmental organizations filed affidavits with the district court detailing that they had visited this part of the forest, had imminent plans to do so again, and their interests would be harmed by the proposed sale. After the district court issued a preliminary injunction to stop the sale, the parties resolved their dispute regarding the Sequoia timber sale. Notwithstanding the settlement, the environmental organizations proceeded to seek a nationwide injunction against the enforcement of the Forest Service's regulations in other unspecified locations.

The district court granted the injunction, and the court of appeals affirmed, rejecting the Forest Service's argument that the organizations lacked the necessary injury in fact to challenge the regulations after the resolution of the Sequoia timber sale. But the Supreme Court, in a 5-4 decision by Justice Scalia, agreed with the Forest Service.

Relying predominantly on *Lujan*, the majority reasoned that the environmental organizations no longer had standing to challenge the regulations in the absence of an identified concrete application of the regulations that created an imminent and concrete threat of harm. The mere fact that the Forest Service admitted it would continue to use the regulations to exempt fire rehabilitation activities from the notice, comment, and appeal process did not suffice because a "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." Instead, to have standing to assert a procedural right, plaintiffs must establish that the procedural right protects their "concrete interests."

While the organizations satisfied this standard with respect to the Sequoia timber sale through the affidavits of their members detailing past visits and imminent plans to visit that area of the forest, the settlement regarding that sale had remedied those injuries. To continue their suit, the organizations had to establish another concrete application threatening imminent harms to their

interests. The affidavit of one member, Bensman, that he had visited many national forests, planned to continue to do so in the future, and would be injured by development under the regulations that the Forest Service admitted would be used thousands of time in the future did not satisfy this burden. The Court explained the affidavit failed

> to allege that any particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan of Bensman's to enjoy the national forests. The national forests occupy more than 190 million acres, an area larger than Texas. There may be a chance, but is hardly a likelihood, that Bensman's wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations. . . .
>
> The Bensman affidavit does refer specifically to a series of projects in the Allegheny National Forest that are subject to the challenged regulations. It does not assert, however, any firm intention to visit their locations, saying only that Bensman "want[s] to" go there. This vague desire to return is insufficient to satisfy the requirement of imminent injury. "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Defenders of Wildlife*.

In dissent, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, argued that the affidavit was sufficient to demonstrate a realistic threat of future harm even though "the plaintiff cannot specify precise times, dates, and GPS coordinates. . . . To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive."

(2) Traceability (or Causation): The traceability element ensures that the injury is fairly traceable to the defendant rather than some independent third party not before the Court. The concern is that, if the causal nexus between the injury and the government's conduct is too attenuated, the suit is not truly seeking to enforce specific legal obligations whose violation works a direct harm, but instead is seeking to intrude upon the mechanisms by which the executive branch enforces the law.

Allen v. Wright and a case it relied upon, *Simon v. Eastern Kentucky Welfare Rights Organization*, illustrate this requirement. In both cases, the plaintiffs sued the government based on their harms flowing from the policies and actions of private parties (in *Allen*, the racial discrimination policies of public schools, and in *Simon*, the availability of medical care for the indigent at private hospitals). The plaintiffs claimed in both cases that the government could rectify these harms by more strictly enforcing the laws that should have denied tax-exempt status to private entities engaging in such conduct. But the Court held in both cases that the plaintiffs' injuries were not fairly traceable to the government, as the links in the chain of causation between the harms caused by the private parties and the actions of the government were too attenuated.

CALIFORNIA v. TEXAS, 593 U.S. 659 (2021), provides another example of this requirement. Two private citizens and several states filed suit seeking to declare unconstitutional the individual health-

care mandate, along with the rest of the Affordable Care Act (ACA or Obamacare), after the shared responsibility payment imposed as a penalty for failing to obtain the required health insurance was reduced to zero during President Trump's administration. The Supreme Court held in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), a case that will be studied in a subsequent chapter, that the individual mandate was constitutional under the power of Congress to tax; the plaintiffs urged that reducing the payment to zero meant that it could no longer be sustained as a tax. But the Supreme Court, in a 7-2 decision authored by Justice Breyer, held that the plaintiffs did not have standing because their alleged harms were not fairly traceable to a $0 penalty for failing to obtain insurance.

The individual plaintiffs claimed that they suffered a pocketbook injury from abiding by the mandate for health insurance. But the Court explained that even assuming this pocketbook injury was a sufficient injury-in-fact, the plaintiffs failed the traceablity requirement:

> Their problem lies in the fact that the statutory provision, while it tells them to obtain that coverage, has no means of enforcement. With the penalty zeroed out, the IRS can no longer seek a penalty from those who fail to comply. Because of this, there is no possible Government action that is causally connected to the plaintiffs' injury—the costs of purchasing health insurance. Or to put the matter conversely, that injury is not "fairly traceable" to any "allegedly unlawful conduct" of which the plaintiffs complain. *Allen v. Wright*.

The state plaintiffs also claimed a financial injury, alleging that the mandate led state residents to enroll in state-operated or state-sponsored insurance programs that require the states to bear a portion of the costs. But the Court likewise rejected this claimed injury on traceability grounds. First, this implicated the same problem confronted by the individual claims—the lack of enforcement. Second, the states failed to demonstrate that the mandate would cause more individuals to enroll:

> We have said that, where a causal relation between injury and challenged action depends upon the decision of an independent third party (here an individual's decision to enroll in, say Medicaid), "standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan* (quoting *Allen*). To satisfy that burden, the plaintiff must show at the least "that third parties will likely react in predictable ways." . . . The state plaintiffs have not done so.
>
> The programs to which the state plaintiffs point offer their recipients many benefits that have nothing to do with the minimum essential coverage provision . . . . Given these benefits, neither logic nor intuition suggests that the presence of the minimum essential coverage requirement would lead an individual to enroll in one of those programs that its absence would lead them to ignore. A penalty might have led some inertia-bound individuals to enroll. But without a penalty, what incentive could the provision provide?

The Court then rejected the states' further argument that other aspects of the ACA imposed costs upon them, such as providing information to the IRS and plan beneficiaries, providing health plans

to government workers, and complying with other rules and regulations of the ACA. Because these provisions operated independently of the mandate, and the states had not alleged that these other provisions violated the Constitution, there was no injury fairly traceable to the alleged unlawful conduct of the government. Justice Alito, in a dissent joined by Justice Gorsuch, argued that the state plaintiffs had established traceability by showing harms from these other provisions of the ACA that were "inextricably linked to the individual mandate."

(3) Redressability: The requirement that the injury be redressable is the flip side of the traceability requirement. Causation ensures that the plaintiff's injury is traceable to the allegedly unlawful conduct of the defendant; redressability ensures that a judicial remedy against the defendant will alleviate the plaintiff's injury. This requirement necessitates that it is likely—not merely speculative—that a favorable judicial judgment will redress the claimed injury. It is not enough that a favorable court opinion would establish a precedent that could redress a plaintiff's injury in a subsequent suit; instead, the court must be able to render a binding judgment alleviating the injury to some extent.

In ***STEEL CO. v. CITIZENS FOR A BETTER ENVIRONMENT***, 523 U.S. 83 (1998), an environmental group sued a steel manufacturer under the Emergency Planning and Community Right-to-Know Act (EPCRA) for failing to file required reporting. The manufacturer, when notified of the plaintiff's intent to sue under the EPCRA, filed the overdue forms before suit was filed. The Supreme Court, in an opinion by Justice Scalia, applied the *Lujan* analysis, and held that the plaintiff lacked standing under the redressability prong because the forms had been filed.

The Court reasoned that even assuming the failure to file the required information was a sufficiently concrete injury, the declaratory and injunctive relief sought would not reimburse the plaintiff for any alleged losses caused by the late reporting. Although the plaintiff also sued for civil penalties, these penalties were only payable to United States Treasury and not recoverable by the plaintiff:

> In requesting [these penalties], respondent seeks not remediation of its own injury—reimbursement for the costs it incurred as a result of the late filing—but vindication of the rule of law—the undifferentiated public interest in faithful execution of EPCRA. *See Lujan*. That does not suffice. . . .
>
> [A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just desserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury. *Allen v. Wright*. Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.

But in ***MASSACHUSETTS v. ENVIRONMENTAL PROTECTION AGENCY***, 549 U.S. 497 (2007), a 5-4 majority held that all the standing requirements (including redressability) were satisfied when several states and other entities sued the EPA for denying their rulemaking petition to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act. Massachusetts had suffered an injury in fact supporting its standing to maintain a statutorily-authorized proceeding to challenge

the EPA's allegedly unlawful failure to act, according to Justice Stevens's majority opinion, because state coastal lands had been impacted by the emissions which implicated the states' sovereign interests, and states should be granted "special solicitude" when suffering an injury to a sovereign interest. The Court also rejected the argument that the states' injuries could not be redressed since it was uncertain that reducing the gas emissions would have any impact on climate change or on the rate that the coastal lands were being lost :

> While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. . . . A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere. . . .
>
> In sum[,] the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge EPA's denial of their rulemaking petition.

Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, disagreed that the requirements of injury and redressability had been satisfied. With respect to injury, the Chief Justice argued that global warming was not a concrete and particularized harm necessary for an injury in fact. Moreover, with respect to redressability, "the realities make it pure conjecture to suppose that EPA regulation of new automobile emissions will likely prevent the loss of Massachusetts coastal land."

UZUEGBUNAM v. PRECZEWSKI, 592 U.S. 279 (2021), considered whether a request for nominal damages based upon a completed violation of a legal right satisfies the redressability requirement. Students enrolled at a public college sued college officials charged with enforcing the college's speech policies after they were threatened with disciplinary action for expressing their religious beliefs in a "free speech zone" on campus. College officials chose to discontinue the challenged policies, and then urged the case should be dismissed as moot. The students claimed they still had standing as a result of their claim for nominal damages.

The Supreme Court, in an 8-1 decision authored by Justice Thomas, held that a request for nominal damages based upon a completed violation of a legal right satisfied the redressability requirement. Because nominal damages were available at common law in the absence of actual damages for those who suffered a deprivation of their rights, the Court determined that such relief was judicially cognizable. While acknowledging that "a single dollar often cannot provide full redress," the Court explained that "the ability 'to effectuate a partial remedy' satisfies the redressability requirement." The Court distinguished the justiciability of claims seeking nominal damages from those seeking only the recovery of attorney's fees and costs incurred during the lawsuit:

> A request for attorney's fees or costs cannot establish standing because those awards are merely a "byproduct" of a suit that already succeeded, not a form of redressability. *Steel Co.* In contrast, nominal damages are redress, not a byproduct.

Chief Justice Roberts dissented, urging that he "would place a higher value on Article III" than a "request for a dollar."

2. THE *FLAST* EXCEPTION TO TAXPAYER STANDING

FLAST v. COHEN, 392 U.S. 83 (1968), recognized an exception to the *Mellon* rule that federal taxpayers do not have standing to complain of unconstitutional expenditures of federal funds. In *Flast*, taxpayers sued to prevent the expenditure of federal funds in religious schools for secular textbooks and instruction. Despite the similarity of the case to *Mellon*, the Supreme Court held the taxpayers had standing under the following two-part test:

> First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Article I, § 8 of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed on the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. . . .
>
> The taxpayer-appellants . . . have satisfied both nexuses . . . . Their constitutional challenge is made to an exercise by Congress of its power . . . to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds. In addition, appellants have alleged that the challenged expenditures violate the Establishment [Clause] of the First Amendment. Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. . . . The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause . . . operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power . . . .

Although Ms. Frothingham in *Mellon* would have met the first prong of this test, she would not have met the second, as she merely claimed that the enactment was beyond Congress's delegated powers and that her taxes would allegedly increase, thereby depriving her of property without due process of law. The *Flast* taxpayers, on the other hand, met both prongs of the test. First, they alleged an unconstitutional exercise of the taxing and spending power. Second, the taxpayers complained that the enactment violated the Establishment Clause, which the Court viewed as imposing a specific constitutional limitation on the taxing and spending power due to the concern of James Madison and others that religious liberty would be imperiled if the federal government could employ its power to tax and spend to aid either a specific religion or religion in general.

Flast left for future cases whether constitutional provisions besides the Establishment Clause constrained Congress's taxing and spending power and granted federal taxpayers standing to challenge allegedly unconstitutional expenditures of tax dollars. But no such additional limitations have been recognized; rather, the Court has strictly construed *Flast*, applying it only to challenges to legislative taxing and spending allegedly violating the Establishment Clause.

VALLEY FORGE CHRISTIAN COLLEGE v. AMERICANS UNITED FOR SEPARATION OF CHURCH & STATE, 454 U.S. 464 (1982), illustrates the narrowness of *Flast*. Article IV of the Constitution grants Congress the power "to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States." Under the Federal Property and Administrative Services Act of 1949, federal agencies could transfer to private entities "surplus" federally owned property that outlived its usefulness to the federal government. After the General Services Administration declared a closed army hospital in Pennsylvania "surplus property," the Department of Health, Education, and Welfare (HEW) transferred a large tract of the land, worth nearly $600,000, to Valley Forge Christian College. The government did not charge for the conveyance; the deed merely provided subsequent conditions, such as the land had to be used for thirty years for educational purposes.

After learning of the conveyance, Americans United for Separation of Church and State sued on behalf of itself and its taxpaying members, alleging that the conveyance violated the Establishment Clause. But the Supreme Court held that taxpayer standing was not authorized under *Flast*:

> Their claim is deficient in two respects. First, the source of their complaint is not a congressional action, but a decision by HEW to transfer a parcel of federal property. *Flast* limited taxpayer standing to challenges directed "only [at] exercises of congressional power."
>
> Second, and perhaps redundantly, the property transfer . . . was not an exercise of authority conferred by the Taxing and Spending Clause . . . . The authorizing legislation, the Federal Property and Administrative Services Act of 1949, was an evident exercise of Congress' power under the Property Clause . . . .

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION v. WINN, 563 U.S. 125 (2011), held that *Flast* did not apply because the case involved a tax credit scheme rather than a government expenditure. Under Arizona state law, taxpayers may claim a state income tax credit of up to $500 for contributions made to school tuition organizations, or STOs. The STOs then use these contributions to provide scholarships to students attending private schools, including religious schools. Arizona taxpayers challenged the STO tax credit under the Establishment Clause, alleging standing under *Flast*. The district court dismissed the taxpayers' suit for failure to state a claim, but the court of appeals reversed, holding that the taxpayers had standing and had stated a claim.

The Supreme Court, in an opinion by Justice Kennedy, reversed, holding the taxpayers lacked standing. The Court emphasized the narrowness of the *Flast* exception:

> It must be noted at the outset that, as this Court has explained, *Flast*'s holding provides a "narrow exception" to "the general rule against taxpayer standing." [*Flast* reasoned] that individuals suffer a particular injury for standing purposes when, in violation of the Establishment Clause and by means of "the taxing and spending power," their property is transferred through the Government's Treasury to a sectarian entity. . . . "Such an injury," *Flast* continued, is unlike "generalized grievances about the conduct of government" and so is "appropriate for judicial redress."

After noting the limited scope of the *Flast* exception, the majority reasoned that a tax credit was not the same as the "religious tax" the Establishment Clause was intended to prevent. Awarding citizens a tax credit, according to the majority, allowed other citizens to retain control over their own funds in accordance with their own consciences, and were not government expenditures. As a result, the general rule barring taxpayer standing applied. Four Justices dissented in an opinion by Justice Kagan, arguing that tax credits were just as effective in financing religious activity as appropriations.

Hein v. Freedom from Religion Foundation, Inc., 561 U.S. 587 (2007), also illustrates the narrowness of *Flast*, although the Court was unable to coalesce around a majority opinion. President Bush, by executive orders, created a White House Office to ensure that "faith-based community groups" would be eligible to compete for federal agency financial support. No legislation authorized this office, nor did Congress specifically appropriate money for the Office's activities; the Office was funded only through general executive branch appropriations. Freedom From Religion Foundation, Inc. (FFRF), an organization opposed to government endorsement of religion, sued the Office and its directors, claiming that the promotion of the faith-based community groups violated the Establishment Clause. Although the court of appeals ruled that FFRF had standing under *Flast*, the Supreme Court reversed. Justice Alito's plurality opinion concluded that the challengers were complaining of an expenditure of the executive branch rather than the use of Congress's power to tax and spend under Article I, Section 8. Justice Scalia, joined by Justice Thomas, urged that *Flast* should be overruled. Four Justices, in an opinion by Justice Souter, dissented.

After *Valley Forge*, *Winn*, *Hein*, and other Supreme Court decisions, a taxpayer will only be able to maintain standing in federal court to challenge the expenditure of funds by federal and state governments in circumstances mirroring those presented in *Flast*: (1) a challenge to a congressional or state legislative exercise of the taxing and spending power (rather than a challenge to any other governmental power), which is (2) based upon the Establishment Clause (rather than based upon any other constitutional provision).

3. STANDING TO ASSERT RIGHTS OF THIRD PERSONS

Litigants who have suffered an injury typically must assert their own rights rather than the rights of third parties. This doctrine is known as the prohibition on third-party standing, even though this terminology is potentially misleading. Litigants always must have some injury to have standing (unless the suit is brought in a legally recognized representative capacity, such as a parent bringing suit as "next friend" for his or her child, or a trustee bringing suit on behalf of a trust). The concept of "third-party standing" creates an additional prudential hurdle for litigants, adding that, in addition

to suffering a constitutionally sufficient injury, litigants must normally rely on their own rights rather than asserting others' rights. Thus, someone charged with violating a statute is not typically allowed to argue as a defense that the statute is unconstitutional as applied to other individuals in other contexts.

Yet because this doctrine is viewed as a prudential rather than a constitutional requirement, the Court has recognized exceptions to the bar on third-party standing. Sometimes these exceptions are doctrinally based, such as the overbreadth doctrine for free speech claims under the First Amendment. In other situations, exceptions stem from the absence of the doctrine's underlying justifications, as illustrated by the following case.

SINGLETON v. WULFF
428 U.S. 106 (1976)

Justice BLACKMUN delivered the opinion of the Court, together with an opinion (Part II-B), in which Justices BRENNAN, WHITE, and MARSHALL joined.

. . . This case involves a claim of a State's unconstitutional interference with the decision to terminate pregnancy. The particular object of the challenge is a Missouri statute excluding abortions that are not "medically indicated" from the purposes for which Medicaid benefits are available to needy persons. In its present posture, however, the case presents two issues not going to the merits of this dispute. The first is whether the plaintiff-appellees, as physicians who perform nonmedically indicated abortions, have standing to maintain the suit, to which we answer that they do. . . .

[Two] distinct standing questions are presented. First, whether the plaintiff-respondents allege "injury in fact," that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court's Art. III jurisdiction, and, second, whether, as a prudential matter, the plaintiff-respondents are proper proponents of the particular legal rights on which they base their suit. . . .

[II-A]

The first of these questions needs little comment for there is no doubt now that the respondent-physicians suffer concrete injury from the operation of the challenged statute. Their complaint and affidavits [allege] that they have performed and will continue to perform operations for which they would be reimbursed under the Medicaid program, were it not for the limitation of reimbursable abortions to those that are "medically indicated." If the physicians prevail in their suit to remove this limitation, they will benefit, for they will then receive payment for the abortions. The State (and Federal Government) will be out of pocket by the amount of the payments. The relationship between the parties is classically adverse, and there clearly exists between them a case or controversy in the constitutional sense.

[II-B-Plurality]

The question of what rights the doctors may assert in seeking to resolve that controversy is more difficult. . . . Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation.

The reasons are two. First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of *stare decisis*. These two considerations underlie the Court's general rule: "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party."

Like any general rule, however, this one should not be applied where its underlying justifications are absent. With this in mind, the Court has looked primarily to two factual elements to determine whether the rule should apply in a particular case. The first is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter. Thus, in *Griswold v. Connecticut*, where two persons had been convicted of giving advice on contraception, the Court permitted the defendants, one of whom was a licensed physician, to assert the privacy rights of the married persons whom they advised. The Court pointed to the "confidential" nature of the relationship between the defendants and the married persons, and reasoned that the rights of the latter were "likely to be diluted or adversely affected" if they could not be asserted in such a case. . . .

The other factual element to which the Court has looked is the ability of the third party to assert his own right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent. Thus, in *NAACP v. Alabama*, the Court held that the National Association for the Advancement of Colored People, in resisting a court order that it divulge the names of its members, could assert the First and Fourteenth Amendments rights of those members to remain anonymous. The Court reasoned that "(t)o require that (the right) be claimed by the members themselves would result in nullification of the right at the very moment of its assertion."

Application of these principles to the present case quickly yields its proper result. The closeness of the relationship is patent, as it was in *Griswold* . . . . A woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State. The woman's exercise of her right to an abortion, whatever its dimension, is therefore necessarily at stake here. Moreover, the constitutionally protected abortion decision is one in which the physician is intimately involved. Aside from the woman herself, therefore, the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision.

As to the woman's assertion of her own rights, there are several obstacles. For one thing, she may

be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit. A second obstacle is the imminent mootness, at least in the technical sense, of any individual woman's claim. Only a few months, at the most, after the maturing of the decision to undergo an abortion, her right thereto will have been irrevocably lost, assuming, as it seems fair to assume, that unless the impecunious woman can establish Medicaid eligibility she must forgo abortion. It is true that these obstacles are not insurmountable. Suit may be brought under a pseudonym, as so frequently has been done. A woman who is no longer pregnant may nonetheless retain the right to litigate the point because it is "'capable of repetition yet evading review.'" *Roe v. Wade*. And it may be that a class could be assembled, whose fluid membership always included some women with live claims. But if the assertion of the right is to be "representative" to such an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by a physician.

For these reasons, we conclude that it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision. . . . In this respect, the judgment of the Court of Appeals is affirmed. [The Court then continued to reverse the judgment of the Court of Appeals on the second issue, which addressed whether the appellate court properly considered the merits when the district court dismissed the cause for lack of jurisdiction.]

[The concurring opinion of Justice Stevens and the concurring and dissenting opinion of Justice Powell, joined by Chief Justice Burger and Justices Stewart and Rehnquist, have been omitted].

Justice Blackmun's plurality opinion in *Singleton* discussed the two factors for determining whether a plaintiff could assert the rights of a third party: (1) the relationship of the plaintiff to the asserted third-party rights, and (2) the obstacles to the third-party's assertion of its own rights. In applying these factors, Justice Blackmun concluded that the physicians had "jus tertii" standing to assert the reproductive-freedom rights of their patients. Justice Stevens concurred, although he relied on a narrower ground and indicated he was "unsure" whether third-party standing was appropriate.

The Supreme Court since *Singleton* continued to permit abortion providers and physicians to invoke the rights of their actual or potential patients in challenging abortion-related regulations. *June Medical Servs. L.L.C. v. Russo*, 591 U.S. 299, 318-19 (2020) (Breyer, J., plurality) (listing cases). Several Justices, though, disagreed. Justice Thomas argued, under his view that the prohibition against third-party standing is constitutional rather than prudential, that a plaintiff can never assert the rights of others not before the court. *Id.* at 361-70 (Thomas, J., dissenting). Justices Alito and Gorsuch contended that abortion providers do not meet the two exception factors, as the relationship between the clinics and their patients is not sufficiently close (especially when challenging regulations that are designed to protect the health and safety of patients) and the patients can assert their own rights. *Id.* at 400-09 (Alito, J., dissenting); *id.* at 413-15 (Gorsuch, J., dissenting). Justice Kavanaugh avoided the issue in *June Medical*, and Justice Barrett was not yet on the Court. Of course, with the Supreme Court in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), subsequently overruling *Roe v. Wade*, 410 U.S. 113 (1973), the patients now have minimal—if any—rights for the physician or provider to assert.

The doctrine is still important, though, because the Court's decisions recognize several other contexts where an injured party may assert the rights of third parties. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), held that a litigant at trial could assert the equal protection rights of jurors excluded by a race-based peremptory challenge. Although it was the juror who suffered the exclusion from jury service on account of his or her race, the Court reasoned that the litigant who wanted the juror to serve was an effective proponent of the juror's rights. Moreover, "daunting" obstacles existed to an excluded juror's ability to assert his or her own rights after being excluded from a jury on account of race. The Court also permits the assertion of third-party rights when the restriction's imposition on the litigant would indirectly violate the third party's rights, such as allowing sellers to challenge laws precluding a sale or exchange to an individual on account of the individual's race, religion, or gender. *See Craig v. Boren*, 429 U.S. 190 (1976) (allowing licensed beer vendor to assert equal protection rights of 18-20 year-old males who could not purchase beer while females of that age could); *Barrows v. Jackson*, 346 U.S. 249 (1953) (allowing white property owner to assert the equal protection rights of non-whites as a defense to a breach of contract action for violating a racially restrictive covenant).

The Court has also allowed an association or organization to sue for injuries to its individual members. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), detailed a three-part test from the Court's prior precedents allowing such a suit by an association if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation in the lawsuit of the individual members." Such "associational standing" permits an organization to redress injuries suffered by its members without showing a specific injury to the organization itself.

4. OTHER PRUDENTIAL STANDING DOCTRINES

The Supreme Court has recognized other prudential standing doctrines in past cases, including the prohibition on generalized grievances and the zone-of-interests test. But its most recent cases have moved away from characterizing these concepts as prudential standing doctrines. Under *Lujan v. Defenders of Wildlife* and other decisions, the refusal to entertain suits based on generalized grievances is not a prudential doctrine, but rather an aspect of the injury-in-fact requirement of Article III. With respect to the zone-of-interests test, the Court announced that this was not a "prudential standing" doctrine, but merely a matter of statutory construction to determine whether the legislatively conferred cause of action encompasses a particular plaintiff's claims. The Court continued that "its obligation to hear and decide cases within its jurisdiction is virtually unflagging," implying constraints on its authority to establish "prudential" standing doctrines. *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

Nevertheless, in other twenty-first century cases, the Court has still relied on—and even erected new—prudential standing doctrines. *E.g.*, *United States v. Windsor*, 570 U.S. 744 (2013) (characterizing as prudential the principle that the parties must take adverse positions on the legal merits of a dispute); *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004) (dismissing noncustodial parent's suit challenging his daughter's public school recitation of "under God" in the Pledge of Allegiance based on prudential standing considerations). The Court's recent cases thus are

in tension regarding whether certain doctrines should be characterized as an aspect of "prudential standing." Irrespective of the characterization of these doctrines, though, the Court continues to adhere to their basic underlying principles, which usually bar plaintiffs from asserting rights that belong to another, bringing suit based upon a generalized grievance, or maintaining statutory or administrative claims when the plaintiff is outside the zone of interests protected by the statute or regulation.

C. RIPENESS

The ripeness requirement is closely related to the imminence aspect of the injury-in-fact requirement from standing doctrine, but typically refers more specifically to the notion that the claim has not sufficiently matured enough to authorize the judiciary to resolve the matter. Ripeness thereby ensures that suit is not filed prematurely before a concrete adversary context exists. Ripeness is an essentially functional inquiry, evaluating the concreteness of the competing interests, the hardship to the parties if review is denied, and the need for additional factual information to decide the issues presented. It frequently is an important issue in pre-enforcement challenges and other controversies involving administrative regulations, in which the court must determine whether the controversy is sufficiently mature for judicial resolution.

ABBOTT LABORATORIES v. GARDNER
387 U.S. 136 (1967)

Mr. JUSTICE HARLAN delivered the opinion of the Court.

In 1962 Congress amended the Federal Food, Drug, and Cosmetic Act to require manufacturers of prescription drugs to print the "established name" of the drug "prominently and in type at least half as large as that used thereon for any proprietary name or designation for such drug," on labels and other printed material. The "established name" is one designated by the Secretary of Health, Education, and Welfare pursuant to § 502 (e) (2) of the Act; the "proprietary name" is usually a trade name under which a particular drug is marketed. The underlying purpose of the 1962 amendment was to bring to the attention of doctors and patients the fact that many of the drugs sold under familiar trade names are actually identical to drugs sold under their "established" or less familiar trade names at significantly lower prices. The Commissioner of Food and Drugs, exercising authority delegated to him by the Secretary, published proposed regulations designed to implement the statute [as follows]:

> If the label or labeling of a prescription drug bears a proprietary name or designation for the drug or any ingredient thereof, the established name, if such there be, corresponding to such proprietary name or designation, shall accompany each appearance of such proprietary name or designation. . . .

The present action was brought by a group of 37 individual drug manufacturers and by the Pharmaceutical Manufacturers Association, of which all the petitioner companies are members, and which includes manufacturers of more than 90% of the Nation's supply of prescription drugs. They challenged the regulations on the ground that the Commissioner exceeded his authority under the

statute by promulgating an order requiring labels, advertisements, and other printed matter relating to prescription drugs to designate the established name of the particular drug involved every time its trade name is used anywhere in such material. . . .

The Court of Appeals . . . held that no "actual case or controversy" existed and, for that reason, that no relief under the Administrative Procedure Act or under the Declaratory Judgment Act was in any event available. . . .

The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution. Without undertaking to survey the intricacies of the ripeness doctrine, it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

As to the former factor, we believe the issues presented are appropriate for judicial resolution at this time. First, all parties agree that the issue tendered is a purely legal one: whether the statute was properly construed by the Commissioner to require the established name of the drug to be used every time the proprietary name is employed. Both sides moved for summary judgment in the District Court, and no claim is made here that further administrative proceedings are contemplated. It is suggested that the justification for this rule might vary with different circumstances, and that the expertise of the Commissioner is relevant to passing upon the validity of the regulation. This of course is true, but the suggestion overlooks the fact that both sides have approached this case as one purely of congressional intent, and that the Government made no effort to justify the regulation in factual terms.

Second, . . . [the] regulation challenged here, promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties is quite clearly definitive. There is no hint that this regulation is informal, or only the ruling of a subordinate official, or tentative. It was made effective upon publication, and the Assistant General Counsel for Food and Drugs stated in the District Court that compliance was expected. . . .

This is also a case in which the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate. As the District Court found on the basis of uncontested allegations: "Either they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution." The regulations are clear-cut, and were made effective immediately upon publication; as noted earlier the agency's counsel represented to the District Court that immediate compliance with their terms was expected. If petitioners wish to

comply they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies. The alternative to compliance—continued use of material which they believe in good faith meets the statutory requirements, but which clearly does not meet the regulation of the Commissioner—may be even more costly. That course would risk serious criminal and civil penalties for the unlawful distribution of "misbranded" drugs.

It is relevant at this juncture to recognize that petitioners deal in a sensitive industry, in which public confidence in their drug products is especially important. To require them to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily. Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here. . . .

Why was the case presented in *Abbott Laboratories* ripe? Were there possible changes in the fact scenario that could have defeated the requisite ripeness?

Most cases in which the Supreme Court addresses ripeness involve challenges to the actions or policies of administrative agencies, including the pre-enforcement challenge to the agency regulations at issue in *Abbott Laboratories*. In these cases, the Court evaluates whether the enforcement of the regulations is sufficiently likely because plaintiff would otherwise engage in the conduct but for defendant's expected enforcement, whether the parties will suffer hardship if judicial review is denied, and whether the record is "fit" for judicial review as further factual development is not necessary.

SUSAN B. ANTHONY LIST v. DRIEHAUS, 573 U.S. 149 (2014), highlighted that, in other cases, standing and ripeness frequently "boil down to the same question." A pro-life advocacy group sought to challenge an Ohio statute prohibiting certain "false statements" during the course of a political campaign. Any person acting on personal knowledge could file a complaint for a prohibited false statement regarding a candidate with the Ohio Elections Commission, which then would hold a hearing and refer the matter for prosecution. While the lower courts dismissed the group's pre-enforcement challenge to this state criminal statute, the Supreme Court, in a unanimous opinion by Justice Thomas, reversed.

The Court's primary analysis evaluated the group's standing, specifically whether the group's allegation of future injuries satisfied the injury-in-fact requirement. The Court explained that an allegation of future injury is sufficient if the threatened injury is "certainly impending" or there is a "substantial risk" the harm will occur. In the pre-enforcement context, this requires that the plaintiff alleges an intent to engage in the statutorily prohibited conduct and there is a credible threat of a resulting prosecution allegedly violating the Constitution. The Court held that the group satisfied these requirements by asserting that it intended to engage in a course of conduct arguably protected by the First Amendment but prohibited by the statute, and that "a credible threat of prosecution"

existed based upon the statute's extensive past enforcement, including in a proceeding involving the same advocacy group.

The Supreme Court then cast doubt on whether the lower courts should have addressed the development of the factual record and the hardship to the parties of denying judicial review under a ripeness analysis. Yet the Court determined there was no need to "resolve the continuing vitality of the prudential ripeness doctrine in this case because the 'fitness' and 'hardship' factors are easily satisfied here." The Court explained that the group's challenge was a pure legal issue clearly "fit" for judicial review without further factual development, and the group would suffer a hardship by having "to choose between refraining from core political speech on the one hand, or engaging in that speech and risking . . . criminal prosecution on the other."

In *Susan B. Anthony*, the facts clearly supported the likelihood of future enforcement, as the group intended to continue to make the same types of statements regarding candidates that had already resulted in one complaint against it. Often, though, one of the most difficult issues in ascertaining whether a pre-enforcement challenge is sufficiently mature to be a justiciable case or controversy is the likelihood that the statute will be enforced against the plaintiff's *intended future* conduct.

One example is *Poe v. Ullman*, 367 U.S. 497 (1961), where the Court, in a plurality opinion joined by a concurrence, dismissed pre-enforcement challenges to Connecticut statutes prohibiting the use of contraceptive devices and the giving of medical advice with respect to using such devices. Two married couples, who desired contraceptive advice, and their physician, Dr. Buxton, who desired to provide such advice, brought the underlying suits, alleging that the state statutes infringed upon their constitutionally protected rights and liberties. But the Court dismissed their suits for lack of a justiciable issue. The plurality noted that the contraceptive ban had been on the books for more than eighty years, and only one prosecution had ever been brought (which the state subsequently dismissed after obtaining a favorable appellate ruling on the statute's constitutionality), even though contraceptives were commonly sold in drug stores. But the dissenters countered that this one prosecution effectively shut down every birth control clinic in the state, and the state prosecutor claimed he had the right to enforce the statute against any birth control clinic. Justice Brennan's concurrence, while agreeing with the plurality that this case was not ripe because he did not believe the state would prosecute isolated married couples conferring with their doctor, highlighted the controversy could "flare[] up again" if birth control clinics opened.

And that's exactly what happened. After the Court's dismissal, Estelle Griswold of the Planned Parenthood League of Connecticut announced the opening of a family planning clinic, with Dr. Buxton as its medical director. Days after the clinic opened, Connecticut state officials arrested, prosecuted, and then fined Dr. Buxton and Ms. Griswold for providing advice to married couples regarding the use of contraceptives. The appeal of these criminal convictions again brought the constitutionality of these statutes before the Court a short four years later. *See Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating the statutes).

D. MOOTNESS

The mootness inquiry addresses whether a controversy continues to exist between the parties at all stages of the proceedings. The Supreme Court (quoting Professor Henry Monaghan) has described mootness as "the doctrine of standing in a time frame"—that is, the injury that existed at the beginning of the litigation must continue to exist throughout the litigation process. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980). Any change in the facts that ends the controversy can make the case moot, including a settlement or a criminal defendant's death.

Arizonans For Official English v. Arizona, 520 U.S. 43 (1997), provides an illustration. The State of Arizona, by a ballot initiative, passed a state constitutional provision providing that the state's "official language" for conducting all state business would be English. A state employee challenged the English-only provision. While the case was on appeal, the employee voluntarily left government employment for a job in the private sector. The unanimous Supreme Court, in an opinion by Justice Ginsburg, dismissed the case on mootness grounds. The Court held that, when the plaintiff state employee left state employment, her claims became moot, as her concerns about facing job-related discipline for using languages other than English to assist residents who did not speak English had been removed.

But a case is not moot unless "it is impossible . . . to grant any effectual relief." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). If some aspect of the plaintiff's suit is still "live," such as a claim for monetary relief, the case is not moot. The Supreme Court has also adopted several doctrines under which an otherwise moot claim may still be heard when the plaintiff is confronting a harm or potential harm from the defendant's conduct. The following case discusses most of these exceptions, although it concludes that none of them apply to prevent the case from becoming moot.

DeFUNIS v. ODEGAARD
416 U.S. 312 (1974)

PER CURIAM.

In 1971 the petitioner Marco DeFunis, Jr. applied for admission as a first-year student at the University of Washington Law School, a state-operated institution. The size of the incoming first-year class was to be limited to 150 persons, and the Law School received some 1,600 applications for these 150 places. DeFunis was eventually notified that he had been denied admission. He thereupon commenced this suit in a Washington trial court, contending that the procedures and criteria employed by the Law School Admissions Committee invidiously discriminated against him on account of his race in violation of the Equal Protection Clause . . . .

DeFunis brought the suit on behalf of himself alone, and not as the representative of any class, against the various respondents, who are officers, faculty members, and members of the Board of Regents of the University of Washington. He asked the trial court to issue a mandatory injunction commanding the respondents to admit him as a member of the first-year class entering in September 1971, on the ground that the Law School admissions policy had resulted in the unconstitutional denial of his application for admission. The trial court agreed with his claim and granted the

requested relief. DeFunis was, accordingly, admitted to the Law School and began his legal studies there in the fall of 1971. On appeal, the Washington Supreme Court reversed the judgment of the trial court and held that the Law School admissions policy did not violate the Constitution. By this time DeFunis was in his second year at the Law School.

He then petitioned this Court for a writ of certiorari, and Mr. Justice Douglas, as Circuit Justice, stayed the judgment of the Washington Supreme Court pending the "final disposition of the case by this Court." By virtue of this stay, DeFunis has remained in law school, and was in the first term of his third and final year when this Court first considered his certiorari petition in the fall of 1973. . . .

[During] oral argument [in February 1974], counsel . . . informed the Court that DeFunis has now registered "for his final quarter in law school." Counsel for the respondents have made clear that the Law School will not in any way seek to abrogate this registration. In light of DeFunis' recent registration for the last quarter of his final law school year, and the Law School's assurance that his registration is fully effective, the insistent question again arises whether this case is not moot. . . .

[All] parties agree that DeFunis is now entitled to complete his legal studies at the University of Washington and to receive his degree from that institution. A determination by this Court of the legal issues tendered by the parties is no longer necessary to compel that result, and could not serve to prevent it. DeFunis did not cast his suit as a class action, and the only remedy he requested was an injunction commanding his admission to the Law School. He was not only accorded that remedy, but he now has also been irrevocably admitted to the final term of the final year of the Law School course. The controversy between the parties has thus clearly ceased to be "definite and concrete" and no longer "touch(es) the legal relations of parties having adverse legal interests." . . .

[The doctrine that] the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot" . . . would be quite relevant if the question of mootness here had arisen by reason of a unilateral change in the admissions procedures of the Law School. For it was the admissions procedures that were the target of this litigation, and a voluntary cessation of the admissions practices complained of could make this case moot only if it could be said with assurance "that 'there is no reasonable expectation that the wrong will be repeated.'" Otherwise, "[t]he defendant is free to return to his old ways," and this fact would be enough to prevent mootness because of the "public interest in having the legality of the practices settled." But mootness in the present case depends not at all upon a "voluntary cessation" of the admissions practices that were the subject of this litigation. It depends, instead, upon the simple fact that DeFunis is now in the final quarter of the final year of his course of study, and the settled and unchallenged policy of the Law School to permit him to complete the term for which he is now enrolled.

It might also be suggested that this case presents a question that is "capable of repetition, yet evading review," *Roe v. Wade*, and is thus amenable to federal adjudication even though it might otherwise be considered moot. But DeFunis will never again be required to run the gauntlet of the Law School's admission process, and so the question is certainly not "capable of repetition" so far as he is concerned. Moreover, just because this particular case did not reach the Court until the eve of the

petitioner's graduation from Law School, it hardly follows that the issue he raises will in the future evade review. If the admissions procedures of the Law School remain unchanged, there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court, now that the Supreme Court of Washington has spoken. . . .

Because the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot . . . consider the substantive constitutional issues tendered by the parties. [Although the dissent suggests] that "[a]ny number of unexpected events—illness, economic necessity, even academic failure—might prevent his graduation at the end of the term," [such] speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide," in the absence of "evidence that this is a prospect of 'immediacy and reality.'" Accordingly, the judgment of the Supreme Court of Washington is vacated. . . .

Mr. JUSTICE BRENNAN, with whom Mr. JUSTICE DOUGLAS, Mr. JUSTICE WHITE, and Mr. JUSTICE MARSHALL concur, dissenting.

. . . I can . . . find no justification for the Court's straining to rid itself of this dispute. While we must be vigilant to require that litigants maintain a personal stake in the outcome of a controversy to assure that "the questions will be framed with the necessary specificity, that the issues will be contested with the necessity adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution," *Flast v. Cohen*, there is no want of an adversary contest in this case. Indeed, the Court concedes that, if petitioner has lost his stake in this controversy, he did so only when he registered for the spring term. But appellant took that action only after the case had been fully litigated in the state courts, briefs had been filed in this Court, and oral argument had been heard. The case is thus ripe for decision on a fully developed factual record with sharply defined and fully canvassed legal issues.

[In] endeavoring to dispose of this case as moot, the Court clearly disserves the public interest. The constitutional issues which are avoided today concern vast numbers of people, organizations, and colleges and universities, as evidenced by the filing of twenty-six *amicus curiae* briefs. Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return to the federal courts and ultimately again to this Court. Because avoidance of repetitious litigation serves the public interest, that inevitability counsels against mootness determinations . . . not compelled by the record. Although the Court should . . . avoid unnecessary decisions of constitutional questions, we should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases. . . .

[The separate dissenting opinion of Justice Douglas has been omitted.]

The Court in *DeFunis* discussed the exceptions to the mootness doctrine, but held that none were satisfied. Why not?

One exception is for injuries that are "capable of repetition, yet evading review." The most well-known example of this exception is *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). The pregnant plaintiff in *Roe* challenged Texas's laws prohibiting abortion, but the plaintiff's claim for a right to an abortion would become moot because the pregnancy would be over before the case reached the Supreme Court. The Court nevertheless held in *Roe* that the case was not moot. The "capable of repetition, yet evading review" exception has two essential elements: (1) the injury is reasonably capable of repetition to the same claimant again, and (2) the injury is of such a short duration that the judicial process will not be complete before the injury has ceased. Both these essential elements were satisfied in *Roe*: the challenger could become pregnant again, and the judiciary could not finally resolve any challenge to abortion laws during the nine-month term of a pregnancy. But notice that DeFunis could not take advantage of this exception because the claimed injury was not capable of repetition to him again—no law student would run the gauntlet of law school a second time after graduating!

The exception for injuries "capable of repetition, yet evading review" frequently arises in the election context. One example is *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007). An advocacy organization challenged the constitutionality of federal limits on electioneering communications that prohibited it from broadcasting political advertisements before the 2004 election. Although the case did not reach the Supreme Court until years after the 2004 election was over, the Court held the controversy was not moot because it was capable of repetition, yet evading review: the organization credibly claimed that it would run similar targeted broadcast ads in future elections and the period between elections was too short to fully litigate the constitutional challenges.

Another exception to mootness is for properly certified class actions. When the claims of one of the class representatives become moot, a new class representative with a live claim can be substituted as the class representative. But a class action is subject to certain procedural requirements that DeFunis had not attempted to satisfy, so the case did not meet that exception. The Court has repeatedly held that this exception only applies to actions brought under the established procedures and rules for class actions; it does not extend to other aggregate litigation devices such as collective or mass actions. *See, e.g.*, *United States v. Sanchez-Gomez*, 584 U.S. 381 (2018).

Yet another mootness exception exists in situations in which the voluntary cessation of some conduct by the defendant allegedly moots the controversy. In these cases, a "defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case," unless there are sufficient assurances that the defendant will not resume the challenged practice. *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). Such a sufficient assurance might exist, for example, if the government formally amends a statute or rule in a manner that provides the plaintiff the relief sought in the lawsuit. *See N.Y. State Rifle & Pistol Ass'n v. City of New York*, 590 U.S. 336 (2020) (holding plaintiffs' claims mooted by statutory and rule amendments that provided the relief the plaintiffs requested). But if such assurances are not present, such that the wrongful behavior could reasonably be expected to recur, the mere fact that the defendant ceases the challenged conduct does not moot the controversy: otherwise, the defendant could just return to its old ways after the case was dismissed, requiring the plaintiff to start over.

This exception was not applicable in *DeFunis* because the mootness stemmed from his impending

graduation, not the cessation of any activity by the law school. The law school did not change its admission policies to moot his case, but rather defended the policies all the way to the Supreme Court. It was the passage of time, not a change in the law school's conduct, that mooted the case.

Finally, a claim will not be moot if there is some remaining "live" element of the claim, such as a claim for damages. But this was no help to DeFunis, as the only remedy he requested was an injunction commanding his admission to the Law School.

In all these exceptions to the mootness doctrine, notice a harm or potential harm still exists *to the plaintiff* from the defendant's conduct, which ensures that the judiciary's resolution of the dispute will not be advisory, even though the plaintiff's primary alleged injury no longer exists.

E. POLITICAL QUESTION DOCTRINE

The basis for the "political question" doctrine is that the resolution of certain matters should be left to the political branches rather than the judiciary. The concept is traceable to *Marbury v. Madison*, where Chief Justice Marshall explained that certain executive acts "are only politically examinable."

Despite its name, the scope of the political question doctrine does not extend to prevent the judiciary from resolving questions of some political consequence. Rather, the political question doctrine only applies to certain limited subject matters where the Constitution, separation-of-powers principles, or prudential reasons advise against judicial intervention. The doctrine thus has several underlying concerns. First, it reflects respect for the separation of powers, in avoiding decisions expressly or implicitly given by the Constitution to the executive or legislative branches. Second, the separation of powers also presupposes that some decisions are inappropriate for the judicial function; their resolution involves non-judicial discretion or lacks judicially determinable standards. Finally, the political question doctrine encompasses underlying prudential concerns, cautioning the judiciary to defer as a matter of policy to avoid either embarrassment to other branches or inconsistent pronouncements on political matters requiring a uniform government response.

LUTHER v. BORDEN, 48 U.S. (7 How.) 1 (1849), is an early illustration. The plaintiff Luther alleged that Borden and others trespassed by breaking and entering into his house. The defendants claimed that they were acting for the legitimate government of Rhode Island in attempting to arrest Luther for insurrection. Luther countered by claiming that the government of Rhode Island had been altered in what since has become known as Dorr's Rebellion. This "rebellion" had proposed a new state constitution, which, among other provisions, extended suffrage rights outside the limited group that comprised the electorate under the original charter that had been granted to Rhode Island by King Charles II in 1663 (Rhode Island had not adopted a state constitution before Dorr's Rebellion, instead merely making legislative adjustments to its original colonial charter). Thus, the resolution of this trespass case required a judicial determination of which of two competing groups should be recognized as the government of Rhode Island during the crisis: the charter government or the government established under the rebellion's proposed new constitution.

The Supreme Court, in an opinion by Chief Justice Roger Taney, refused to decide the issue, reasoning the inquiry was appropriate for the political, rather than the judicial, power. The Supreme

Court began by examining the consequences of holding that the rebellion annulled the charter government: "the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; . . . and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals." In light of these potential results, the Supreme Court opined that it must "examine very carefully its own powers before [undertaking] to exercise jurisdiction."

The Court first reasoned that the question of government legitimacy under a ratified constitution was not for the judiciary: "It is the province of a court to expound the law, not make it." The question of ratification of a new constitution belonged to the political departments, with the judiciary following its decision; the courts have no power to determine "that a State government has been lawfully established."

Rather, under the Constitution's Guaranty Clause, which guarantees every state a republican form of government, "it rests with Congress to decide what government is the established one in a State." That legislative decision "is binding on every other department of the government, and could not be questioned in a judicial tribunal." With respect to Article IV, Section IV's protections against domestic violence, the Court continued it "rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee." Since Congress had provided by legislation that the President was to make this determination in case of an insurrection, and the President recognized the charter government as legitimate, the Court "respected and enforced" his decision, without expressing any opinion upon the "political rights and political questions" raised by Luther.

Subsequent cases from the Supreme Court indicated that any decision regarding the appropriate republican representation of the state was a political question. *E.g.*, *Colegrove v. Green*, 328 U.S. 549 (1946); *Pacific States Tel. Co. v. Oregon*, 223 U.S. 118 (1912). But the Supreme Court limited the doctrine in the following case.

BAKER v. CARR
369 U.S. 186 (1962)

Mr. JUSTICE BRENNAN delivered the opinion of the Court.

[Plaintiffs complained that they were "denied the equal protection of the laws" as a result of "the debasement of their votes" under the Tennessee apportionment scheme that had been used since 1901. Their claim was that, during the intervening sixty years since the legislature had reapportioned the state, shifting migration patterns and increasing statewide population had diluted the strength of urban voters while enhancing the relative voting strength of rural areas. The district court dismissed in part on jurisdictional grounds, but the Supreme Court reversed.]

. . . In holding that the subject matter of this suit was not justiciable, the District Court relied on *Colegrove v. Green* and subsequent *per curiam* cases. . . . We understand the District Court to have read the cited cases as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a "political question" and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable "political

question." The cited cases do not hold the contrary.

Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection "is little more than a play upon words." Rather, it is argued that apportionment cases, whatever the actual wording of the complaint, can involve no federal constitutional right except one resting on the guaranty of a republican form of government, and that complaints based on that clause have been held to present political questions which are nonjusticiable.

We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause . . . . But because there appears to be some uncertainty as to why those cases did present political questions, . . . we deem it necessary first to consider the contours of the "political question" doctrine.

. . . That review reveals that in the Guaranty Clause cases and in the other "political question" cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question." . . . The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. . . .

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments of one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." . . .

We come, finally, to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that discrimination reflects no policy, but simply arbitrary and

capricious action. . . .

We conclude that the complaint's allegations of a denial of equal protection present a justiciable cause of action upon which appellants are entitled to a trial and a decision. . . .

Mr. JUSTICE CLARK, concurring,

. . . The controlling facts cannot be disputed. It appears from the record that 37% of the voters of Tennessee elect 20 of the 33 Senators while 40% of the voters elect 63 of the 99 members of the House. . . .

Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no "practical opportunities for exerting their political weight at the polls" to correct the existing "invidious discrimination." Tennessee has no initiative and referendum. I have searched diligently for other "practical opportunities" present under the law. I find none other than through the federal courts. . . . It is said that there is recourse in Congress and perhaps that may be, but from a practical standpoint this is without substance. To date Congress has never undertaken such a task in any State. We therefore must conclude that the people of Tennessee are stymied and without judicial intervention will be saddled with the present discrimination in the affairs of their state government. . . .

Mr. JUSTICE FRANKFURTER, whom Mr. JUSTICE HARLAN joins, dissenting.

. . . Appellants invoke the right to vote and to have their votes counted. But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to the state councils. Their complaint is simply that the representatives are not sufficiently numerous or powerful—in short, that Tennessee has adopted a basis of representation with which they are dissatisfied. Talk of "debasement" or "dilution" is circular talk. One cannot speak of "debasement" or "dilution" of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union. . . .

To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution. *See Luther v. Borden*. Certainly, "equal protection" is no more secure a foundation for judicial judgment of the permissibility of varying forms of representative government than is "Republican Form of Government." For a court could not determine the equal-protection issue without in fact first determining the Republican-Form issue, simply because what is reasonable for equal-protection purposes will depend upon what frame of government, basically, is allowed.

The notion that representation proportioned to the geographic spread of population is so universally

accepted as a necessary element of equality . . . that it must be taken to be the standard of a political equality preserved by the Fourteenth Amendment . . . is, to put it bluntly, not true. However desirable and however desired by some among the great political thinkers and framers of our government, it has never been generally practiced, today or in the past. . . . [Justice Frankfurter engaged in a lengthy historical analysis of the apportionment practices in Great Britain, the American colonies, the early American states, the states at the time of ratification of the Fourteenth Amendment, and contemporary states to demonstrate "that there is not—as there has never been—a standard by which the place of equality as a factor in apportionment can be measured."]

[The concurring opinions of Justices Douglas and Stewart, and the separate dissenting opinion of Justice Harlan joined by Justice Frankfurter, have been omitted.]

The Supreme Court held in *Baker v. Carr*, over the objections of Justices Frankfurter and Harlan, that state apportionment schemes could be challenged under equal protection principles. The Court reasoned that the constitutionality of state apportionment schemes was not committed to another coordinate branch of the federal government, that judicially discoverable and manageable standards existed to make such a determination, and that there was no risk of embarrassment or other prudential consideration barring the Court's action. Justices Frankfurter and Harlan, though, argued that the determination was not subject to judicially discoverable standards, as the issue of representation had always been an issue of political philosophy. While the Court in *Baker* did not indicate an intent to impose strict mathematical formulas upon state reapportionment, subsequent cases began interpreting the Equal Protection Clause as requiring apportionment according to population: a principle that since has become known as "one person, one vote." But by utilizing this standard, could it be argued that the Court adopted a particular political philosophy, just as Justices Frankfurter and Harlan maintained?

Although *Baker v. Carr* listed six indicia for a political question, recent Supreme Court cases rely only on the first two stemming from separation of powers: a textually demonstrable commitment to a coordinate branch of the federal government and the lack of judicially discoverable and manageable standards for resolving the issue. The following case emphasizes these two factors in holding nonjusticiable a claim that the Senate failed to properly "try" an impeachment proceeding.

NIXON v. UNITED STATES
506 U.S. 224 (1993)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[Federal District Judge Walter L. Nixon (no relation to President Nixon) was convicted of a felony for making false statements to a grand jury investigating bribery charges. He refused to resign his federal judgeship and continued to draw his salary while in prison. The House of Representatives impeached him, and then the Senate removed him from office under Senate Impeachment Rule XI, which allows the appointment of a committee to "receive evidence and take testimony" before the full Senate votes on removal. After being removed from office, Nixon filed suit for a declaratory judgment that the conviction was void, arguing that the constitutional power to "try" all

impeachments required the full Senate to take part in evidentiary hearings. The lower courts, however, dismissed on the ground that his suit presented a nonjusticiable political question, which the Supreme Court affirmed.]

A controversy is nonjusticiable—*i.e.*, involves a political question—where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . ." *Baker v. Carr*. But the courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed. As the discussion that follows makes clear, the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.

In this case, we must examine Art. I, § 3, cl. 6, to determine the scope of authority conferred upon the Senate by the Framers regarding impeachment. It provides:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

The language and structure of this Clause are revealing. The first sentence is a grant of authority to the Senate, and the word "sole" indicates that this authority is reposed in the Senate and nowhere else. The next two sentences specify requirements to which the Senate proceedings shall conform: The Senate shall be on oath or affirmation, a two-thirds vote is required to convict, and when the President is tried the Chief Justice shall preside.

Petitioner argues that the word "try" in the first sentence imposes by implication an additional requirement on the Senate in that the proceedings must be in the nature of a judicial trial. From there petitioner goes on to argue that this limitation precludes the Senate from delegating to a select committee the task of hearing the testimony of witnesses, as was done pursuant to Senate Rule XI. . . .

There are several difficulties with this position which lead us ultimately to reject it. The word "try," both in 1787 and later, has considerably broader meanings than those to which petitioner would limit it. Older dictionaries define try as "[t]o examine" or "[t]o examine as a judge." See 2 S. Johnson, A Dictionary of the English Language (1785). In more modern usage the term has various meanings. For example, try can mean "to examine or investigate judicially," "to conduct the trial of," or "to put to the test by experiment, investigation, or trial." Webster's Third New International Dictionary 2457 (1971). Petitioner submits that "try," as contained in T. Sheridan, Dictionary of the English Language (1796), means "to examine as a judge; to bring before a judicial tribunal." Based on the variety of definitions, however, we cannot say that the Framers used the word "try" as an implied limitation on the method by which the Senate might proceed in trying impeachments. . . .

The conclusion that the use of the word "try" in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions is fortified by the existence of the three very specific requirements that the Constitution does impose on the Senate when trying impeachments: The Members must be under oath, a two-thirds vote is required to convict, and the Chief Justice presides when the President is tried. These limitations are quite precise, and their nature suggests that the Framers did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word "try" in the first sentence.

Petitioner devotes only two pages in his brief to negating the significance of the word "sole" in the first sentence of Clause 6. . . . We think that the word "sole" is of considerable significance. Indeed, the word "sole" appears only one other time in the Constitution—with respect to the House of Representatives' "sole Power of Impeachment." The commonsense meaning of the word "sole" is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted. The dictionary definition bears this out. . . .

The history and contemporary understanding of the impeachment provisions support our reading of the constitutional language. The parties do not offer evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers. This silence is quite meaningful in light of the several explicit references to the availability of judicial review as a check on the Legislature's power with respect to bills of attainder, ex post facto laws, and statutes. See The Federalist No. 78 ("Limitations . . . can be preserved in practice no other way than through the medium of the courts of justice").

The Framers labored over the question of where the impeachment power should lie. Significantly, in at least two considered scenarios the power was placed with the Federal Judiciary. . . . Despite these proposals, the Convention ultimately decided that the Senate would have "the sole Power to Try all Impeachments." According to Alexander Hamilton, the Senate was the "most fit depositary of this important trust" because its Members are representatives of the people. . . .

There are two additional reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments. First, the Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses—the impeachment trial and a separate criminal trial. In fact, the Constitution explicitly provides for two separate proceedings. The Framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent judgments. . . . Certainly judicial review of the Senate's "trial" would introduce the same risk of bias as would participation in the trial itself.

Second, judicial review would be inconsistent with the Framers' insistence that our system be one of checks and balances. In our constitutional system, impeachment was designed to be the only check on the Judicial Branch by the Legislature. . . . Nixon's argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.

Nevertheless, Nixon argues that judicial review is necessary in order to place a check on the Legislature. Nixon fears that if the Senate is given unreviewable authority to interpret the Impeachment Trial Clause, there is a grave risk that the Senate will usurp judicial power. The Framers anticipated this objection and created two constitutional safeguards to keep the Senate in check. The first safeguard is that the whole of the impeachment power is divided between the two legislative bodies, with the House given the right to accuse and the Senate given the right to judge. This split of authority "avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution from the prevalency of a factious spirit in either of those branches." The second safeguard is the two-thirds supermajority vote requirement. . . .

In addition to the textual commitment argument, we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability. . . . This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. Equally uncertain is the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to create an additional judgeship if the seat had been filled in the interim?

Petitioner finally contends that a holding of nonjusticiability cannot be reconciled with our opinion in *Powell v. McCormack*, 395 U. S. 486 (1969). The relevant issue in *Powell* was whether courts could review the House of Representatives' conclusion that Powell was "unqualified" to sit as a Member because he had been accused of misappropriating public funds and abusing the process of the New York courts. We stated that the question of justiciability turned on whether the Constitution committed authority to the House to judge its Members' qualifications, and if so, the extent of that commitment. Article I,§ 5, provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." In turn, Art. I, § 2, specifies three requirements for membership in the House: The candidate must be at least 25 years of age, a citizen of the United States for no less than seven years, and an inhabitant of the State he is chosen to represent. We held that, in light of the three requirements specified in the Constitution, the word "qualifications"—of which the House was to be the Judge—was of a precise, limited nature. *Id.*; The Federalist No. 60 ("The qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion, are defined and fixed in the constitution; and are unalterable by the legislature").

Our conclusion in *Powell* was based on the fixed meaning of "[q]ualifications" set forth in Art. I, § 2. The claim by the House that its power to "be the Judge of the Elections, Returns and Qualifications of its own Members" was a textual commitment of unreviewable authority was defeated by the existence of this separate provision specifying the only qualifications which might be imposed for House membership. The decision as to whether a Member satisfied these qualifications *was* placed with the House, but the decision as to what these qualifications consisted of was not.

In the case before us, there is no separate provision of the Constitution that could be defeated by allowing the Senate final authority to determine the meaning of the word "try" in the Impeachment

Trial Clause. We agree with Nixon that courts possess power to review either legislative or executive action that transgresses identifiable textual limits. . . . But we conclude . . . that the word "try" in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate.

JUSTICE SOUTER, concurring in the judgment.

I agree with the Court that this case presents a nonjusticiable political question. Because my analysis differs somewhat from the Court's, however, I concur in its judgment by this separate opinion. . . .

One can . . . envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin-toss, or upon a summary determination that an officer of the United States was simply "a bad guy," judicial interference might well be appropriate. . . .

[The concurring opinion of Justice Stevens, and the opinion of Justice White, joined by Justice Blackmun, concurring in the judgment, have been omitted.]

The Court held that Nixon's claim that the Senate did not appropriately "try" him by using a committee to receive evidence presented a political question. The Court examined whether the Constitution provided a "textual commitment" to a non-judicial branch to make the decision and whether there was a "lack of judicially discoverable and manageable standards" for resolving the issue. The Court first determined that the Constitution's use of the word "try"in the Impeachment Trial Clause lacked sufficient precision to afford a judicially manageable standard for reviewing the Senate's actions. The Court then reasoned that the constitutional grant of the "sole Power" to the Senate to try impeachments established a textually demonstrable commitment to the Senate to resolve the issue without the involvement of the judiciary; the Court buttressed these conclusions with structural, historical, and prudential arguments.

The Court finally distinguished its prior holding in *Powell v. McCormack*, 395 U. S. 486 (1969). *Powell* held that the exclusion of Representative Powell by the House of Representatives was not a political question. While Congress excluded Powell on the basis that he was "unqualified" due to accusations of financial improprieties and abuse of power, the constitutional "qualifications" for a representative are specified in the Constitution and concern age, citizenship, and residence. The fixed meaning of the relevant constitutional "qualifications" in *Powell*, according to the *Nixon* Court, differed from the multifaceted potential meanings of "try" in the Impeachment Trial Clause. Is this distinction the Court drew between the two cases justified?

ZIVOTOFSKY v. CLINTON, 566 U.S. 189 (2012), was the first political question case decided during the tenure of Chief Justice Roberts. The Court held that adjudging the constitutionality of a congressional statute did not implicate the political question doctrine, even though the statute impacted foreign affairs, an arena where the Court has frequently employed the political question doctrine. Congress enacted a statute in 2003 requiring that, upon request, passports of U.S. citizens born in Jerusalem record the place of birth as Israel. This 2003 statute contravened a longstanding

State Department policy, followed for sixty years, refusing to record the place of birth as Israel for those born in Jerusalem. The State Department adopted this policy to avoid staking a position on the contentious international dispute regarding sovereign authority over Jerusalem. When Zivotofsky's parents sought to have their son's passport record his place of birth as Israel under the 2003 statute, the State Department refused under its longstanding policy. The Zivotofskys then filed suit against the Secretary of State, with the lower courts dismissing the suit on the basis that the case involved a nonjusticiable political question regarding the Executive's authority to recognize foreign sovereigns.

The Supreme Court reversed the dismissal and remanded the case to the district court to address the merits of the controversy. The opinion of Chief Justice Roberts for the Court reasoned that the dispositive issue in the case was the constitutionality of the congressional statute, specifically whether it unconstitutionally encroached on Executive authority. Such a determination, the Chief Justice continued, "is a familiar judicial exercise" and part of the "'duty of the judicial department to say what the law is.'" (quoting *Marbury v. Madison*). There was no textually demonstrable commitment to the Executive, as adjudging the constitutionality of a statute is the role of the courts. Nor was there any problem, according to the Court, with "judicially discoverable and manageable standards." The Court examined the textual, structural, historical, and precedential arguments of the parties on separation of powers and held that deciding such arguments "is what courts do."

But because the lower courts had not had an opportunity to address the separation-of-powers issue involved in the case, the Supreme Court remanded for further proceedings rather than considering the merits in the first instance. (After those further proceedings, the case returned to the Court under the style *Zivotofsky v. Kerry*, 576 U.S. 1 (2015)—this holding will be covered in a subsequent chapter). Justice Sotomayor concurred in the judgment, contending that the Court correctly reversed on political question grounds, but arguing that the political question doctrine is "more demanding" than the Court's opinion suggested. Justice Alito likewise concurred in the judgment, contending that, while this case did not involve a political question, in some situations determining the constitutionality of an Act of Congress might. Justice Breyer dissented, arguing that the political question doctrine barred these claims under several "prudential" considerations.

The Roberts Court returned to the political question doctrine in the following case, holding that federal constitutional challenges to partisan gerrymandering are not justiciable, even though, as held in *Baker v. Carr*, apportionment challenges do not present a nonjusticiabile political question. Does Chief Justice Roberts' opinion adequately distinguish *Baker v. Carr*, or does Justice Kagan's dissenting opinion have the better of the argument?

RUCHO v. COMMON CAUSE
588 U.S. 684 (2019)

CHIEF JUSTICE ROBERTS delivered the opinion of 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

their plan discriminated against Republicans. . . . The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court . . . 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. . . .

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." *Flast v. Cohen*. . . .

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*. 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*. 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. . . .

Partisan gerrymandering claims have proved far more difficult to adjudicate [than districting challenges based on malapportionment or race]. 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," [as] "[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." . . .

Any standard for resolving [partisan gerrymandering] claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." . . . 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." . . .

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. . . . [But the] Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or "general ticket" elections. Such States typically sent single-party delegations to Congress. That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation. . . .

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. . . .

The initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in this context. . . . 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*.

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? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.

If a court instead focused on the respective number of seats in the legislature, it would have to decide the ideal number of seats for each party and determine at what point deviation from that balance went too far. If a 5-3 allocation corresponds most closely to statewide vote totals, is a 6-2 allocation permissible, given that legislatures have the authority to engage in a certain degree of partisan gerrymandering? Which seats should be packed and which cracked? Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Presumably not all districts could qualify, so how to choose? Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. The questions are "unguided and ill suited to the development of judicial standards," and "results from one gerrymandering case to the next would likely be disparate and inconsistent."

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.

More fundamentally, "vote dilution" in the one-person, one-vote cases refers to the idea that each

vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters. . . .

Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. "[N]othing 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. . . .

Appellees and the dissent propose a number of "tests" for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties. . . .

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles" 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. "[J]udicial action must be governed by *standard*, by *rule*," and must be "principled, rational, and based upon reasoned distinctions" found in the Constitution or laws. . . .

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. [The Court then discussed various state constitutional provisions and laws limiting or prohibiting partisan gerrymandering.]

[The] Framers [also] gave Congress the power to do something about partisan gerrymandering in the Elections Clause. The first bill introduced in the 116th Congress would require States to create 15-member independent commissions to draw congressional districts and would establish certain redistricting criteria, including protection for communities of interest, and ban partisan gerrymandering. . . . Dozens of other bills have been introduced to limit reliance on political considerations in redistricting. . . .

No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. . . .

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities. . . . 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. . . . These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. . . . 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. . . . In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong. . . .

For the first time in this Nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply. The majority gives two reasons for thinking that the adjudication of partisan gerrymandering claims is beyond judicial capabilities. First and foremost, the majority says, it cannot find a neutral baseline—one not based on contestable notions of political fairness—from which to measure injury. . . . And second, the majority argues that even after establishing a baseline, a court would have no way to answer "the determinative question: 'How much is too much?' " . . .

But . . . [w]hat [the majority] says can't be done *has* been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims. . . . And that standard does what the majority says is impossible. The standard does not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State's own criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders. . . .

[Justice Kagan then discussed the framework that had been developed by the lower courts and the stark departures from democratic norms apparent in the cases under review. In North Carolina, the redistricting committee chair acted to ensure a 10-3 Republican congressional delegation, despite the fact that Republicans received only 50-55% of the statewide vote, with the chair arguing that "electing Republicans is better than electing Democrats." In Maryland, Democrats acted with a single purpose to flip a congressional district, moving 700,000 voters into new districts to ensure the election of another Democratic congressman, thereby granting Democrats a 7-1 advantage in the state's congressional delegation].

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. . . .

Chief Justice Roberts' majority opinion in *Rucho* relied entirely on the "no judicially manageable standards" prong of the political question doctrine to hold that partisan gerrymandering claims are not justiciable in federal court. Justice Kagan's dissent responded that this was "the first time ever" that the Court had refused "to remedy a constitutional violation because it thinks the task beyond judicial capabilities." Of course, as witnessed in cases such as *Marbury* and *McCardle*, the Supreme Court has frequently held that it could not cure a potential constitutional violation due to limits on its jurisdictional power. But Justice Kagan's point apparently was that this was the first time the Court relied exclusively on the "no judicially manageable standards" prong, standing alone without support from the "textual commitment" prong or other prudential concerns regarding separation of powers, to dismiss a case on political question grounds.

The majority correctly recounts the Framers were not concerned about the possibility of partisan gerrymandering. But nor were the Framers bothered by extreme malapportionment, as Justice Frankfurter, joined by Justice Harlan, explained in the *Baker v. Carr* dissent. Does that mean that *Baker v. Carr* and *Rucho v. Common Cause* are incompatible? Or is it merely that the solution proposed for the malapportionment problem—one person, one vote—is simpler than a multi-factor approach evaluating whether a particular partisan gerrymander is "too much"?

JUSTICIABILITY DISCUSSION PROBLEMS

(1) A U.S. Army Captain participating in the military campaign against ISIL filed suit against the President seeking a declaration that the campaign is illegal because Congress failed to authorize it. Congress never declared war, and the captain argues that the prior congressional authorizations for the use of force (one in 2001 against those responsible for the 9/11 attacks, and another in 2002 against the continuing threat posed by Iraq) do not authorize the campaign against ISIL. Although he personally supports the military action against ISIL, he contends that he has taken an oath to preserve, protect, and defend the Constitution of the United States, and he is concerned that he is violating this oath by fighting even a good war that violates the Constitution. Since he is uncertain whether the war is legal, he does not know whether he should disobey orders at the risk of a court martial or obey orders at the risk of violating his oath. What are the arguments for and against the justiciability of his suit? *See Smith v. Obama*, 217 F. Supp. 3d 283 (D.D.C. 2016).

(2) New Hampshire enacted a statute allowing (but not requiring) a reproductive health-care facility to mark a zone extending up to 25 feet onto public property adjacent to the facility's private entrances, exits, or driveways to ensure access to the facilities during anti-abortion protests. A few weeks later, the U.S. Supreme Court invalidated a Massachusetts statute that created similar 35-foot buffer zones around every reproductive health center in the state. Immediately after the Supreme Court decision, a group of individuals who regularly protest at New Hampshire reproductive facilities filed suit to enjoin the statute's enforcement. But, at the time of their suit, and continuing to the present, no reproductive health facility actually created such a buffer zone. What justiciability problems are presented by their suit? *Cf. Reddy v. Foster*, 845 F.3d 493 (1st Cir. 2017).

(3) Retired pensioners with defined-benefit retirement plans (guaranteeing a fixed payment each month regardless of the plan's value, which the pensioners had been paid so far) filed a class-action suit under the Employee Retirement Income Security Act (ERISA) against U.S. Bank for past alleged mismanagement of the plan. ERISA provides that participants in a defined-benefit plan have a general cause of action to sue for restoration of plan losses and other equitable relief along with attorneys' fees. What are the arguments for and against the standing of the pensioners to maintain this lawsuit? *See Thole v. U.S. Bank N.A.*, 590 U.S. 538 (2020).

(4) Several groups whose occupations often involved communications with individuals located abroad, including attorneys, journalists, and human rights organizations, challenged the constitutionality of an amendment to the Foreign Intelligence Surveillance Act that made it somewhat easier for the government to conduct surveillance of communications of non-U.S. persons located abroad. Although the plaintiffs could not prove that any of their international communications had been intercepted, the plaintiffs alleged that there was an objective reasonable likelihood that this would occur under the new amendment, and that they had to take costly measures to ensure the confidentiality of their international communications. What are the arguments for and against the justiciability of their claims? *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013).

(5) The President issued a memorandum to the Secretary of Commerce in advance of the decennial census of the population required by the Constitution for apportioning members of the House of Representatives among the states, which is also important information for allocation of federal funds and intrastate redistricting. The memorandum announced a policy to exclude those without lawful immigration status from the count and instructed the Secretary to provide information "to the extent practicable" to allow the President, to the maximum extent feasible, to facilitate this policy. A group of states and local governments challenged the constitutionality of the memorandum, alleging that the Constitution requires the "whole number of persons in each State" to be counted, regardless of immigration status. The states and local governments asserted that the memorandum would cause them to lose federal funds and was also chilling those who unlawfully entered the United States from responding to the census, thereby degrading the quality of census data used to allocate funds under federal spending programs. However, during the pendency of the suit, the census response period concluded. What are the arguments for and against the justiciability of this suit? *See Trump v. New York*, 592 U.S. 125 (2020).

(6) In an effort to avoid vaccine hesitancy after a deadly flu variant is spreading, the federal Employer Vaccine Mandate Act requires any employer, including state and local governments, with fifty or more employees engaged in an industry affecting trade, traffic, or commerce to ensure all its employees either get vaccinated or undergo daily flu testing and wear a mask while at work. Immediately after the Act is signed, the State of Florida and the Sunshine Corporation, both of which will undisputedly have to incur costs to comply with the Act's mandates, file suit in federal district court to prevent the enforcement of the Act. What are the arguments for and against the justiciabiity of their suits challenging the constitutionality of the Act both as outside the powers of Congress and as violating the rights of their employees?

(7) During a declared national emergency arising from a pandemic, the President of the United States directs the Secretary of Education to adopt a plan canceling up to $20,000 of preexisting student loan

debt for borrowers earning up to $125,000 per year. The Secretary of Education relies on a federal statute that authorizes the waiver or modification of any provision applicable to student financial assistance programs guaranteed by the federal government when necessary to ensure that, as a result of a war or national emergency, recipients of student financial assistance are not harmed financially. In order to obtain the cancellation of the debt, borrowers must submit an application to the Department of Education detailing their existing student loan debt, their gross income as reported on their latest tax return, and their desire to have up to $20,000 of the debt canceled. What are the arguments for and against the standing of each of the following potential plaintiffs who desire to challenge the President's constitutional and statutory authority to adopt the debt cancellation plan?

(A) A federal taxpayer who has never had any student loan debt.
(B) A student loan debtor who does not qualify for any debt cancellation because she makes more than $125,000 per year.
(C) A prior student loan debtor who previously paid off her debt so she has no existing student loan debt to cancel.
(D) A student loan debtor who qualifies for debt cancellation but opposes the plan.
(E) A student loan servicing firm that will lose fees it collects for loan payments on behalf of the federal government because its fees depend on the payments collected, the amount of money owed by the borrower, and the length of time the borrower takes to pay the loan.
(E) An individual member of the House of Representatives or the Senate.
(F) The House of Representatives or the Senate as an institution.

Cf. Biden v. Nebraska, 600 U.S. 477 (2023); *Dep't of Educ. v. Brown*, 600 U.S. 551 (2023).

CHAPTER FOUR
FOUNDATIONS FOR CONSTITUTIONAL RIGHTS AND LIBERTIES

This chapter explores the foundations for the constitutional protection of individual rights and liberties against the government. The chapter begins with the textual foundations for constitutional rights and liberties. It then explores judicial decisions and constitutional amendments during the nineteenth and twentieth centuries that established the foundations for the due process, equal protection, and other preferred rights and liberties protected by the courts today. These early decisions considered three primary questions: (1) the appropriate interpretation of these rights; (2) the entities that had to respect these rights; and (3) whether protection could be afforded to additional rights not enumerated in the text of the Constitution.

A. TEXTUAL FOUNDATIONS

The text of the Constitution, as ratified by the states after the Constitutional Convention, contained very few rights guarantees. Article I, Section 9 prohibits *Congress* from (1) suspending the writ of habeas corpus, except in times of invasion and rebellion; (2) passing a bill of attainder, which is legislation determining the guilt and punishment of a particular person; and (3) enacting an ex post facto law, which is a law that punishes conduct that was either lawful when done or subject to a less harsh punishment when performed. Article I, Section 10 of the Constitution then prevents the *States* from enacting a bill of attainder, ex post facto law, or law impairing the obligation of contracts. Article III provides for trial by jury in the federal courts in criminal proceedings and contains certain rules regarding the necessary evidence for a treason conviction. And Article VI bars any religious test for federal office. But that is all the individual rights protected in the original constitutional text.

Although proposals were made during the convention to include additional rights or a declaration of rights, the convention refused to do so. The majority of the delegates viewed the Constitution as protecting liberty through its separation of powers and federalist features, which would make it difficult for an oppressive majority to enact laws targeting such rights. In light of the structural constraints on the federal government, the delegates did not believe that the federal government would be a threat to individual liberty. Some delegates also argued that a bill of rights could be dangerous, as it might serve as a pretext to assert government power over non-enumerated rights that were properly outside the federal government's constitutional powers. Thus, the Constitution, as submitted for ratification by the people, did not contain a bill or declaration of rights, even though such rights provisions had become relatively common in state constitutions.

The Anti-Federalist opponents of ratification seized upon the omission of a bill of rights as evidence that the proposed Constitution was a threat to liberty. After all, why did the Constitution not have a bill of rights, when many state constitutions did? The omission of an enumerated listing of protected rights came to be the most resonating criticism of the Constitution. The Federalist supporters of the Constitution eventually conceded the point in order to secure ratification.

After the Constitution was ratified and the first Congress was in session, the House of Representatives, with James Madison leading the effort, recommended seventeen amendments to the United States Constitution, twelve of which were passed by the Senate. One of the proposals

passed by the House but rejected by the Senate would have explicitly extended protections for religious freedom, expressive liberty, and criminal jury trials against state interference. This proposal's rejection, as will be seen later in this chapter, necessitated another avenue to require the states to respect the fundamental liberties protected by the Bill of Rights.

The States ratified ten of the amendments by 1791, which became known as the Bill of Rights. But the mere fact that these rights were now entrenched in the Constitution still left many questions unresolved. How would such rights be enforced? Who could the rights be enforced against? And did other rights warrant protection that were not within the written text of the Constitution? The answers the judiciary provided to these questions during the nineteenth and early twentieth centuries still greatly influence the paths of constitutional doctrine today.

B. THE ANTEBELLUM PERIOD

Before the Civil War, the Supreme Court decided very few cases that protected individual rights, and even the few cases that were decided frequently involved economic and contractual rights. Yet the Court did issue a few significant opinions on three fundamental issues: (1) could "natural law" afford protection to non-enumerated rights; (2) who was bound by the Bill of Rights; and (3) who was within the political community afforded such rights?

1. NATURAL LAW AND NON-TEXTUAL RIGHTS

CALDER v. BULL
3 U.S. (3 Dall.) 386 (1798)

[The Connecticut state legislature, through a statute, voided a previously rendered probate decree and directed a rehearing regarding the validity of a will. Those who had inherited the property under the prior decree challenged the law as an ex post facto law prohibited by the U.S. Constitution and as outside the power of the Connecticut legislature under the state constitution. The Court unanimously held, in seriatim opinions, that this law was not an invalid ex post facto law, essentially because it did not relate to crime or punishment. The Court also held that it had no jurisdiction to determine whether a state law violated that state's own constitution. The opinions also contained this debate between Justices Chase and Iredell regarding the sources for constitutional limits on government action:]

CHASE, JUSTICE. . . . I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without controul; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessing of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundations of the legislative power, they will decide what are the proper objects of it: the nature, and ends of legislative power will limit the exercise of it. . . . There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and

flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An ACT of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B. It is against all reason and justice for a people to entrust a legislature with SUCH powers; and therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. . . .

IREDELL, JUSTICE. . . . If, then, a government, composed of Legislative, Executive and Judicial departments, were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power, could never interpose to pronounce it void. It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that any court of justice would possess a power to declare it so. . . .

[I]t has been the policy of all the American states . . . and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a State, violates those constitutional provisions, it is unquestionably void; though . . . the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed upon the subject. . . . There are then but two lights, in which the subject can be viewed. 1st. If the Legislature pursue the authority delegated to them, their acts are valid. 2d. If they transgressed the boundaries of that authority, their acts are invalid. . . .

The debate between Justices Chase and Iredell is, in some respects, still ongoing. It might be said that Justice Iredell prevailed because the Supreme Court does not justify its decisions through natural law alone. But, on the other hand, the meaning of some of the broad terms of the Constitution has often been supplemented by natural law or comparable reasoning, as suggested by Justice Chase.

FLETCHER v. PECK, 10 U.S. (6 Cranch) 87 (1810), is an early illustration. In 1795, Georgia enacted the Yazoo Land Act, which sold over 35 million acres of Georgia's claimed western wilderness territory (most of modern day Alabama and Mississippi) to a consortium of four companies for $500,000, under 1.5 cents per acre. In addition to outright bribes paid by the companies to many state officials, almost every legislator voting for the Act held stock in one of the

companies that profited handsomely from flipping the land grants, which were sold at eight or more times the purchase price. Once the scheme became known, the public's fiery opposition led to the election of a new Georgia state legislature the following year that repealed the Act and voided the original sales in order to recover the land.

But much of the land had been sold in the interim to good faith purchasers and continued to be sold thereafter. In 1803, John Peck sold Robert Fletcher thousands of acres Peck purchased in 1800. Fletcher later discovered the Yazoo Act had been voided and sued Peck in a federal circuit court for failing to transfer good title. Peck defended, among other grounds, on the basis that the legislature's attempt to annul the original sales to recover land in the hands of innocent purchasers violated the United States Constitution.

The Supreme Court agreed with Peck. Chief Justice Marshall's opinion explained that a state might be restrained by "general principles of our political institutions [or] by the words of the constitution." Here, Peck had not participated in the fraud and did not have notice of it; as such, the state legislature's attempt to revoke the original fraudulent transaction (which its predecessor legislature enacted) was subject "to certain great principles of justice, whose authority is universally acknowledged." The judiciary rather than the legislature typically redressed fraudulent land sales, employing "rules of property which are common to all the citizens of the United States" to protect those who were good faith purchasers for value without notice of the fraud. The Court reasoned that an assertion of legislative authority to transfer the vested property of an individual to the public by purporting to annul a prior statute could violate the natural limits on the legislative power.

In addition, the Court continued, Article I, Section 10 of the United States Constitution specifically prohibited states from enacting laws impairing the obligation of contracts. The Court reasoned that Georgia's original land grants were contracts protected by this provision, as grants from the state were not excluded from protection. Georgia's subsequent attempt to annul these grants was invalid under the Contracts Clause:

> It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

A few years later, in *Terret v. Taylor*, 13 U.S. (9 Cranch) 43 (1815), the Court similarly held that state legislation divesting a church of its property violated unidentified aspects of the "spirit and letter" of the Constitution, "principles of natural justice," and "fundamental laws of every free government." While the Court in both *Fletcher* and *Terret* also discussed the constitutional text, much of its reasoning relied on principles of right and justice to limit government authority.

To some extent, as will be seen in subsequent chapters, the Supreme Court still integrates ethical commitments into modern decisions. This led Professors Nowak and Rotunda to contend in their constitutional law treatise: "In form, the Supreme Court has adopted the views of Justice Iredell and

ruled that it only may invalidate acts of the legislative and executive branches on the basis of specific provisions of the Constitution. In substance, however, the beliefs of Justice Chase have prevailed as the Court continually has expanded its bases for reviewing the acts of other branches of government."

2. THE BILL OF RIGHTS AND THE STATES

Americans today view the Bill of Rights as protecting their rights against all levels of government, federal, state, and local. But that was not the original understanding, and the mechanism by which these rights subsequently have been applied to state and local governments assists in understanding current constitutional doctrine.

BARRON v. MAYOR & CITY COUNCIL OF BALTIMORE
32 U.S. (7 Pet.) 243 (1833)

Mr. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

[Barron sued the City of Baltimore to recover damages to his wharf arising after the city diverted streams of water which allegedly deposited large amounts of sand into his wharf, rendering it so shallow to be useless as a wharf. Although Barron prevailed in the state trial court, the state court of appeals reversed the judgment in his favor. Barron then sought review by the Supreme Court. He alleged that the Supreme Court had jurisdiction because the city's actions violated the Fifth Amendment to the U.S. Constitution, which he viewed as restraining state and local governments as well as the federal government. But the Supreme Court disagreed that it had jurisdiction, as the provisions of the Bill of Rights did not apply to the states.]

. . . The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the General Government, not as applicable to the States. In their several Constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested, such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the Constitution was intended to secure the people of the several States against the undue exercise of power by their respective State governments, as

well as against that which might be attempted by their General Government. In support of this argument he relies on the inhibitions contained in the tenth section of the first article. We think that section affords a strong, if not a conclusive, argument in support of the opinion already indicated by the court. . . .

The ninth section [of Article I of the Constitution] having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the General Government, the tenth proceeds to enumerate those which were to operate on the State legislatures. These restrictions are brought together in the same section, and are by express words applied to the States. "No State shall enter into any treaty," &c. Perceiving, that in a constitution framed by the people of the United States, for the government of all, no limitation of the action of government on the people would apply to the State government, unless expressed in terms, the restrictions contained in the tenth section are in direct words so applied to the States.

It is worthy of remark, too, that these inhibitions generally restrain State legislation on subjects intrusted to the General Government, or in which the people of all the States feel an interest. A State is forbidden to enter into any treaty, alliance or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the General Government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution. To grant letters of marque and reprisal, would lead directly to war, the power of declaring which is expressly given to Congress. To coin money is also the exercise of a power conferred on Congress. . . . The question of their application to States is not left to construction. It is averred in positive words.

If the original Constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the General Government and on those of the State; if, in every inhibition intended to act on State power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments before that departure can be assumed. We search in vain for that reason. . . . Had Congress engaged in the extraordinary occupation of improving the Constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the General Government—not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress and adopted by the States. These amendments contain no expression indicating an intention to apply

them to the State governments. This court cannot so apply them.

We are of opinion that the provision in the Fifth Amendment to the Constitution declaring that private property shall not be taken for public use without just compensation is intended solely as a limitation on the exercise of power by the Government of the United States, and is not applicable to the legislation of the States. We are therefore of opinion that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that State, and the Constitution of the United States. This court, therefore, has no jurisdiction of the cause, and it is dismissed.

The Supreme Court in *Barron*, relying on the Constitution's text, structure, history, and political theory, held that the Fifth Amendment does not limit state and local legislation. The Court reasoned that only when the Constitution's text specifically applies to the states, such as in Article I, Section 10, do the constraints established by the Constitution apply to state and local governments. Notice that Article I, Section 10 prohibits the States from passing a bill of attainder or ex post facto law even though the previous section, Article I, Section 9, provides that "No Bill of Attainder or ex post facto Law shall be passed." This repetition was necessary, according to Marshall's opinion, because the Constitution's restrictions only apply to the federal (or "general") government unless the Constitution specifies otherwise. Since the Fifth Amendment does not have an explicit provision establishing its application to state and local governments, no federal constitutional issue was presented by Barron's claim that the city had taken his private property.

As a matter of original meaning and the framers' intent, it is difficult to disagree with *Barron*. Recall that James Madison proposed, and the House passed, a constitutional amendment that would have explicitly prevented the *states* from violating the right to a criminal jury trial or the freedoms of the press and religious conscience, but this proposal was rejected by the Senate and did not become part of the Bill of Rights. The fact that a separate amendment was proposed to explicitly protect these guarantees from state interference when other amendments also guaranteed these rights indicates that the Supreme Court had the correct understanding in *Barron*: only when the text specifically applied to the states did the framers view the states as being bound by the U.S. Constitution.

Since the enactment of the Fourteenth Amendment, the Due Process and Equal Protection Clauses of that provision, which do apply to the states, have provided the kind of protection that was lacking in *Barron*. But after the *Barron* decision, there were few federal constitutional restraints on states within the Supreme Court's jurisdiction. Essentially these restraints were all contained in Article I, Section 10, barring the states from enacting imposts or duties on imports or exports, passing paper money tender laws, enacting ex post facto laws or bills of attainder, or impairing the obligations of contracts.

Before the Civil War, most Supreme Court cases addressing federal constitutional limitations on state legislation invoked the Contracts Clause of Article I, Section 10. Even before *Barron*, the Supreme Court had relied on the Contracts Clause in cases such as *Fletcher v. Peck* and *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). *Dartmouth College* declared unconstitutional New Hampshire laws designed to change the private corporate charter granted to Dartmouth by King

George III in 1769 in order to create a public state-run college, with Chief Justice Marshall's opinion for the Court reasoning that a government charter (even from the British king) granted to a private corporate entity such as Dartmouth was protected by the Contracts Clause.

But there were important limits to the Contracts Clause's scope recognized in other antebellum decisions. The Contracts Clause applies to the modification or alteration of the obligations of existing contracts—no protection is afforded from laws impacting the future execution of contracts. Also, the remedy or certain procedural aspects of an existing contract may be altered without implicating the Clause. And charters from state governments to private entities were strictly and narrowly construed in post-*Barron* decisions to provide more regulatory authority to state governments. In *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), the Supreme Court held, in an opinion authored by Chief Justice Marshall's successor, Chief Justice Taney, that the Contracts Clause only protected exclusive state privileges when explicitly delineated in a state charter. The Court decided that an 1828 charter granted by the Massachusetts legislature to the proprietors of the Warren Bridge to build a toll-free bridge over the Charles River separating Boston from Charlestown did not interfere with an earlier charter granted in 1785 to the Charles River Bridge Company to construct and operate a nearby toll bridge for seventy years when there was no exclusive right explicitly granted in the first charter.

Due to such limitations, lawyers often had to search for other implied theories of natural law in the Constitution, either alone or in conjunction with another of the explicit restraints on the states. Typically this was unsuccessful. But one time in which supposed natural law precepts were combined with a textual restraint on the federal government, it was a national catastrophe.

3. NATIONAL CITIZENSHIP

Many leading Founding Fathers viewed the perpetuation of human bondage as inconsistent with the natural rights promises of the Declaration of Independence and hoped for its disappearance from the United States. Nevertheless, the Constitution as originally written evinced a series of compromises regarding slavery that would ensure that odious institution's survival for generations. While some constitutional delegates attempted to justify their compromises as necessary until slavery died out on its own accord, the rise of cotton as America's leading export beginning a little over a decade after the Constitutional Convention intensified the South's reliance on enslaved laborers. As abolitionist William Lloyd Garrison frequently paraphrased the prophet Isaiah, the Constitution's compromises on slavery were a "covenant with death" and an "agreement with hell." This injustice could not be ignored, and ultimately tore the country apart.

In the early 1800s, a number of legislative compromises attempted to provide short-term solutions. In 1820, the Missouri Compromise prohibited slavery in federal territories north of 36 degrees 30 minutes latitude. While the Missouri Compromise was effectively repealed by the Kansas-Nebraska Act of 1854, the Supreme Court, in the 1857 decision below that deserves its infamy, declared the Missouri Compromise unconstitutional and held that United States citizenship was unattainable for descendants of enslaved persons.

DRED SCOTT v. SANDFORD
60 U.S. (19 How.) 393 (1857)

Mr. CHIEF JUSTICE TANEY delivered the opinion of the Court.

[Dred Scott first sued his enslaver Dr. Emerson, an army surgeon, in Missouri state court for assaults on his family and himself. Emerson alleged that the assaults were justified because Scott and his family were enslaved, and then Scott argued that he and his family were free because he had lived with Dr. Emerson for a few years at a military post in Illinois, which was a free state, before Dr. Emerson later returned to Missouri. Scott won at the trial court level, because Missouri had, until his case, recognized residence in a free state as a legal basis for emancipation. But the Missouri Supreme Court reversed on appeal, overturning its prior decisions on political grounds and holding that it would no longer recognize an enslaved individual's freedom based on his residence in a free state because of the nationwide "dark and fell spirit in relation to slavery" that sought "the overthrow and destruction of our Government."

After Scott was transferred to Sanford, Scott sued again, this time in federal court, with his filing misspelling Sanford's name as "Sandford." Scott alleged federal diversity jurisdiction because he was a citizen of Missouri and Sanford was a citizen of New York. This time, Scott relied upon the Missouri Compromise to establish his freedom, because he had also lived, before returning to Missouri, with Dr. Emerson at a military fort in the Wisconsin Territory where slavery was prohibited by the Missouri Compromise. Sanford countered that those of African ancestry were not U.S. citizens, so Scott could not sue under federal diversity of citizenship, even if he was free.

The lower federal court held that Scott could sue if he was free, but that he was not free because it had to apply Missouri law to determine his status, and the Missouri Supreme Court had already held that Scott was not free. The Supreme Court went further and held that Scott could not even sue in federal court because Black individuals, even if freed, were not citizens of the United States. The Court also continued, in dicta, to find the Missouri Compromise unconstitutional.]

. . . The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution. . . .

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On

the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. . . .

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. . . . [The] legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument. . . .

There are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808, if it thinks proper. And the importation which it thus sanctions was unquestionably of persons of the race of which we are speaking, as the traffic in slaves in the United States had always been confined to them. And by the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. . . . And these two provisions show, conclusively, that neither the description of persons therein referred to, nor their descendants, were embraced in any of the other provisions of the Constitution; for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen. . . .

The only two [constitutional] provisions which point to them and include them, treat them as property, and make it the duty of the Government to protect it; no other power, in relation to this

race, is to be found in the Constitution; and as it is a Government of special, delegated, powers, no authority beyond these two provisions can be constitutionally exercised. The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society, require. The States evidently intended to reserve this power exclusively to themselves.

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. . . .

And upon a full and careful consideration of the subject, the court is of opinion, that . . . Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous. . . .

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom . . . . The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the have of any one of the States. . . .

The power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a Government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character, and assume discretionary or despotic powers which the

Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the Constitution. The Territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved. . . .

[The] rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law. . . .

[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution. . . . [N]o word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. . . .

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident. . . .

Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction.

Mr. JUSTICE McLEAN dissenting.

. . . We need not refer to the mercenary spirit which introduced the infamous traffic in slaves, to show the degradation of negro slavery in our country. This system was imposed upon our colonial settlements by the mother country, and it is due to truth to say that the commercial colonies and States were chiefly engaged in the traffic. But we know as a historical fact, that James Madison, that great and good man, a leading member in the Federal Convention, was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man.

I prefer the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings, rather than to look behind that period, into a traffic which is now declared to be piracy, and punished with death by Christian nations. . . . Our independence was a great epoch in the history of freedom; and while I admit the Government was not made especially for the colored race, yet many of them were citizens of the New England States, and exercised, the rights of suffrage when

the Constitution was adopted, and it was not doubted by any intelligent person that its tendencies would greatly ameliorate their condition.

Many of the States, on the adoption of the Constitution, or shortly afterward, took measures to abolish slavery within their respective jurisdictions; and it is a well-known fact that a belief was cherished by the leading men, South as well as North, that the institution of slavery would gradually decline, until it would become extinct. The increased value of slave labor, in the culture of cotton and sugar, prevented the realization of this expectation. Like all other communities and States, the South were influenced by what they considered to be their own interests.

But if we are to turn our attention to the dark ages of the world, why confine our view to colored slavery? On the same principles, white men were made slaves. All slavery has its origin in power, and is against right. . . .

Mr. JUSTICE CURTIS dissenting

. . . [M]y opinion is that, under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States. . . .

It has been often asserted that the Constitution was made exclusively by and for the white race. [But] in five of the thirteen original States, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. . . . And that it was made exclusively for the white race is . . . contradicted by its opening declaration, that it was ordained and established by the people of the United States, for themselves and their posterity. And as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established. . . .

. . . If it can be shown, by anything in the Constitution itself, that when it confers on Congress the power to make all needful rules and regulations respecting the territory belonging to the United States, the exclusion or the allowance of slavery was excepted; or if anything in the history of this provision tends to show that such an exception was intended by those who framed and adopted the Constitution to be introduced into it, I hold it to be my duty carefully to consider, and to allow just weight to such considerations in interpreting the positive text of the Constitution. But where the Constitution has said all needful rules and regulations, I must find something more than theoretical reasoning to induce me to say it did not mean all. . . .

. . . Looking at the power of Congress over the Territories as of the extent just described, what positive prohibition exists in the Constitution, which restrained Congress from enacting a law in 1820 to prohibit slavery north of thirty-six degrees thirty minutes north latitude? The only one suggested is that clause in the fifth article of the amendments of the Constitution which declares that no person shall be deprived of life, liberty, or property, without due process of law. . . . Slavery, being contrary to natural right, is created only by municipal law. . . .

[T]hey who framed and adopted the constitution were aware that persons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws; that they must cease to be available as property, when their owners voluntarily place them permanently within another jurisdiction, where not municipal laws on the subject of slavery exist; and that, being aware of these principles, and having said nothing to interfere with or displace them, . . . and having empowered Congress to make all needful rules and regulations respecting the territory of the United States, it was their intention to leave to the discretion of Congress what regulations, if any, should be made concerning slavery therein. . . .

For these reasons, I am of opinion that so much of the several acts of Congress as prohibited slavery and involuntary servitude within that part of the Territory of Wisconsin lying north of thirty-six degrees thirty minutes north latitude, and west of the river Mississippi, were constitutional . . . .

[The concurring opinions have been omitted.]

The majority of the Supreme Court evidently envisioned that its *Dred Scott* holding would resolve the contentious slavery issue for the nation. The Court held that enslaved Black persons and their descendants, even if freed, could not be citizens of the United States due to the Constitution's text, structure, and purported original meaning. The Court also continued to hold Dred Scott was not free in any event because the Missouri Compromise was invalid under the Due Process Clause of the Fifth Amendment for interfering with the property interest an "owner" was said to have in his "slaves."

Justices McLean and Curtis in dissent objected that Black men could vote in five states when the Constitution was ratified, undercutting the majority's conclusion that a freed Black man could not become a citizen. Both Justices also drew upon British common law, international law, and earlier American precedents to urge that slavery was not a "natural right," but rather was a creation of public law, leaving the federal government free to ban slavery in the territories it governed without infringing on any recognized property right.

Rather than resolving the slavery issue, *Dred Scott* only fueled the fire. Frederick Douglass, a prominent formerly enslaved Black abolitionist, urged the decision was unconstitutional—the Constitution did not specifically create a property right in men or otherwise countenance slavery and such an amoral interpretation of the Constitution was in violence with the Preamble. But he stated his abolition "hopes were never brighter than now" because the "open, glaring, and scandalous tissue of lies" in the opinion would advance the cause of liberty. And within a few short years, the nation was at war over slavery.

As the deadliest war in American history ended with the Union states victorious over the Confederate southern states, new amendments to the Constitution were ratified to abolish slavery, to ensure birth-right citizenship for all Americans, to prevent the states from infringing upon the due process and equal protection rights of its inhabitants, to protect the privileges or immunities of U.S. citizens, and to ensure the right to vote irrespective of race or prior condition of servitude.

C. THE RECONSTRUCTION AMENDMENTS

Months after the Civil War ended, the requisite number of states ratified the Thirteenth Amendment. The Thirteenth Amendment bars the existence of slavery or involuntary servitude, except as punishment for a crime after conviction, anywhere within the territory or jurisdiction of the U.S. The Thirteenth Amendment also empowers Congress to enforce the slavery prohibition by appropriate legislation. The Thirteenth Amendment outlaws all slavery, whether established by the government or private individuals, the only aspect of the Constitution that can apply to wholly private conduct.

Yet Congress wanted more protection for the former enslaved persons than merely their freedom. While the Thirteenth Amendment was being ratified, Southern states enacted Black Codes, which discriminated in numerous ways against the new "freedmen" and essentially rendered their freedom an empty promise. One Louisiana Black Code required all Black individuals to be in the regular service of a white person, barred them from renting or keeping their own house, and banned them from traveling or exchanging merchandise without the permission of their employer. Formerly enslaved individuals often were prohibited from performing any occupation other than being a farmer or servant; they could not assemble, bear arms, exercise religion, travel, or vote. Nor could they speak at public meetings or gatherings without permission from their employer and government officials. Private white employers (often the former plantation owners) also conspired to fix wages and working conditions that harkened back to the slave system (including employers' right to whip "servants"), with enforcement aided by the Ku Klux Klan and white mobs using terror and violence.

To protect the freedmen, Congress the next year passed the Civil Rights Act of 1866, which barred the states and private individuals from denying contract, property, or various other rights to any citizen on grounds of "race or color [or] previous condition" of servitude. While the Thirteenth Amendment gave Congress the power to enforce, through appropriate legislation, the prohibition against slavery, Representative John Bingham expressed concern that this power alone was not enough to eradicate all the various provisions in the Black Codes.

Soon thereafter, Congress took up another constitutional amendment, the Fourteenth Amendment, that had several objectives. One objective was to override the holding in *Dred Scott* that free Black persons could never be citizens. Another objective was to provide the additional constitutional support that Representative John Bingham and likely others thought necessary for the provisions of the Civil Rights Act of 1866, by allowing Congress the power to enforce, by appropriate legislation, the guarantees of due process, equal protection, and the privileges or immunities of U.S. citizenship. Another key objective at the time was ensuring that those loyal to the Union controlled the federal government and the government of the former Confederate states; this was accomplished through the provisions reducing a state's representation in Congress in proportion to the number of male citizens denied the right to vote, disqualifying from political office those who had previously taken an oath to support the U.S. Constitution and then engaged "in insurrection or rebellion," and prohibiting the payment of Confederate debt. But with respect to modern constitutional doctrine, the most important provision is the following clause in the first section:

> 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.

Despite the preeminence of this provision today, it inspired less discussion in Congress than the other provisions of the Fourteenth Amendment. After passing Congress, the Fourteenth Amendment was ratified by the requisite number of states in 1868.

Congress later passed and the states ratified the Fifteenth Amendment, providing that states could not deny the right to vote based on race, color, or previous condition of servitude, and that Congress could enforce these guarantees through appropriate legislation.

These Reconstruction Amendments were largely promises to create a new equality for, and to protect the rights, of the freedmen. But these promises went wholly unfulfilled for the next century. This was partly because the Supreme Court's early decisions interpreted the Amendments narrowly. Yet such decisions mirrored prevailing public sentiment as Reconstruction ended, with the North losing any commitment to protect equal rights for the freedmen in the face of Southern violence and resistance as the nation was beset with financial and political challenges.

SLAUGHTER-HOUSE CASES

83 U.S. (16 Wall.) 36 (1873)

Mr. JUSTICE MILLER delivered the opinion of the Court.

[Independent butchers challenged Louisiana's grant of a twenty-five year monopoly to the Crescent City Live-Stock Landing and Slaughtering Company to operate the exclusive slaughterhouse for New Orleans that all butchers had to pay statutorily designated fees to use. The legislature claimed that the grant was a justifiable exercise of the state's "police," or regulatory, power to promote the public health due to the discarded animal entrails butchers left in city streets and the water supply, but the butchers viewed the grant as interfering with their right to make a living for the benefit of the company's owners. The butchers argued the act violated the Thirteenth Amendment and the Privileges or Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment. In a 5-4 decision, the Court rejected the butchers' claims, emphasizing the text, structure, and history of the Reconstruction Amendments while narrowly interpreting their reach.]

. . . It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city, the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health, and comfort of the people require they shall be located. . . . It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the constitution of that State or in the amendments to the Constitution of the United States . . . .

The most cursory glance at [the Reconstruction Amendments] discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. . . .

The institution of African slavery, as it existed in about half the States of the Union . . . culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion. . . . In that struggle slavery, as a legalized social relation, perished. . . . [The] thirteenth article of amendment . . . [was] designed to establish the freedom of four millions of slaves . . . . [But to] endeavor to find in it a reference to servitudes which may have been attached to property in certain localities requires an effort, to say the least of it.

That a personal servitude was meant is proved by the use of the word "involuntary," which can only apply to human beings. . . . The word servitude is of larger meaning than slavery, . . . and the obvious purpose was to forbid all shades and conditions of African slavery. . . . And that is all that we deem necessary to say on the application of [the Thirteenth Amendment] to the statute . . . now under consideration.

The process of restoring to their proper relations with the Federal government and with the other States those which had sided with the rebellion . . . developed the fact that . . . the condition of the [former] slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of the legislation adopted by several of the States in the legislative bodies . . . were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty and property. . . .

[I]n the light of this recapitulation of events, . . . and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made free men and citizens from the oppressions of those who had formerly exercised unlimited dominion over them. . . .

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the thirteenth [amendment] it forbids any other kind of slavery, now or hereafter. . . .

The first section of the fourteenth [amendment], to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution . . . . [I]t had been held by this Court, in the celebrated *Dred Scott* case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. . . . To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States and also citizenship of a State, the [national citizenship] clause was framed.

"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."

[Under this national citizenship clause], there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual. . . .

[The] next paragraph of this same section . . . speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. . . . The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States*." It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States in the very sentence which precedes it. . . .

[I]t is only the [privileges or immunities of the citizens of the United States] which are placed by this clause under the protection of the federal Constitution, and . . . the [privileges and immunities of the citizen of the state], whatever they may be, are not intended to have any additional protection by this paragraph of the amendment. . . .

The first occurrence of the words "privileges and immunities" in our constitutional history is to be found in the fourth of the articles of the old Confederation. . . . In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

[The Court then turned to the "privileges and immunities" of state citizenship, which cannot be denied to out-of-state citizens when granted to in-state citizens under the Interstate Privileges and Immunities Clause of Article IV, Section 2, to differentiate these fundamental rights from the limited "privileges or immunities" of U.S. citizenship protected by the Fourteenth Amendment:]

. . . The first and the leading case on the subject is that of *Corfield v. Coryell*, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823. "The inquiry . . . is what are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with a right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole." . . .

[This] description . . . embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are . . . those rights which are fundamental [and are] rights belonging to the individual as a citizen of a State. . . .

[But Article IV, Section 2] did not create those rights . . . . Its sole purpose was to declare to the

several States that, whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

. . . Was it the purpose of the fourteenth amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? . . .

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States, which ratified them.

[W]e may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no state can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its national character, its Constitution, or its laws. [The Court went on to describe some such privileges or immunities of U.S. citizenship protected by the Fourteenth Amendment, including the right "to come to the seat of government to assert any claim he may have" or "to transact any business he may have with it," to have "free access to its seaports" and "courts of justice in the several states," and "to demand the care and protection of the federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government."]

But it is useless to pursue this branch of the inquiry, since we are of the opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States . . . .

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. . . . [It] is sufficient to say that under no construction of [the Due Process Clause] that we have ever seen . . . can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this [equal protection] clause. . . . We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. . . .

Mr. JUSTICE FIELD, dissenting [joined by the Chief Justice and Justices Swayne and Bradley].

. . . The act of Louisiana presents the naked case, unaccompanied by any public considerations, where a right to pursue a lawful and necessary calling, previously enjoyed by every citizen, and in connection with which a thousand persons were daily employed, is taken away and vested exclusively for twenty-five years . . . in a single corporation . . . .

. . . The question presented is . . . nothing less than the question whether the recent amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by State legislation. In my judgment, the fourteenth amendment does afford such protection, and was so intended by the Congress which framed and the States which adopted it. . . .

The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation. If this inhibition . . . only refers, as held by the majority of the court . . . , to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage. . . . But if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence. . . .

The privileges and immunities designated are those which of right belong to the citizens of all free governments. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons. . . . All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness. . . .

[The separate dissenting opinions of Justices Bradley and Swayne have been omitted.]

The *Slaughter-House Cases* left the Fourteenth Amendment's Privileges or Immunities Clause with almost no independent meaning. The Court, relying on the National Citizenship Clause that superseded *Dred Scott*, reasoned that there were two distinct types of citizenship: (1) citizenship of a state, and (2) citizenship of the United States. Turning to the Fourteenth Amendment's Privileges or Immunities Clause, the Court concluded that its language—prohibiting the states from abridging the "privileges or immunities of *citizens of the United States*"—only prevented the states from denying those privileges or immunities of citizens that came into existence as a result of their national citizenship, such as to seek redress from the national government or to access the nation's seaports or courts in the several states. The Fourteenth Amendment was not, then, according to the Supreme Court, a basis for the federal government to require the states to protect those privileges or immunities that arose from being a citizen of a state, which were the more important rights, such as the fundamental rights of life, liberty, and property (including the right to pursue lawful employment). While Article IV, Section 4 of the Constitution, the Interstate Privileges and

Immunities Clause, prohibited states from discriminating against citizens of other states with respect to these fundamental rights that a state granted to its own citizens, the Court held the Fourteenth Amendment's Privileges or Immunities Clause was not intended to authorize the federal government to protect state citizens from state deprivations of their fundamental rights.

The *Slaughter-House* interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment has never been overruled, despite fervent academic and even occasional judicial criticism. This criticism relies on the strong evidentiary support that the enacting Congress—and especially the principal architect of the amendment, Representative John Bingham—intended that the Fourteenth Amendment would indeed be the basis for federal protection of fundamental rights from state deprivations. But the evidence in the states ratifying the amendment is mixed, and, in any event, the political winds were changing by the time the Court decided *Slaughter-House.*

Despite the Supreme Court's continued adherence to the *Slaughter-House* interpretation of the Privileges or Immunities Clause, the Court has since expanded the meaning of the Equal Protection and Due Process Clauses. While *Slaughter-House* expressed doubts that the Equal Protection Clause would ever be the basis for striking down legislation other than that directed at the former enslaved persons or that discriminated on account of their race, and also indicated a narrow meaning for the Due Process Clause, the Supreme Court has, over time (as will be witnessed in this chapter and in the next two chapters), expanded protection under the Due Process and Equal Protection Clauses.

Yet during the rest of the 1800s, the Court continued to employ the Equal Protection Clause only to government actions that discriminated against individuals on account of their race or prior condition of servitude. The discrimination had to be based on race, not on other non-racial criteria that impacted one race more than another. Moreover, it was not discriminatory for the government to account for race as long as both races were treated equally. The following three cases illustrate these principles.

STRAUDER v. WEST VIRGINIA, 100 U.S. (10 Otto) 303 (1880), invalidated, under the Equal Protection Clause, a West Virginia law that allowed only "white male persons who are twenty-one years of age and who are citizens of this State" to be jurors. Strauder, who had formerly been enslaved, was convicted of murder by an all-white West Virginia jury, and urged that the blanket exclusion of jury service to non-whites violated the Fourteenth Amendment. The Court, relying on the *Slaughter-House Cases*, explained that the Fourteenth Amendment was "designed to assure to the colored race the enjoyment of all the civil rights that, under the law, are enjoyed by white persons, and to give to that race the protection of the general government in that enjoyment whenever it should be denied by the States." The Court continued that this meant that

> the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them because of their color[.] The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as

> colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

Strauder's equal protection rights had therefore been violated because "while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color," Strauder was not afforded a similar protection under West Virginia law. But the Court cautioned that this did not prevent states from adopting non-racial qualifications regarding those entitled to jury service, including limiting it to males, freeholders, or those with specified educational qualifications. The Court's blessing of such textually neutral juror qualifications rendered *Strauder* of little practical import, as states could employ such qualifications to prevent Black citizens from serving on juries.

THE CIVIL RIGHTS CASES, 109 U.S. 3 (1883), held that Congress could not provide a remedy under the Fourteenth Amendment for private discrimination on account of race. The Civil Rights Act of 1875 had entitled all persons within the United States to "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement . . . applicable alike to citizens of every race and color, regardless of any previous condition of servitude." Under this Act, then, privately owned places of public accommodation could not discriminate based on race or color. But the Supreme Court decided in these consolidated cases arising from four prosecutions and one civil enforcement action that the Act was unconstitutional and outside congressional power because the Fourteenth Amendment only guarantees equal protection rights against state governments, not private individuals:

> It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. . . . It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. . . .
>
> [C]ivil rights, such as are guaranteed by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong . . . ; an invasion of the rights of the injured party, . . . but if not sanctioned in some way by the State, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.

Because the Fourteenth Amendment only applies against "state legislation or state action," any congressional legislation attempting to enforce the protections of the Fourteenth Amendment had to be directed to the correction of state laws and state proceedings that denied equality with respect to political and civil rights. Here, though, the Act was not "corrective of any constitutional wrong

committed by the States," but instead adopted "rules for the conduct of individuals in society towards each other . . . without referring in any manner to any supposed action of the State or its authority."

While the Court acknowledged that the Thirteenth Amendment applies to private conduct, the Court held that it prohibits "all badges and incidents of slavery" rather than "the social rights of men and races in the community." The "necessary incidents" of slavery, according to the Court, were compulsory service, restraint of movement, and disabilities from contracting, possessing property, suing, or testifying against whites. The Court determined that individual discrimination in public accommodations "has nothing to do with slavery or involuntary servitude," as it would be "running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make." Justice John Marshall Harlan dissented, arguing that because slavery "rested wholly upon the inferiority, as a race, of those held in bondage," the freedom secured by the Thirteenth Amendment "necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races."

YICK WO v. HOPKINS, 118 U.S. 356 (1886), determined that race-based classifications could exist even if the statute was facially neutral but was applied in a racially discriminatory fashion. San Francisco ordinances, ostensibly for fire prevention reasons, barred laundries from operating in buildings not made of brick or stone unless consent was obtained from the board of supervisors. Yick Wo, a Chinese native and subject who had lived in California since 1861, had operated a laundry in the same wooden building for twenty-two years and had satisfactory inspections by fire wardens. Yet he was denied permission by the supervisors to continue operating after the enactment of the ordinance. He was imprisoned for ten days after being unable to pay his $10 fine when he continued to operate his laundry without the requisite license. The record established that "there were about 320 laundries in [San Francisco], of which about 240 were owned and conducted by subjects of China, and . . . about 310 were constructed of wood, the same material that constitutes nine-tenths of the houses in the city of San Francisco." The board of supervisors denied all 200 applications from Chinese-owned laundries to continue to operate in wood buildings as they had done for 20 or more years, while granting permission to continue to operate in wood buildings to all but one of the non-Chinese applicants (Mrs. Mary Meagles being the sole exception). The Supreme Court, in a unanimous opinion by Justice Matthews, reversed the convictions of Yick Wo and another Chinese laundry operator who had likewise been imprisoned for violating the ordinances:

> The fourteenth amendment to the Constitution is not confined to the protection of citizens. . . . [Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws. . . .
>
> [T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state

> of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the Constitution of the United States. Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. . . .
>
> The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite deemed by the law, or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatsoever, except the will of the supervisors, is assigned why they should not be permitted to carry on. . . . And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. . . . [T]he imprisonment of the petitioners is therefore illegal, and they must be discharged. . . .

But not all discriminatory actions taken as a result of race were considered unconstitutional. The first wave of state laws requiring segregation of the races in railway carriages started appearing in the late 1880s, and the Supreme Court upheld such a law in the following infamous case.

PLESSY v. FERGUSON
163 U.S. 537 (1896)

Mr. JUSTICE BROWN . . . delivered the opinion of the Court.

[Homer Plessy sought a writ of prohibition against Louisiana criminal district court judge John Ferguson, urging that he was being unlawfully imprisoned for violating Louisiana's segregation laws. Plessy alleged that he was of "mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege and immunity secured to the citizens of the United States of the white race by its Constitution and laws." Nevertheless, after buying a first class ticket and entering into a white-only coach on the East Louisiana Railway, he was required by the conductor to vacate the white-only coach for the non-white coach. When he refused, a police officer was summoned and he was ejected from the coach and imprisoned. The Court upheld the Louisiana law providing for separate railway carriages for whites and non-whites.]

. . . The constitutionality of this act is attacked upon the ground that it conflicts both with the Thirteenth Amendment of the Constitution, abolishing slavery, and the Fourteenth Amendment,

which prohibits certain restrictive legislation on the part of the States.

1. That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services. . . . A statute which implies merely a legal distinction between the white and colored races . . . has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.

2. . . . The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced. [The Court then discussed the Massachusetts state constitutional decision upholding segregated schools and remarked that similar laws "have been generally, if not uniformly, sustained by the courts."]

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court. Thus in *Strauder v. West Virginia*, it was held that a law of West Virginia limiting to white male persons, 21 years of age and citizens of the State, the right to sit upon juries, was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility. Indeed, the right of a colored man that, in the selection of jurors to pass upon his life, liberty and property, there shall be no exclusion of his race, and no discrimination against them because of color, has been asserted in a number of cases. . . .

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is property, in the same sense that a right of action, or of inheritance, is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

In this connection, it is also suggested . . . that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them

to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class.

So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . .

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some holding that any visible admixture of black blood stamps the person as belonging to the colored race, others that it depends upon the preponderance of blood, and still others that the predominance of white blood must only be in the proportion of three fourths. But these are questions to be determined under the laws of each State . . . .

Mr. JUSTICE HARLAN dissenting.

. . . In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances

when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation, as that here in question, is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States. . . .

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

. . . It is quite another thing for government to forbid citizens of the white and black races from travelling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road of street? Why may it not require sheriffs to assign whites to one side of a court-room and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the considerations of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics? . . .

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case. . . .

Plessy upheld, with only Justice John Marshall Harlan dissenting, forced legal segregation of the races on historical and precedential grounds. Justice Harlan, who had also been the lone dissenter in the *Civil Rights Cases*, had a remarkable personal transformation in his lifetime: he was born into a prominent, slaveholding family in Kentucky—and had himself held enslaved persons until the Thirteenth Amendment's ratification. He fought for the Union during the Civil War, even while opposing the Emancipation Proclamation. Nonetheless, during his over three decades on the Court after his 1877 appointment by President Hayes, he became an often lonely judicial voice for the protection of the civil rights of the freedmen.

In response to the argument that segregated railway cars could lead to requirements that the races paint their houses, vehicles, or business signs different colors, *Plessy* countered that "every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good." The "police power" is simply another word for the regulatory power of state and local governments. Shortly after the decision in *Slaughter-House*, the Court had started to indicate that the Fourteenth Amendment's Due Process Clause required that exercises of the police power by the states had to be "reasonable." We next turn to this doctrine.

D. THE "*LOCHNER* ERA"

The Court's decision in *Slaughter-House* required litigants to seek other potential avenues for federal judicial protection from state deprivations of fundamental rights and liberties. Soon they found one: the Fourteenth Amendment's Due Process Clause, barring states from depriving "any person of life, liberty, or property, without due process of law." While this provision's text might be argued to be concerned solely with procedural matters, such as notice and a right to be heard, the Court soon found there was a substantive component to the guarantee as well, preventing arbitrary state deprivations of life, liberty, and property.

MUNN v. ILLINOIS, 94 U.S. 113 (1877), was a key initial step. The Illinois legislature had established maximum prices for grain storage in Chicago and other cities, which were challenged on, among other grounds, the Fourteenth Amendment's Due Process Clause. The Supreme Court began its analysis with a presumption of constitutionality: "Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so." Under this "presumption of constitutionality," the Court upheld the statute as within the police power of the legislature, reasoning:

> When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. . . . This does not confer power upon the whole people to control rights which are purely and exclusively private, . . . but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property as not unnecessarily to injure another. . . . From this source came the police powers. . . .
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> With the fifth amendment in force, Congress . . . conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharfs, . . . the sweeping

> of chimneys, and to fix the rates of fees therefore . . . and the weight and quality of bread . . . ."
>
> From this it is apparent that, down to the time of the adoption of the fourteenth amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. . . .
>
> This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be juris privati only." Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit it to be controlled by the public for the common good, to the extent of the interest he thus has created. . . .

While the regulation of the rates charged by those owning "property in which the public has an interest" was thus within the police power, the Court continued that the regulation of other matters outside the public interest was subject to judicial review for reasonableness because "the legislature has no control over such a contract." This language arguably indicated that due process did indeed establish some substantive limitations on state authority. And the Court over the next twenty years continued to drop similar hints, even when upholding challenged laws. *Mugler v. Kansas*, 123 U.S. 623 (1887), upheld a state law prohibiting almost all alcoholic beverages, but cautioned that the Due Process Clause invalidated legislation that had "no real or substantial relation" to protecting the public health, morals, or safety. *See also Barbier v. Connolly*, 113 U.S. 27 (1885).

Allgeyer v. Louisiana, 165 U.S. 578 (1897), was the first case declaring a state statute unconstitutional under the substantive component of the Fourteenth Amendment's Due Process Clause. The challenged Louisiana statute prohibited obtaining insurance on Louisiana property from companies not registered to do business under Louisiana law, purportedly to protect Louisiana citizens from deceitful insurance companies. A Louisiana corporation contracted in New York with a New York insurer for an open policy of marine insurance; the corporation later sent a notification letter from Louisiana of an insured cotton shipment to the New York insurer, which the state contended violated the statute. But a unanimous Supreme Court, in an opinion by Justice Peckham, held that the state's construction of the statute impermissibly invaded the defendant's liberty, which included not only freedom from physical restraint (such as through imprisonment) but also the

> right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

After *Allgeyer*, the substantive component of the Due Process Clause became a basis for the Court to declare unconstitutional state and local laws unreasonably interfering with the liberty of contract or other fundamental rights. The paradigm case from this era was *Lochner v. New York*.

LOCHNER v. NEW YORK
198 U.S. 45 (1905)

Mr. JUSTICE PECKHAM delivered the opinion of the Court.

[A New York statute prohibited bakery employees from working more than ten hours a day or sixty hours a week. Lochner, a bakery owner, was convicted of violating the statute. He challenged the statute as, among other things, violating his liberty of contract. The New York Court of Appeals, in a 4-3 decision, upheld the statute as a reasonable health law, but the U.S. Supreme Court reversed.]

The 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. *Allgeyer v. Louisiana* (1897). . . . The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere. . . .

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. . . . Otherwise the 14th Amendment would have no efficacy . . . . In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court.

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 whatsoever 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. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. . . .

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. . . . In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employees. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than eight hours a day, would be invalid. . . .

We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employees named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best. . . .

It is manifest to us that the limitation of the hours of labor . . . has no such direct relation to, and no such substantial effect upon, the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees . . . in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution. . . .

Mr. JUSTICE HARLAN, with whom Mr. JUSTICE WHITE and Mr. JUSTICE DAY concurred, dissenting.

. . . It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed

their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. . . . So that, in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation. *Mugler v. Kansas* (1887). . . .

Professor Hirt in his treatise on the "Diseases of the Workers" has said: "The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it. It is hard, very hard, work, not only because it requires a great deal of physical exertion in an overheated workshop and during unreasonably long hours, but more so because of the erratic demands of the public, compelling the baker to perform the greater part of his work at night, thus depriving him of an opportunity to enjoy the necessary rest and sleep, a fact which is highly injurious to his health." Another writer says: "The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. The eyes also suffer through this dust, which is responsible for the many cases of running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps, and swollen legs. . . . The average age of a baker is below that of other workmen; they seldom live over their fiftieth year, most of them dying between the ages of forty and fifty. During periods of epidemic diseases the bakers are generally the first to succumb to the disease, and the number swept away during such periods far exceeds the number of other crafts in comparison to the men employed in the respective industries." . . .

Mr. JUSTICE HOLMES dissenting.

. . . This case is decided upon an economic theory which a large part of the country does not entertain. . . . 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 Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] 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. . . .

I think that the word "liberty" in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have

been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

Lochner held that, although liberty of contract was a constitutionally protected freedom, it was "held on such reasonable conditions as may be imposed by the governing power of the State" in properly exercising the police power to protect the public health, safety, morals, and general welfare. The relevant judicial determination was whether the legislation under review was "a fair, reasonable and appropriate exercise of the police power of the State, or . . . an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty." To survive, the regulation had to have a "direct and substantial" relationship to the police power, a heightened form of judicial scrutiny. The majority in *Lochner* concluded that the New York law limiting the hours of a baker was not valid as a labor law because bakers could fend for themselves in negotiating employment contracts. The majority then continued that the law was not valid as a health law because, in the Court's view, the trade of a baker was not particularly unhealthy.

There were two dissents. Justice Harlan, while accepting the general approach of the majority to the Due Process Clause, urged that the law was a reasonable health law, relying on studies and treatises regarding the health of bakers (notice the absence of any *evidence* cited in the majority's opinion, instead relying on "common understanding"). Justice Holmes, in contrast, urged that the Court did not give the appropriate deference to the legislative determination. He stated that only if "a rational and fair man necessarily would admit that the statute proposed would infringe on fundamental principles as they have been understood by the traditions of our people and our law" should a statute be invalidated under the Due Process Clause. Justice Holmes' dissent is the progenitor of the modern "rational basis" test that will be encountered later in this chapter and in subsequent chapters. But during the *Lochner* era, the "direct and substantial" relationship test generally held sway, requiring state interferences with the liberty of contract to be justified as sufficiently related to the public health, safety, welfare, or morals.

Numerous state laws were invalidated during the over three decades that the Court followed *Lochner*'s principles. But many were upheld. Although the Court held that the maximum-hours law in *Lochner* violated the Due Process Clause, it sustained in other cases maximum-hours laws for coal miners and factory workers. The result often depended on the view of the members of the Court at that particular time regarding the need for and the reasonableness of the law, with some Justices being more strict than others in reviewing the legislative record.

The need for a "direct and substantial" relationship to the public health, safety, welfare, or morals led to the phenomena of the "Brandeis Brief," named for the brief attorney (later Supreme Court Justice) Louis Brandeis filed three years after *Lochner* in *Muller v. Oregon*, 208 U.S. 412 (1908). Brandeis successfully defended Oregon's law limiting women to only ten hours of work in factories and laundries, with his brief relying on extensive factual and sociological evidence rather than

traditional legal argument. The brief only contained a couple of pages of legal argument while including more than 100 pages of excerpts from other state and foreign statutes regulating the working hours of women and from medical reports supporting the impact of long hours on women's health and welfare. The *Muller* Court unanimously upheld the Oregon law, distinguishing *Lochner* under the Court's (misogynist) view of the "difference between the sexes" related to physical strength, stamina, and "capacity to maintain the struggle for subsistence." The Brandeis Brief strategy was frequently imitated in other cases involving liberty of contract, with mixed results.

The Court during the *Lochner* era did not limit the "liberty" protected by the Fourteenth Amendment's Due Process Clause to freedom of contract. Instead, the Court expanded "liberty" in other directions, two of which are very significant in modern constitutional doctrine.

First, the Court gradually began to recognize that, even though the Bill of Rights did not apply to the states under *Barron*, certain rights guaranteed within the first eight amendments to the Constitution were included within the concept of "liberty" and therefore protected by the Fourteenth Amendment against state intrusions. Three years after *Lochner*, the Court in *Twining v. New Jersey*, 211 U.S. 78 (1908), acknowledged the possibility that some guarantees in the Bill of Rights were protected by the Fourteenth Amendment, but explained that this "is not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process."

To be included within the conception of due process, the right had to be a fundamental, inalienable principle of liberty and justice inhering in the very idea of free government. But in the early twentieth century, this applied to very few of the guarantees in the first eight amendments. *Twining* held that the Fifth Amendment's principle that a jury cannot be instructed to draw an unfavorable inference from the defendant's failure to testify was not part of the liberty protected by due process because it was not recognized as a right in "the great instruments," such as the Magna Carta and the English Bill of Rights. On the other hand, the Court held ten years before *Twining* that the Fourteenth Amendment's protection against deprivation of property without due process of law required "compensation to be made or adequately secured to the owner of private property for public use under the authority of a State." *Chicago, Burlington & Quincy RR Co. v. Chicago*, 166 U.S. 226, 235 (1897). And the Court began in the 1920s and 1930s to include such rights as freedom of speech, press, and assembly within the fundamental, inalienable "liberties" protected by the Fourteenth Amendment. The method of analysis in such early takings and expressive decisions often mirrored the scrutiny employed in *Lochner*, depending on the challenged law's relationship to judicially recognized police power purposes.

In a second expansion, the Court held that non-textual liberties other than the freedom to contract were protected by the Fourteenth Amendment against unreasonable state interference. Liberty also included the right to seek knowledge, to marry, to establish a home, to raise a family, and to pursue other long-recognized privileges. The following case illustrates.

MEYER v. NEBRASKA
262 U.S. 390 (1923)

Mr. JUSTICE McREYNOLDS delivered the opinion of the Court.

[Meyer, an instructor in Zion Parochial School, taught German to Raymond Parpart, a ten-year old who had not passed the eighth grade. This violated a Nebraska statute, passed in 1919, that prohibited the teaching of "any subject to any person in any language than the English language," unless the pupil had successfully passed the eighth grade. Other states enacted similar statutes after World War I. The Nebraska state courts affirmed Meyer's conviction, reasoning that the reasonable police power purpose behind the statute was to ensure that English would be the mother tongue of all Nebraska children.]

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to [Meyer] by the Fourteenth Amendment . . . .

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. *Slaughter-House Cases* (1873); *Yick Wo v. Hopkins* (1886); *Allgeyer v. Louisiana* (1897); *Lochner v. New York* (1905). The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. . . . [It] is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.

The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The Supreme Court of the State has held

that "the so-called ancient or dead languages" are not "within the spirit or the purpose of the act." Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian, and every other alien speech are within the ban. Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals, and "that the English language should be and become the mother tongue of all children reared in this State." It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means. . . .

The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every character of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.

The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the [state] Supreme Court. . . . No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State.

As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child. . . .

[See the separate opinion of Mr. JUSTICE HOLMES, concurred in by Mr. JUSTICE SUTHERLAND, in the next case . . . .]

[In a companion case, *Bartels v. Iowa*, 262 U.S. 404 (1923), Justice Holmes explained the basis for his dissent noted in *Meyer*: "Youth is the time when familiarity with language is established and if there are sections in the State where a child would hear only Polish or French or German spoken at home, I am not prepared to say that it is unreasonable to provide that, in his early years, he shall hear and speak only English at school. But, if it is reasonable, it is not an undue restriction of the liberty either of teacher or scholar. . . . [I]t appears to me to present a question upon which men reasonably might differ, and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried."]

Meyer held that a Nebraska statute prohibiting the teaching of modern foreign languages, which was enacted soon after World War I during an era of nativist sentiment, arbitrarily interfered with "certain fundamental rights which must be respected," including the liberty of parents to control the education of their children, teachers' right to pursue their occupations, and students' opportunity to acquire knowledge. Notice that the Court defined the "liberty" protected by the Due Process Clause broadly: "it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." When a state intruded upon this liberty, the judiciary ascertained whether the intrusion had the necessary relationship to the police power interests in the public health, safety, morals, and general welfare.

Other Supreme Court cases during the 1920s similarly protected the rights of parents to control the education and upbringing of their children under the "liberty" component of due process. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), declared unconstitutional a state law compelling all children between the ages of eight and sixteen to attend public school (rather than Catholic or other parochial schools) for interfering with parents' liberty to direct the upbringing and direction of their children, and as potentially destructive to the private schools' business interests. In another case, the Supreme Court protected the fundamental right of parents to direct the education of their children under the Fifth Amendment when Hawaiian territorial law (which governed Hawaii before it became a state in 1959) placed severe restrictions on foreign language schools. *See Farrington v. Tokushige*, 273 U.S. 284 (1927).

Meyer and its progeny thus incorporated within the concept of "liberty" certain nontextual rights related to individual autonomy that supplemented the economic freedoms of contracting and pursuing an occupation. As detailed in the next section, the Supreme Court later disavowed economic substantive due process liberties protected in cases such as *Lochner*. Yet the idea that "liberty" includes certain non-textual autonomy rights, such as the right recognized in *Meyer* for parents to control the upbringing and education of their children, has become an important aspect of modern substantive due process doctrine.

These autonomy liberties, just like economic freedoms, were subject to appropriate police power regulation. If the Court viewed a challenged regulation as directly and substantially related to the public health, safety, welfare, or morals, the regulation did not invade the liberty protected by the Fourteenth Amendment.

JACOBSON v. MASSACHUSETTS, 197 U.S. 11 (1905), illustrates. A Massachusetts law required vaccinations for the inhabitants of a city or town when, in the opinion of the board of health, it was necessary for the public safety. After a smallpox outbreak in Cambridge, the board imposed a fine on those refusing to be vaccinated, which Jacobson challenged as violating the liberty protected by the Fourteenth Amendment's Due Process Clause. Although recognizing the government's duty to protect the right of individual liberty, the Court determined that the safety of the general public may limit this right: "Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own . . . person or . . . property . . . regardless of the injury that may be done to others." The Court continued that it had long recognized the "authority of a State to enact quarantine laws and 'health laws of every description'" in order to protect the public health and public safety. Despite Jacobson's claims that vaccines were ineffective and could cause other health problems, the Court held state-mandated vaccinations had the necessary "real and substantial relation" to the public health and safety to be a reasonable police power regulation, at least in the absence of a specifically articulated health condition precluding an individual from being a fit candidate for a vaccine.

The Court extended *Jacobson*'s health and safety rationale in an unfortunate direction in *Buck v. Bell*, 274 U.S. 200 (1927), upholding a sterilization program for the "feeble-minded" in state institutions, reasoning the "principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes." Carrie Buck's mother was confined to an institution, and Carrie Buck was raised by foster parents and attended public schools until the sixth grade when she was pulled out of school to help around the house. She became pregnant at 17, allegedly after being raped by the nephew of her foster parents, and her foster parents had her committed to the same institution as her mother. Virginia had recently enacted a law authorizing the sterilization of the feeble-minded, insane, and epileptic on the eugenic assumption that these traits were hereditary. Carrie Buck was selected as a test case for the constitutionality of the program since her mother was institutionalized and her daughter allegedly showed signs of slow mental development. The opinion of Justice Holmes upholding the constitutionality of the Virginia statute mimicked the state's ploy, announcing that "three generations of imbeciles are enough."

E. THE ASCENDANCY OF PREFERRED RIGHTS

The modern protection for individual rights is a tiered structure. Some rights are viewed as "preferred" or "fundamental." These rights receive heightened judicial scrutiny when infringed by state action. All other asserted rights receive a form of rational basis review, similar to that envisioned by Justice Holmes in his *Lochner* dissent.

This dichotomy began taking shape during the New Deal, when the Court began moving away from economic substantive due process for several reasons, including national economic conditions during the Depression, popular acceptance of the need for economic and labor legislation in light of these

economic conditions, persistent political and intellectual criticisms of the Court as a super-legislature, and the changing perspectives of the new Justices appointed to the Court by President Franklin D. Roosevelt. But as the Court withdrew economic substantive due process review, it realized that the protection of individual rights and liberties could not always be entrusted to legislative majorities. As a result, it began to recognize that certain rights—some mentioned in the text of the Constitution, and others without a textual foundation—were fundamental or preferred, and should receive additional judicial protection from state interference. The following subsections trace the development of this tiered structure under due process and equal protection principles.

1. THE DEMISE OF ECONOMIC SUBSTANTIVE DUE PROCESS

In the mid-1930s, the Supreme Court began limiting the scope of economic substantive due process before effectively abandoning the concept. The Court's initial step was to provide more deference to the legislative judgment on the public purposes supporting the challenged statute.

The first key case involved a challenge brought under the Contracts Clause and the Due Process Clause. While the Contracts Clause, as discussed earlier in this chapter, was the primary textual source for limitations on state legislation before Reconstruction, the Clause in the late 1800s became less frequently litigated as the Supreme Court adopted broader substantive protections for the "right to contract" under the Due Process Clause. The liberty to contract as an aspect of due process extended to both existing and future contractual arrangements, unlike the Contracts Clause that afforded limited protection only to existing contractual obligations.

HOME BUILDING & LOAN ASSOCIATION v. BLAISDELL, 290 U.S. 398 (1934), involved a challenge under both the Contracts Clause and the Due Process Clause to the 1933 Minnesota Mortgage Moratorium Law that delayed mortgage foreclosures until the earlier of May 1935 or the passing of the "emergency" caused by the Great Depression. The Blaisdells applied under the law for an extension of the period of redemption from a foreclosure sale, but the state trial court agreed with the mortgage holder that the law was unconstitutional. The Minnesota Supreme Court reversed and afforded relief to the Blaisdells, reasoning that the public economic emergency of the Great Depression supported the state's police power to enact the legislation.

In a 5-4 decision by Chief Justice Hughes, the Supreme Court likewise upheld the Minnesota law. While acknowledging that an emergency could not create governmental power forbidden by the Constitution, the Court reasoned "an emergency may furnish the occasion for the exercise of power" when interpreting general constitutional provisions such as the Contracts Clause. After examining its precedents on the Contracts Clause, the Court reasoned that the "economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." The Court continued:

> It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the

> complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.
>
> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a *constitution* we are expounding" (*McCulloch v. Maryland*)—"a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." . . .
>
> With a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests. . . . [The] reservation of the reasonable exercise of the protective power of the State is read into all contracts and there is no [reason] for refusing to apply this principle to Minnesota mortgages . . . .
>
> An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community. . . . The legislation was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society. . . . The conditions upon which the period of redemption was extended do not appear to be unreasonable [and the] legislation is temporary in operation. . . . We are of the opinion that the Minnesota statute as here applied does not violate the contract clause of the Federal Constitution.

The Court then summarily rejected the mortgage holder's challenge under the Due Process Clause on the same grounds: "What has been said on [the Contracts Clause] is also applicable to the contention presented under the due process clause." Justice Sutherland, joined by Justices Van Devanter, McReynolds, and Butler, dissented in a lengthy opinion, arguing that the "history and circumstances which led up to and accompanied the framing and adoption of this clause will demonstrate conclusively that it was framed and adopted with the specific and studied purpose of preventing legislation designed to relieve debtors *especially* in time of financial distress."

Notice that the majority did not dispute the dissent's historical interpretation, instead relying on a contemporary understanding of the state's interest in preventing or alleviating the economic catastrophe of the Great Depression considering the nation's integrated, interconnected, and industrial economic system. This interest would not have been acknowledged by the framers—as the dissent detailed, the Contracts Clause was specifically designed to prevent debt-relief legislation and it was adopted during a severe national economic contraction that is typically described as a depression (or at least a deep recession). But the majority, while not opining on the policy wisdom of Minnesota's law, refused to rely on this history to declare the law unconstitutional when it was a reasonable means adopted by the legislature to attain the legitimate end of societal protection under the legislature's contemporary understandings of the public welfare.

Blaisdell expressed that the same analysis also applied to defeat the mortgage holder's challenge under the Due Process Clause. Another 5-4 decision two months later addressed the scope of the Due Process Clause in more depth.

NEBBIA v. NEW YORK, 291 U.S. 502 (1934), considered a New York milk control law adopted in 1933 during the Great Depression that established a board empowered to set a minimum retail price for milk. The law was supported by extensive hearings and a lengthy report, which detailed, among other findings, that the failure of milk producers to receive a reasonable return potentially threatened the milk supply. Nebbia, a store owner who was convicted of violating the law, challenged his conviction as violating the Fourteenth Amendment. But the Supreme Court, in an opinion by Justice Owen Roberts, upheld the law.

Justice Roberts first detailed that "neither property rights nor contract rights are absolute" as "equally fundamental" with such rights "is that of the public to regulate" in the common interest. The protections for due process in the Fifth and Fourteenth Amendments, he continued, "do not prohibit governmental regulation for the public welfare," but demand "only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

He rejected the argument that price controls are *per se* unreasonable and unconstitutional outside those businesses, such as public utilities or monopolies, historically defined as affected with a public interest. He explained that the "due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property" and that there was "no closed class or category of businesses affected with a public interest." His opinion concluded:

> So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. . . . If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. . . . And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. . . . Times without number we have said that the legislature is

> primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power. . . .
>
> Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty. Tested by these considerations we find no basis in the due process clause of the Fourteenth Amendment for condemning the provisions of the [challenged law.]

The four dissenters from *Blaisdell* dissented again, this time in an opinion by Justice McReynolds. The dissent urged that, as a historical and precedential matter, "fixation of the price at which 'A,' engaged in an ordinary business, may sell, in order to enable 'B,' a producer, to improve his condition, has not been regarded as within legislative power. This is not regulation, but management, control, dictation—it amounts to the deprivation 'of the fundamental right which one has to conduct his own affairs honestly and along customary lines.'" Since milk production had not historically been a business subject to price control as affected with the public interest, the dissenters viewed the regulation as violating the Due Process Clause.

The majority's opinion in *Nebbia* evinces a Court in transition. Some of its phraseology harkens to *Lochner*, such as stating that "the means suggested shall have a real and substantial relation to the object sought to be obtained." But the opinion as a whole appears to be moving to the position articulated in Justice Holmes' *Lochner* dissent. The Court disavows that "affected with the public interest" is a term of any special meaning. Rather, as long as the challenged regulation is "reasonable," rather than arbitrary or discriminatory, it does not run afoul of the Constitution. While economic substantive due process was not yet dead, and was used to invalidate another state law two years later, its days after *Nebbia* were numbered.

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), decided three years after *Nebbia*, explicitly overruled the *Lochner*-era precedent *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), and upheld a minimum wage law for women and minors enacted by the state of Washington. The Court noted that the Fourteenth Amendment "does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law." The Court then explained that a government "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." The Court affirmed that a state could adopt any economic policy, including attempting to adjust economic bargaining power between employers and employees, as the state legislation here had done by establishing a minimum wage. The Court thereby indicated that it would no longer apply a heightened scrutiny to government regulations interfering with nontextual contractual rights.

UNITED STATES v. CAROLENE PRODUCTS CO., 304 U.S. 144 (1938), explained that the correct judicial scrutiny of economic regulations necessitated (1) a presumption of constitutionality and (2) the rational basis test: "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the

assumption that it rests upon some rational basis within the knowledge and experience of the legislators." Employing this test, Justice Stone's opinion for the majority upheld a federal act prohibiting substituting vegetable oil for milk fat in milk transported in interstate commerce against a due process challenge.

Yet *Carolene Products* also suggested, in its famous footnote four (arguably the most significant footnote in any American constitutional decision), that a more searching inquiry might be required if the legislation was (1) inconsistent with explicit constitutional text, (2) interfered with democratic processes, or (3) violated the rights of "discrete and insular minorities." Footnote four detailed:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . than are most other types of legislation. [The Court then cited as examples prior decisions regarding voting rights, dissemination of information, interference with political organizations, and banning peaceful assembly.]
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

But, with these possible exceptions, otherwise the rational basis test, and its presumption of constitutionality, would apply, requiring only a conceivable basis to conclude that the challenged law bears a rational relationship to a constitutionally permissible government objective. The following case illustrates the deference afforded under this rational basis test.

WILLIAMSON v. LEE OPTICAL OF OKLAHOMA, INC.
348 U.S. 483 (1955)

Mr. JUSTICE DOUGLAS delivered the opinion of the Court.

This suit was instituted in the District Court to have an Oklahoma law declared unconstitutional and to enjoin state officials from enforcing it, for the reason that it allegedly violated various provisions of the Federal Constitution. . . . The District Court held unconstitutional portions . . . of the Act . . . which make it unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances, except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist.

An ophthalmologist is a duly licensed physician who specializes in the care of the eyes. An optometrist examines eyes for refractive error, recognizes (but does not treat) diseases of the eye, and fills prescriptions for eyeglasses. The optician is an artisan qualified to grind lenses, fill prescriptions, and fit frames.

In practical effect, [the statute] means that no optician can fit old glasses into new frames or supply a lens, whether it be a new lens or one to duplicate a lost or broken lens, without a prescription. The District Court conceded that it was in the competence of the police power of a State to regulate the examination of the eyes. But it rebelled at the notion that a State could require a prescription from an optometrist or ophthalmologist "to take old lenses and place them in new frames and then fit the completed spectacles to the face of the eyeglass wearer." . . . It was, accordingly, the opinion of the court that this provision of the law violated the Due Process Clause by arbitrarily interfering with the optician's right to do business.

The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. It appears that in many cases the optician can easily supply the new frames or new lenses without reference to the old written prescription. It also appears that many written prescriptions contain no directive data in regard to fitting spectacles to the face. But in some cases the directions contained in the prescription are essential, if the glasses are to be fitted so as to correct the particular defects of vision or alleviate the eye condition. The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses. Likewise, when it is necessary to duplicate a lens, a written prescription may or may not be necessary. But the legislature might have concluded that one was needed often enough to require one in every case. Or the legislature may have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert. To be sure, the present law does not require a new examination of the eyes every time the frames are changed or the lenses duplicated. For if the old prescription is on file with the optician, he can go ahead and make the new fitting or duplicate the lenses. But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. "For protection against abuses by legislatures the people must resort to the polls, not to the courts." . . .

[The Court unanimously upheld other aspects of the Oklahoma law under similar reasoning.]

Notice the deference afforded to the legislation in *Williamson v. Lee Optical*: the legislature "might have concluded" or "it might be thought that the particular legislative measure was a rational way to correct it." Is the Court now too deferential to the legislature on economic regulation?

Since 1937, the Supreme Court has not invalidated any economic regulations on substantive due process grounds. Instead, the Court has upheld regulations against due process challenges that required debt adjustors to be lawyers (thus putting non-lawyer debt adjustors out of business) and that have created retroactive civil liability on businesses and taxpayers. Economic substantive due process thus appears largely dead—economic regulations, though, may still be subject to challenge on other constitutional grounds, such as the Takings Clause, the Contracts Clause, or, in exceedingly rare cases, the Equal Protection Clause.

But the demise of economic substantive due process has not precluded other textual and nontextual constitutional rights from enhanced protection from government interference. First, the Court turned to the Equal Protection Clause (and to the First Amendment, as detailed in a subsequent chapter). Later, the Court began to revive substantive due process review to incorporate the textual provisions of the Bill of Rights to apply against the states and to protect nontextual fundamental autonomy rights from government interference, unless the government had a compelling basis for the intrusion.

2. THE RISE OF EQUAL PROTECTION

After the demise of economic substantive due process, the Court turned to the Equal Protection Clause to both protect nontextual fundamental rights and to protect minorities against discrimination with enhanced judicial scrutiny, which is known today as "strict scrutiny."

SKINNER v. OKLAHOMA
316 U.S. 535 (1942)

Mr. JUSTICE DOUGLAS delivered the opinion of the Court.

This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring. Oklahoma has decreed the enforcement of its law against petitioner, overruling his claim that it violated the Fourteenth Amendment. Because that decision raised grave and substantial constitutional questions, we granted the petition for certiorari.

The statute involved is Oklahoma's Habitual Criminal Sterilization Act. That Act defines an "habitual criminal" as a person who, having been convicted two or more times for crimes "amounting to felonies involving moral turpitude," either in an Oklahoma court or in a court of any other State, is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution. Machinery is provided for the institution by the Attorney General of a proceeding against such a person in the Oklahoma courts for a judgment that such person shall be rendered sexually sterile. Notice, an opportunity to be heard, and the right to a jury trial are provided. The issues triable in such a proceeding are narrow and confined. If the court or jury finds that the defendant is an "habitual criminal" and that he "may be rendered sexually sterile without detriment to his or her general health," then the court "shall render judgment to the effect that said defendant be rendered sexually sterile" by the operation of vasectomy in case of a male, and of salpingectomy in case of a female. Only one other provision of the Act is material here, and that is § 195, which provides that "offenses arising out of the violation of the prohibitory laws,

revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act."

Petitioner was convicted in 1926 of the crime of stealing chickens, and was sentenced to the Oklahoma State Reformatory. In 1929 he was convicted of the crime of robbery with firearms, and was sentenced to the reformatory. In 1934 he was convicted again of robbery with firearms, and was sentenced to the penitentiary. He was confined there in 1935 when the Act was passed. In 1936 the Attorney General instituted proceedings against him. Petitioner in his answer challenged the Act as unconstitutional by reason of the Fourteenth Amendment. A jury trial was had. The court instructed the jury that the crimes of which petitioner had been convicted were felonies involving moral turpitude, and that the only question for the jury was whether the operation of vasectomy could be performed on petitioner without detriment to his general health. The jury found that it could be. A judgment directing that the operation of vasectomy be performed on petitioner was affirmed by the Supreme Court of Oklahoma by a five to four decision.

Several objections to the constitutionality of the Act have been pressed upon us. It is urged that the Act cannot be sustained as an exercise of the police power, in view of the state of scientific authorities respecting inheritability of criminal traits. It is argued that due process is lacking because, under this Act, unlike the Act upheld in *Buck v. Bell* (1927), the defendant is given no opportunity to be heard on the issue as to whether he is the probable potential parent of socially undesirable offspring. It is also suggested that the Act is penal in character and that the sterilization provided for is cruel and unusual punishment and violative of the Fourteenth Amendment. We pass those points without intimating an opinion on them, for there is a feature of the Act which clearly condemns it. That is, its failure to meet the requirements of the equal protection clause of the Fourteenth Amendment.

We do not stop to point out all of the inequalities in this Act. A few examples will suffice. In Oklahoma, grand larceny is a felony. Larceny is grand larceny when the property taken exceeds $20 in value. Embezzlement is punishable "in the manner prescribed for feloniously stealing property of the value of that embezzled." Hence, he who embezzles property worth more than $20 is guilty of a felony. A clerk who appropriates over $20 from his employer's till and a stranger who steals the same amount are thus both guilty of felonies. If the latter repeats his act and is convicted three times, he may be sterilized. But the clerk is not subject to the pains and penalties of the Act no matter how large his embezzlements nor how frequent his convictions. A person who enters a chicken coop and steals chickens commits a felony; and he may be sterilized if he is thrice convicted. If, however, he is a bailee of the property and fraudulently appropriates it, he is an embezzler. Hence, no matter how habitual his proclivities for embezzlement are and no matter how often his conviction, he may not be sterilized. . . .

It was stated in *Buck v. Bell* that the claim that state legislation violates the equal protection clause . . . is "the usual last resort of constitutional arguments." Under our constitutional system the States in determining the reach and scope of particular legislation need not provide "abstract symmetry." They may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience. . . . Thus, if we had here only a question as to a State's classification of crimes, such as embezzlement or larceny, no substantial federal question would be raised. For a State

is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment. . . .

But the instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of the foregoing cases requires. We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of "equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo v. Hopkins* (1886). When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. *Yick Wo*. Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks. . . . In terms of fines and imprisonment, the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn. In *Buck v. Bell*, the Virginia statute was upheld though it applied only to feeble-minded persons in institutions of the State. But it was pointed out that "so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached." Here there is no such saving feature. Embezzlers are forever free. Those who steal or take in other ways are not. . . .

Mr. CHIEF JUSTICE STONE, concurring:

I concur in the result, but I am not persuaded that we are aided in reaching it by recourse to the equal protection clause. . . . I think the real question we have to consider is not one of equal protection, but whether the wholesale condemnation of a class to such an invasion of personal liberty, without opportunity to any individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process.

There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned (see *United States v. Carolene Products Co.* (1938)) and where the presumption is resorted to only to dispense with a procedure which the ordinary dictates of prudence would seem to demand for the protection of the individual from arbitrary action. Although petitioner here was given a hearing to ascertain whether sterilization would be detrimental to his health, he was given none to discover whether his criminal tendencies are of an inheritable

type. Undoubtedly a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies. *Buck v. Bell*. But until now we have not been called upon to say that it may do so without giving him a hearing and opportunity to challenge the existence as to him of the only facts which could justify so drastic a measure. . . .

[The] State does not contend—nor can there be any pretense—that either common knowledge or experience, or scientific investigation, has given assurance that the criminal tendencies of any class of habitual offenders are universally or even generally inheritable. In such circumstances, inquiry whether such is the fact in the case of any particular individual cannot rightly be dispensed with. . . . A law which condemns, without hearing, all the individuals of a class to so harsh a measure as the present because some or even many merit condemnation, is lacking in the first principles of due process. . . .

Mr. JUSTICE JACKSON concurring:

I join the CHIEF JUSTICE in holding that the hearings provided are too limited in the context of the present Act to afford due process of law. I also agree with the opinion of Mr. JUSTICE DOUGLAS that the scheme of classification set forth in the Act denies equal protection of the law. I disagree with the opinion of each in so far as it rejects or minimizes the grounds taken by the other. . . .

There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes. But this Act falls down before reaching this problem, which I mention only to avoid the implication that such a question may not exist because not discussed. On it I would also reserve judgment.

The *Skinner* majority avoided the presented due process question, instead resolving the case on equal protection grounds. While recognizing that generally states could make distinctions in the punishments afforded to even similar crimes without violating the Equal Protection Clause, the Court viewed the presented situation as different because the punishment involved "one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." As a result, the Court reasoned that "strict scrutiny of the classification" was necessary to prevent "invidious discriminations" against particular groups or classes of individuals. The Court held that such an invidious classification existed here when embezzlers (often white-collar workers) were not subject to sterilization, while those committing larceny were subject to sterilization.

Chief Justice Stone preferred analyzing the case under due process, as Skinner was not provided an opportunity to prove "whether his criminal tendencies are of an inheritable type." Justice Jackson would have relied on both equal protection and due process rationales. Why did the majority refrain from analyzing the due process question? Could the Court have been concerned with reinvigorating due process review so shortly after disavowing heightened due process scrutiny of state legislation?

If the law had required the sterilization of all those committing three felonies, without drawing

distinctions between offenses, would the Court have upheld the sterilization program? As discussed in the prior section, the Supreme Court in *Buck v. Bell* upheld a sterilization program for the "feeble-minded" in state institutions. *Skinner* did not overrule *Buck v. Bell*, instead distinguishing it (which allowed sterilization programs like the one in *Buck* to continue until the early 1970s, with over 65,000 Americans with alleged mental illnesses or developmental disabilities sterilized). Is the *Skinner* Court's discomfort with the Oklahoma statute based on distinguishing criminality traits from those traits it believed inheritable, such as mental illness?

Skinner explained that, to ensure that the Equal Protection Clause's purpose of preventing invidious discrimination was satisfied with respect to classifications impacting fundamental rights, such as the right to procreate, the appropriate scrutiny was "strict scrutiny" rather than rational basis. In the following case, decided two year later, the Court stated that "most rigid" scrutiny under the Equal Protection Clause should also apply to classifications made on the basis of race and national origin, but nevertheless held that the government had a sufficiently compelling reason for the classification.

KOREMATSU v. UNITED STATES
323 U.S. 214 (1944)

Mr. JUSTICE BLACK delivered the opinion of the Court.

[Two months after the Japanese attack on Pearl Harbor, President Franklin D. Roosevelt signed Executive Order 9066, authorizing the Secretary of War and U.S. military commanders to prevent possible espionage and sabotage by declaring parts of the U.S. to be "military areas." Pursuant to that authority, the west coast of the U.S. was declared to be under military command. The Army then issued a series of security orders directed at those of Japanese descent living on the west coast: first imposing a curfew, then an exclusion from coastal areas, and finally a directive to report to internment camps in the interior of the country.

In *Hirabayashi v. United States*, 320 U.S. 81 (1943), the Supreme Court unanimously upheld the conviction of a curfew violator, holding that, while the regulations were explicitly discriminatory based on Japanese ancestry, the Constitution empowered the federal government to enact and enforce such a restriction in the interest of national security.

Two additional cases reached the Supreme Court the next year. One filed by Endo, a loyal U.S. citizen of Japanese ancestry, challenged the legality of the government's internment. The day before the Supreme Court announced its holding in *Ex parte Endo*, 323 U.S. 283 (1944), the military revoked the internment orders. The Court the next day unanimously held that the President's executive orders that provided the authority for the evacuation of those of Japanese ancestry did not authorize the continued detention of loyal U.S. citizens.

But in the companion case, the Supreme Court upheld, in a divided opinion, Korematsu's conviction in federal district court for remaining in a "military area."]

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area," contrary to Civilian Exclusion Order No.

34 of the . . . U.S. Army, which directed that . . . all persons of Japanese ancestry shall be excluded from that area. No question was raised as to petitioner's loyalty to the United States. . . .

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can. . . .

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated, was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066. That order, issued after we were at war with Japan, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. . . ."

. . . In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas. . . .

Here, as in *Hirabayashi*, " . . . we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it."

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group. [Because of] the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal, we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan. . . .

[W]e are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. . . .

[The Court refused to consider the validity of a portion of the order requiring Korematsu to remain in a relocation center because he was not convicted of violating that portion of the order.]

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Mr. JUSTICE ROBERTS, dissenting.

. . . This is not a case of keeping people off the streets at night as was *Hirabayashi*, nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated. . . .

Mr. JUSTICE MURPHY, dissenting.

. . . Justification for the exclusion is sought . . . mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence. Individuals of Japanese ancestry are condemned because they are said to be "a large, unassimilated, tightly knit

racial group, bound to an enemy nation by strong ties of race, culture, custom and religion." They are claimed to be given to "emperor worshiping ceremonies" . . . .

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation. . . .

Mr. JUSTICE JACKSON, dissenting.

. . . Had Korematsu been one of four—the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole—only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. . . .

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. . . .

The limitation under which courts always will labor in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? . . . Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint. . . .

[A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. . . . [O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution . . . , the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon . . . . [I]f we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case. . . .

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy. . . .

I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.

Because the exclusion order in *Korematsu* curtailed "the civil rights of a single racial group," the Court purported to subject the order "to the most rigid scrutiny," highlighting that it was "immediately suspect." Such heightened scrutiny with respect to classifications based on race or national origin parallels the judicial scrutiny of classifications impacting fundamental rights, such as the right to procreate at issue in *Skinner*. But other classifications in laws do not trigger such rigorous judicial review under the Equal Protection Clause.

Consider ***RAILWAY EXPRESS AGENCY, INC. v. NEW YORK***, 336 U.S. 106 (1949). A New York traffic regulation prohibited the operation of "advertising vehicles," defined as vehicles used for advertising other businesses. Railway Express, a nationwide delivery business, operated hundreds of trucks in New York City and sold space on the exterior sides of its trucks for advertising unconnected with its business operations. After being convicted and fined for violating the regulation in a magistrate court, Railway Express appealed through the state courts up to the U.S. Supreme Court. Among other claims, Railway Express argued that the regulation violated equal protection by distinguishing between advertising on behalf of *other* businesses and advertising on behalf of one's *own* business, even though both types of advertisements could cause equal traffic distractions. But the Supreme Court held that the discrimination at issue did not trigger heightened scrutiny under the Equal Protection Clause:

> [The] classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection. It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. And the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.

Thus, if a legal classification is not based on an inherently suspect personal characteristic or does not impact a fundamental right, judicial review is not as stringent under the Equal Protection Clause.

Yet while *Korematsu* involved national origin discrimination, purportedly triggering the "most rigid" scrutiny, the *Korematsu* majority essentially deferred to the military's judgment on the necessity of the exclusion. Although the internment ended the day before the Court issued *Korematsu*, approximately 110,000 Japanese Americans—some 70,000 of whom were U.S. citizens—had been subject in the interim to the exclusion order and internment. Subsequent examination of the documentary records leading to the military orders at issue has revealed that the government exaggerated their necessity for the nation's defense. Instead, prejudice against those of Japanese ancestry appears to have been the key motivating factor.

Almost 75 years later, in *Trump v. Hawaii*, 585 U.S. 667 (2018), the Supreme Court stated that "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" *Id.* at 710 (quoting Justice Jackson's dissent). The majority in *Trump v. Hawaii* distinguished its review of President Trump's "facially neutral policy denying certain foreign nationals the privilege of admission," which the majority held was well within the President's executive authority, from the "objectively unlawful" presidential actions in *Korematsu* of "forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race." Yet Justice Sotomayor's dissent maintained that the parallels between *Korematsu* and President Trump's proclamation denying entry to the nationals of eight foreign states were striking: in both cases, she maintained, the government invoked an ill-defined threat to national security as justifying an exclusionary policy rooted in stereotypes and impermissible hostility and animus (in the present case against Muslims based on the connections the President and his advisors made between his policy and his campaign call for a ban on Muslims entering the country). If the key difference between *Korematsu* and *Trump v. Hawaii* is the neutrality of the order, does that mean that President Roosevelt's order would have been acceptable today if it applied to all recent descendants of one of the Axis powers?

After World War II, race-based prejudice was still ensconced in other laws across the U.S., as the segregation approved by *Plessy v. Ferguson* under the "separate but equal" doctrine was still rampant in the South. Despite the "separate but equal" moniker, the Supreme Court initially did not even mandate true "equality" with respect to racially segregated facilities. In *Cumming v. Board of Education*, 175 U.S. 528 (1899), the Court upheld the closing of an all-male Black high school for "economic" reasons, even though the all-male white high school was kept open and public money was provided to a private school for white girls. But later, the Court began to make the separate but equal doctrine more difficult to satisfy.

In *Missouri ex. rel. Gaines v. Canada*, 305 U.S. 337 (1938), Missouri offered to provide a Black law school applicant an education outside the state, but denied him entrance to the state's own law school because of his race, which the Supreme Court held violated equal protection. In the companion cases of *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), the Court subsequently held that the government had not provided substantially equal educational opportunities for Black students with respect to a law school and a graduate school, respectively. *McLaurin* held that a Black graduate student could not be segregated alone from his fellow graduate students in the classroom, in the library, and in the cafeteria: "Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." *Sweatt* concluded that the newly created law school at the Texas State University for Negroes (now Thurgood Marshall School of Law at Texas Southern University) was not substantially equal to the University of Texas law school, which was reserved for whites. *Sweatt* expressly reserved the question whether separate but equal remained constitutionally acceptable—which it answered in the following case.

BROWN v. BOARD OF EDUCATION
347 U.S. 483 (1954)

Mr. CHIEF JUSTICE WARREN delivered the opinion of the Court.

[Four equal protection challenges were filed by Black pupils to obtain admission to the public schools in Kansas, South Carolina, Virginia, and Delaware on a nonsegregated basis. The pupils had all been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. The plaintiff students contended that segregated public schools were inherently unequal and thus were a deprivation of the equal protection of the laws. The case was originally argued before the Court during the 1952 Term, but was reargued during the 1953 Term after the Court propounded several questions to the parties regarding the original intent behind the Equal Protection Clause with respect to segregation.]

. . . 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 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. . . .

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 *Cumming v. Board of Education of Richmond County*, the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines v. Canada*; *Sweatt v. Painter*; *McLaurin v. Oklahoma State Regents*. In none of these cases was it necessary to

re-examine the doctrine to grant relief . . . . And in *Sweatt v. Painter*, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the 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 . . . .

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. . . . 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.

In *Sweatt v. Painter*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: " . . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. 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 racial[ly] integrated school system.

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.

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 . . . [are] 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.

[The Court then restored the cases to the docket to consider the appropriate remedy.]

While *Brown* generated "massive resistance," the decision—as well as federal legislative action—eventually led to a dismantling of forced legal segregation in public school education. The Supreme Court charged the federal district courts to enter such orders as necessary and proper to ensure integration "with all deliberate speed." These orders could include busing or redrawing boundaries within a school district to achieve "unitary status," in which the vestiges of the past discrimination had been removed. Today, almost all school districts have achieved "unitary status." But, due to socioeconomic factors, minority students still often attend schools that are predominantly composed of other minority students, a problem that will be considered in a subsequent chapter.

At the same time that the Court was integrating the schools, it was also dismantling segregation in other areas, relying on *Brown* even though its holding seemed to be limited to the educational setting.

Despite the promise of the Equal Protection Clause starting to be fulfilled, the Court came to be faced with other claims of preferred or fundamental rights that could not be decided under equal protection. As a result, the Supreme Court rekindled a new form of substantive due process.

3. PRIVACY, DUE PROCESS, AND INCORPORATION

Equal protection analysis depends upon classifications in laws. *Skinner* held that, if such a classification infringed upon a fundamental constitutional right, such as the nontextual right to procreate, strict judicial scrutiny was appropriate. But what if the law failed to make a classification, instead treating everyone similarly? In the next principal case, *Griswold v. Connecticut*, an equal

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[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); Brumeld, 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 Myrdul, An American Dilemma (1944).

protection challenge was not possible—because the law prohibited everyone from access to contraceptives designed to prevent conception.

Yet there was a hesitancy by some members of the Court to rely on substantive due process to invalidate the law. Since 1937, the Court had not invalidated any legislative action under substantive due process principles, except for decisions employing the "liberty" component of due process to incorporate provisions of the Bill of Rights against the states.

The idea of incorporation, as discussed earlier in the materials on the *Lochner* era, was that at least some of the first eight amendments to the Constitution applied against the states as an aspect of "liberty" protected by the Fourteenth Amendment's Due Process Clause. Many of the due process decisions decided by the Court from the 1940s to the 1960s addressed whether specific aspects of the first eight amendments should be incorporated to apply against state and local governments. There were three basic approaches that different Justices adopted.

Justice Black, joined typically by Justice Douglas, contended that *all* the first eight amendments should be made applicable to the states, a theory known as "total incorporation." He viewed the historical evidence as establishing that those who sponsored and favored the Fourteenth Amendment intended, as one of their chief objectives, to make the Bill of Rights applicable to the states. He relied on congressional materials to argue that the Amendment was designed to overrule *Barron*. In his view, "liberty" in the Fourteenth Amendment meant only the textual provisions of the first eight amendments. He objected both to nontextual rights being protected as "liberty" and to the judiciary selecting which rights in the Bill of Rights applied against the states, reasoning both were analogous to the "natural law" approach to constitutional interpretation reminiscent of the *Lochner* era.

Their antagonists were typically Justices Frankfurter and Harlan, who championed a fundamental rights analysis. Their belief was that the Fourteenth Amendment neither comprehended the first eight amendments nor was confined to them. Rather, they viewed "liberty" as having an independent meaning. Indeed, according to these Justices, "liberty" in the Fourteenth Amendment could not include all the rights specified in the first eight amendments, because one of those rights was the Fifth Amendment's Due Process Clause, which also protected "liberty." If "liberty" was simply a shorthand for all the rights in the Bill of Rights, then everything in the Bill of Rights was surplusage other than the Due Process Clause.

The Court eventually adopted a "selective incorporation" approach, incorporating on a right-by-right basis aspects of the first eight amendments to apply against the actions of state and local governments. This "selective incorporation" approach became especially prevalent in the 1960s, when the Warren Court began incorporating almost all the provisions of the Fourth, Fifth, and Sixth Amendments against the states. The various *Griswold* opinions below include aspects of the incorporation debate in holding a Connecticut statute prohibiting contraceptive use and advice (even if the couple was married) violated the Due Process Clause.

GRISWOLD v. CONNECTICUT
381 U.S. 479 (1965)

Mr. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven—a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instruction, and medical advice to married persons as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free. [Their actions violated Connecticut statutes, on the books since 1879, that prohibited any person from using "any drug, medicinal article or instrument for the purpose of preventing conception" or from assisting, abetting, or counseling another to use such devices to prevent conception. They were found guilty as accessories and fined $100 each, which they challenged under the Fourteenth Amendment. After concluding they had standing to raise the constitutional rights of the married individuals with whom they had a professional relationships, the Court turned to the merits.]

[We] are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce v. Society of Sisters*, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska*, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. . . . And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

In *NAACP v. Alabama* we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. . . . In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. . . .

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment

is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against 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 have had many controversies over these penumbral rights of "privacy and repose." *See, e.g.*, . . . *Skinner v. Oklahoma*. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

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.

Mr. JUSTICE GOLDBERG, whom THE CHIEF JUSTICE and Mr. JUSTICE BRENNAN join, concurring.

I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that "due process" as used in the Fourteenth Amendment incorporates all of the first eight Amendments, I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment, I add these words to emphasize the relevance of that Amendment to the Court's holding.

The Court stated many years ago that the Due Process Clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." . . . The Court, in a series of decisions, has held the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights. The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental right specifically mentioned in the first eight constitutional amendments.

The Ninth Amendment . . . was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected. In presenting the proposed Amendment, Madison said:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to [the Ninth Amendment].

. . . [The] Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people. . . .

To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. . . . [The] Ninth Amendment . . . lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . ."

. . . The logic of the dissents would sanction federal or state legislation that seems to me even more plainly unconstitutional than the statute before us. Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. Yet by their reasoning, such an invasion of marital privacy would not be subject to constitutional challenge because, while it might be "silly," no provision of the Constitution specifically prevents the Government from curtailing the marital

right to bear children and raise a family. While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected. . . .

Mr. JUSTICE HARLAN, concurring in the judgment.

I fully agree with the judgment of reversal, but find myself unable to join the Court's opinion. The reason is that it seems to me to evince an approach to this case very much like that taken by my Brothers Black and Stewart in dissent, namely: the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights.

In other words, what I find implicit in the Court's opinion is that the "incorporation" doctrine may be used to restrict the reach of Fourteenth Amendment Due Process. For me this is just as unacceptable constitutional doctrine as is the use of the "incorporation" approach to impose upon the States all the requirements of the Bill of Rights as found in the provisions of the first eight amendments and in the decisions of this Court interpreting them. . . .

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty." . . . I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

Mr. JUSTICE WHITE, concurring in the judgment.

In my view this Connecticut law as applied to married couples deprives them of "liberty" without due process of law, as that concept is used in the Fourteenth Amendment. . . .

[S]tatutes regulating sensitive areas of liberty do, under the cases of this Court, require "strict scrutiny," *Skinner v. Oklahoma*. . . . But such statutes, if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause. . . .

In these circumstances one is rather hard pressed to explain how the ban on use by married persons in any way prevents use of such devices by persons engaging in illicit sexual relations and thereby contributes to the State's policy against such relationships. Neither the state courts nor the State before the bar of this Court has tendered such an explanation. . . . A statute limiting its prohibition on use to persons engaging in the prohibited relationship would serve the end posited by Connecticut

in the same way, and with the same effectiveness, or ineffectiveness, as the broad anti-use statute under attack in this case. I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law.

Mr. JUSTICE BLACK, with whom Mr. JUSTICE STEWART joins, dissenting.

. . .The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy.". . . 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. . . .

The due process argument which my Brothers HARLAN and WHITE adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this Court's belief that a particular state law under scrutiny has no "rational or justifying" purpose, or is offensive to a "sense of fairness and justice." If these formulas based on "natural justice," or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body. Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous. . . .

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law. The Due Process Clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. *Lochner v. New York*. That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all . . . .

Mr. JUSTICE STEWART, whom Mr. JUSTICE BLACK joins, dissenting.

Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do. . . .

Pay particular attention to the theories of each separate opinion in *Griswold*. Justice Douglas wrote the majority opinion, relying on the "penumbras" of various provisions in the Bill of Rights to find a protected right of privacy—which included the right of a married couple to decide whether to use birth control—that applied against the states under incorporation principles. What might have motivated him to author his opinion in this fashion, rather than simply relying upon a nontextual fundamental right of marital privacy protected as "liberty" under the Due Process Clause?

While Justice Goldberg joined the Court's opinion, he also wrote a separate concurrence, joined by Chief Justice Warren and Justice Brennan, based on the Due Process Clause and the Ninth Amendment. Justice Harlan concurred, relying solely on the Due Process Clause itself; he concluded that certain rights that were "implicit in the concept of ordered liberty" should receive heightened scrutiny. Justice White also concurred; he concluded that certain personal rights should receive "strict scrutiny" under the Due Process Clause, relying on *Skinner* for support.

Justices Black and Stewart dissented. Stewart, while accepting the idea that the Connecticut statute was "asinine," argued that there was no basis for judicial action; he would have left the issue to the political process. Justice Black's dissent highlighted parallels to *Lochner*, arguing that subjective "natural justice" considerations were "no less dangerous when used to enforce this Court's views about personal rights than those about economic rights."

Despite the pains that Justice Douglas took in the majority opinion to refrain from relying upon a nontextual "liberty" as the basis for the holding, *Griswold* is acknowledged as a substantive due process case, albeit one involving individual autonomy rights rather than economic rights. Notice Justice Douglas' reliance on *Meyer* and *Pierce*, which, despite his efforts to recharacterize them as First Amendment cases, were substantive due process cases (indeed, since the First Amendment had not been incorporated yet to apply against the states when *Meyer* and *Pierce* were decided, the decisions by necessity had to be substantive due process cases). Thus, *Griswold* reinvigorated substantive due process, although in a more limited form than during the *Lochner* era.

But the Court also continued to protect against invidious discrimination under equal protection principles. The following case demonstrates that both due process and equal protection may be implicated in the same case, as Justice Jackson recognized in his concurrence in *Skinner*.

LOVING v. VIRGINIA
388 U.S. 1 (1967)

Mr. CHIEF JUSTICE WARREN delivered the opinion of the 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 and Due Process Clauses of the Fourteenth Amendment. For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand . . . .

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. . . . [A] grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

> Almighty God created the races . . . and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. . . .

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. . . . Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications. The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a "white person" marrying other than another "white person" . . . .

I.

. . . [T]he State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, 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*, or an exemption in Ohio's ad valorem tax for merchandise owned by a nonresident in a storage warehouse. In these 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. . . .

[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. *Slaughter-House Cases*; *Strauder v. West Virginia.*

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 "distinctions 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*. 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*, 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. . . .

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.

II.

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. Oklahoma*. To deny this fundamental freedom on so unsupportable a basis as the racial

classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

Mr. JUSTICE STEWART, concurring.

I have previously expressed the belief that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." Because I adhere to that belief, I concur in the judgment of the Court.

While reinvigorating substantive due process doctrine, the Court also largely completed the incorporation process. Justice Black's total incorporation theory was never adopted by the Court, but he essentially obtained the result he desired as almost every provision in the first eight amendments has been "selectively" incorporated to apply against state and local governments.

DUNCAN v. LOUISIANA
391 U.S. 145 (1968)

Mr. JUSTICE WHITE delivered the opinion of the Court.

Appellant, Gary Duncan, was convicted of simple battery[,] . . . a misdemeanor, punishable by a maximum of two years' imprisonment and a $300 fine. Appellant sought trial by jury, but because the Louisiana Constitution grants jury trials only in cases in which capital punishment or imprisonment at hard labor may be imposed, the trial judge denied the request. Appellant was convicted and sentenced to serve 60 days in the parish prison and pay a fine of $150. . . .

The Fourteenth Amendment denies the States the power to "deprive any person of life, liberty, or property, without due process of law." In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State; the rights of speech, press, and religion covered by the First Amendment; the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized; the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination; and the Sixth Amendment rights to counsel, to a speedy and public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses.

The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked

whether a right is among those "'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," whether it is "basic in our system of jurisprudence," and whether it is "a fundamental right, essential to a fair trial." The claim before us is that the right to trial by jury guaranteed by the Sixth Amendment meets these tests. The position of Louisiana, on the other hand, is that the Constitution imposes upon the States no duty to give a jury trial in any criminal case, regardless of the seriousness of the crime or the size of the punishment which may be imposed. Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee. Since we consider the appeal before us to be such a case, we hold that the Constitution was violated when appellant's demand for jury trial was refused. . . .

The State of Louisiana urges that holding that the Fourteenth Amendment assures a right to jury trial will cast doubt on the integrity of every trial conducted without a jury. Plainly, this is not the import of our holding. Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial.

[The Court then held that the offense was not petty because the punishment for battery was up to two years in prison, and a jury trial was required since Duncan had not waived his jury trial rights.]

Mr. JUSTICE BLACK, with whom Mr. JUSTICE DOUGLAS joins, concurring.

. . . I want to emphasize that I believe as strongly as ever that the Fourteenth Amendment was intended to make the Bill of Rights applicable to the States. I have been willing to support the selective incorporation doctrine, however, as an alternative, although perhaps less historically supportable than complete incorporation. The selective incorporation process, if used properly, does limit the Supreme Court in the Fourteenth Amendment field to specific Bill of Rights' protections only and keeps judges from roaming at will in their own notions of what policies outside the Bill of Rights are desirable and what are not. And, most importantly for me, the selective incorporation process has the virtue of having already worked to make most of the Bill of Rights' protections applicable to the States.

Mr. JUSTICE HARLAN, whom Mr. JUSTICE STEWART joins, dissenting.

Every American jurisdiction provides for trial by jury in criminal cases. The question before us is not whether jury trial is an ancient institution, which it is; nor whether it plays a significant role in the administration of criminal justice, which it does; nor whether it will endure, which it shall. The question in this case is whether the State of Louisiana, which provides trial by jury for all felonies, is prohibited by the Constitution from trying charges of simple battery to the court alone. In my view, the answer to that question, mandated alike by our constitutional history and by the longer history

of trial by jury, is clearly "no." . . .

The Court's approach to this case is an uneasy and illogical compromise among the views of various Justices on how the Due Process Clause should be interpreted. The Court does not say that those who framed the Fourteenth Amendment intended to make the Sixth Amendment applicable to the States. And the Court concedes that it finds nothing unfair about the procedure by which the present appellant was tried. Nevertheless, the Court reverses his conviction: it holds . . . that the Due Process Clause incorporates the particular clause of the Sixth Amendment that requires trial by jury in federal criminal cases . . . .

In my view, . . . the first section of the Fourteenth Amendment was meant neither to incorporate, nor to be limited to, the specific guarantees of the first eight Amendments. . . . Today's Court . . . has simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is "in" rather than "out."

. . . I can find in the Court's opinion no real reasons for concluding that it should be "in." The basis for differentiating among clauses in the Bill of Rights cannot be that only some clauses are in the Bill of Rights, or that only some are old and much praised, or that only some have played an important role in the development of federal law. These things are true of all. . . .

. . . When a criminal defendant contends that his state conviction lacked "due process of law," the question before this Court, in my view, is whether he was denied any element of fundamental procedural fairness.

That trial by jury is not the only fair way of adjudicating criminal guilt is well attested by the fact that it is not the prevailing way, either in England or in this country. [Justice Harlan then points out that only 1% of criminal defendants in England receive a jury trial and only about 12-15% in America due to plea bargaining, bench trials, etc. He then urged that states should be able to continue to experiment for the best approach without federal judicial intervention.]

[The concurring opinion of Justice Fortas has been omitted.]

With these foundational cases as a backdrop, Chapters 5-7 analyze in more detail the modern bases for constitutional protections for individual rights and liberties under the Fifth and Fourteenth Amendments. Chapter 5 addresses modern substantive due process, including both the incorporation doctrine and protections for nontextual fundamental rights. Chapter 5 concludes with the more natural "procedural due process" reading of the Due Process Clauses in the Fifth and Fourteenth Amendments. Chapter 6 is an in-depth examination of modern equal protection doctrine. Chapter 7 studies in more detail the "state action" problem from the *Civil Rights Cases*.

But do not forget the foundational cases studied in this chapter. Not only will there be constant references to these foundations in the modern cases, but the foundations also help explain the connections between all the Constitution's protections for individual rights and liberties.

CHAPTER FIVE
DUE PROCESS OF LAW

The United States Constitution has two Due Process Clauses: one in the Fifth Amendment, which applies to the federal government, and one in the Fourteenth Amendment, which applies to state and local governments. Both clauses prevent government deprivations of "life, liberty, or property, without due process of law."

Despite this textual simplicity, the Due Process Clauses have a kaleidoscope quality, with numerous different applications in different contexts. This chapter focuses on three particular aspects of due process: (1) incorporation, through which constitutionally protected rights not textually applicable to that sovereign are encompassed within the substantive "liberty" protected against federal or state deprivations; (2) substantive due process protections for nontextual, yet "fundamental rights" or constitutionally protected "liberties," from arbitrary government interference; and (3) procedural due process, which ensures that government actions depriving persons of life, liberty, or property have appropriate safeguards to limit the likelihood of an erroneous deprivation. Each of these three aspects will be examined in turn.

A. SUBSTANTIVE DUE PROCESS INCORPORATION

The Fourteenth Amendment's Due Process Clause "incorporates" most provisions of the Bill of Rights to apply against the actions of state and local governments. As discussed in the last chapter, the Court first acknowledged around the beginning of the twentieth century that the word "liberty" in the Due Process Clause might encompass certain aspects of the Bill of Rights that were fundamental principles inhering in the very idea of free government. Although the Court was cautious regarding incorporation before 1960 (incorporating only the First Amendment freedoms, protections against unreasonable searches and seizures, and safeguards against government takings), the Warren Court during the 1960s accelerated the process and incorporated almost all the criminal procedure protections, as outlined in *Duncan v. Louisiana* in the last chapter.

In 2010, the Supreme Court returned to the incorporation debate for the first time in over four decades. *McDonald v. City of Chicago*, 561 U.S. 742 (2010), considered whether the Second Amendment right to bear arms should be incorporated to apply against state and local governments.

DISTRICT OF COLUMBIA v. HELLER, 554 U.S. 570 (2008), issued only two years before *McDonald*, held for the first time that the Second Amendment protected an individual right to keep and bear arms for self-defense that could be asserted against the federal government. The text of the Second Amendment has always been an enigma. It provides: "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." This grammatical structure, with its introductory prefatory clause referencing the "Militia" and state "security," led to a debate regarding whether the right to keep and bear arms is only constitutionally protected if connected to militia service, or whether the preface is merely a statement of purpose. The *Heller* Court, in a 5-4 decision, with dissents filed by Justices Stevens and Breyer (joined by Justices Souter and Ginsburg), adopted the latter reading, invalidating a ban on handguns and operable firearms within the home in the federal enclave of the District of Columbia.

Justice Scalia's opinion for the Court first examined the text of the Second Amendment, explaining that, by its terms, it protected "the right of the people," wording which, in other parts of the Constitution, refers unambiguously to an individual right. The Court continued that the most natural meaning of the next phrase, "to keep and bear arms," was to possess and carry weapons in case of confrontation. In light of this operative scope of the right, the prefatory clause, according to the Court, merely announced the purpose for which the right was codified in the Constitution: to prevent elimination of an armed citizenry militia. But this did not change that "the central component" of the preexisting right to keep and bear arms was for individual self-defense. This inherent right to self-defense was violated when the District's ordinances totally banned handgun possession or operable firearms in the home, where "the need for defense . . . is most acute." According to the Court, the ordinances were invalid under any level of scrutiny applicable to enumerated constitutional rights.

The *Heller* Court cautioned, though, that the right to keep and bear arms is "not unlimited;" it is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." As a result, its holding did not, for example, "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." And the Court limited its rationale to arms for self-defensive purposes "in common use at the time," rather than those that were "dangerous or unusual."

Among the many questions left open in *Heller* was whether the right to keep and bear arms applied against state and local governments, rather than just in a federal territory like the District of Columbia. As highlighted in the last chapter, the original judicial interpretation of the Fourteenth Amendment was extremely narrow, with the *Slaughter-House Cases* holding that the amendment's Privileges or Immunities Clause only protected those rights of national citizenship that were wholly distinct from those inalienable, fundamental rights of state citizenship that predated the creation of the federal government. Shortly after *Slaughter-House*, a series of cases confirmed this narrow interpretation, and specifically held that the right to keep and bear arms was not one of the rights of national citizenship protected by the Privileges or Immunities Clause. *United States v. Cruikshank*, 92 U.S. 542, 553 (1876); *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *Miller v. Texas*, 153 U.S. 535, 538 (1894). The Court in these cases reasoned that the right to keep and bear arms for a lawful purpose was a preexisting right predating the existence of the Constitution, not a right owing its existence to the federal government.

These earlier decisions led to the dispositive issue in *McDonald*. When local residents challenged the handgun prohibitions in Chicago and Oak Park that were similar in many respects to the handgun ban invalidated in *Heller*, the municipalities' primary defense was that the Second Amendment's guarantees did not apply to the actions of state and local governments. While acknowledging that the logic of *Heller* might portend a different result, the lower federal courts concluded that they were bound to agree with the municipalities by directly applicable precedent that only could be modified by the United States Supreme Court. The Supreme Court did so in the following case.

McDONALD v. CITY OF CHICAGO
561 U.S. 742 (2010)

JUSTICE ALITO announced the judgment of the Court and [delivered an opinion joined in full by] THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY.

Two years ago, in *District of Columbia v. Heller*, 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. . . .

Petitioners, [individual city residents who desired to keep their handguns in their home for self-defense rather than storing them outside the city limits], argue that the Chicago and Oak Park laws violate the right to keep and bear arms for two reasons. Petitioners' primary submission is that this right is among the "privileges or immunities of citizens of the United States" and that the narrow interpretation of the Privileges or Immunities Clause adopted in the *Slaughter-House Cases* should now be rejected. As a secondary argument, petitioners contend that the Fourteenth Amendment's Due Process Clause "incorporates" the Second Amendment right.

Chicago and Oak Park (municipal respondents) maintain that a right set out in the Bill of Rights applies to the States only if that right is an indispensable attribute of any "civilized" legal system. If it is possible to imagine a civilized country that does not recognize the right, the municipal respondents tell us, then that right is not protected by due process. And since there are civilized countries that ban or strictly regulate the private possession of handguns, the municipal respondents maintain that due process does not preclude such measures. In light of the parties' far-reaching arguments, we begin by recounting this Court's analysis over the years of the relationship between the provisions of the Bill of Rights and the States.

The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government. *Barron v. Baltimore* (1833). [But the Fourteenth Amendment] adopted in the aftermath of the Civil War fundamentally altered our country's federal system. . . .

The *Slaughter-House Cases* . . . concluded that the Privileges or Immunities Clause protects only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." The Court held that other fundamental rights—rights that predated the creation of the Federal Government and that "the State governments were created to establish and secure"— were not protected by the Clause. . . .

Three years after the decision in the *Slaughter-House Cases*, the Court decided *Cruikshank*. In that case, the Court reviewed convictions stemming from the infamous Colfax Massacre in Louisiana on

Easter Sunday 1873. Dozens of blacks, many unarmed, were slaughtered by a rival band of armed white men, [three of whom were] convicted under the Enforcement Act of 1870 for banding and conspiring together to deprive their victims of various constitutional rights, including the right to bear arms.

The Court reversed all of the convictions, including those relating to the deprivation of the victims' right to bear arms. The Court wrote that the right of bearing arms for a lawful purpose "is not a right granted by the Constitution" and is not "in any manner dependent upon that instrument for its existence." "The second amendment," the Court continued, "declares that it shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress." . . .

Petitioners argue . . . that we should overrule those decisions and hold that the right to keep and bear arms is one of the "privileges or immunities of citizens of the United States." [But we] see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding.

At the same time, however, [our earlier] decisions . . . do not preclude us from considering whether the Due Process Clause of the Fourteenth Amendment makes the Second Amendment right binding on the States. None of those cases "engage[d] in the sort of Fourteenth Amendment inquiry required by our later cases." . . .

In the late 19th century, the Court began to consider whether the Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights. *See Hurtado v. California* (1884) (due process does not require grand jury indictment); *Chicago, B. & Q.R. Co. v. Chicago* (1897) (due process prohibits States from taking of private property for public use without just compensation). . . .

[Over several decades, the Court began] 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. . . .

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, we must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty, or as we have said in a related context, whether this right is "deeply rooted in this Nation's history and tradition." . . .

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. Explaining that "the need for defense of self, family, and property is most acute" in the home, we found that this right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family." Thus, we concluded, citizens must be permitted "to use

[handguns] for the core lawful purpose of self-defense."

Heller makes it clear that this right is "deeply rooted in this Nation's history and tradition." *Heller* explored the right's origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense, and that by 1765, Blackstone was able to assert that the right to keep and bear arms was "one of the fundamental rights of Englishmen." [Justice Alito's opinion then engaged in a lengthy historical analysis, tracing the development of the right to keep and bear arms from the colonial experience to the ratification of the Constitution and the Bill of Rights and through the Civil War and Reconstruction Amendments.]

Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise,[30] that guarantee is fully binding on the States and thus limits (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values. As noted by the 38 States that have appeared in this case as *amici* supporting petitioners, "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." . . .

In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. We . . . hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*. . . .

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I agree with the Court that the Fourteenth Amendment makes the right to keep and bear arms set forth in the Second Amendment "fully applicable to the States." I write separately because I believe there is a more straightforward path to this conclusion, one that is more faithful to the Fourteenth Amendment's text and history.

Applying what is now a well-settled test, the plurality opinion concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment's Due Process Clause because it is "fundamental" to the American "scheme of ordered liberty," and "deeply rooted in this Nation's history and tradition." I agree with that description of the right. But I cannot agree that it is enforceable against the States through a clause that speaks only to "process." Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause. [Justice Thomas then engaged in a lengthy analysis arguing that the *Slaughter-House Cases* and its progeny should be overruled and

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[30] As noted above, cases that predate the era of selective incorporation held that the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement do not apply to the States. *See Hurtado v. California* (1884) (indictment); *Minneapolis & St. Louis R. Co. v. Bombolis* (1916) (civil jury). As a result of *Hurtado*, most States do not require a grand jury indictment in all felony cases, and many have no grand juries. As a result of *Bombolis*, cases that would otherwise fall within the Seventh Amendment are now tried without a jury in state small claims courts.

the Privileges or Immunities Clause should be reinvigorated to apply the guarantees of the Second Amendment to the States.]

[The separate concurrence of Justice Scalia and the dissent of Justice Stevens have been omitted.]

JUSTICE BREYER, with whom Justices GINSBURG and SOTOMAYOR join, dissenting.

In my view, Justice Stevens has demonstrated that the Fourteenth Amendment's guarantee of "substantive due process" does not include a general right to keep and bear firearms for purposes of private self-defense. As he argues, the Framers did not write the Second Amendment with this objective in view. Unlike other forms of substantive liberty, the carrying of arms for that purpose often puts others' lives at risk. And the use of arms for private self-defense does not warrant federal constitutional protection from state regulation. . . .

I shall therefore separately consider the question of "incorporation." I can find nothing in the Second Amendment's text, history, or underlying rationale that could warrant characterizing it as "fundamental" insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes. Nor can I find any justification for interpreting the Constitution as transferring ultimate regulatory authority over the private uses of firearms from democratically elected legislatures to courts or from the States to the Federal Government. I therefore conclude that the Fourteenth Amendment does not "incorporate" the Second Amendment's right "to keep and bear Arms." And I consequently dissent. . . .

Justice Alito's plurality opinion in *McDonald*, after tracing the development of the incorporation debate, refused to revitalize the Privileges or Immunities Clause and "disturb the *Slaughter-House* holding," instead concluding that the right to keep and bear arms is incorporated in the concept of due process because it is fundamental to the American scheme of liberty and deeply rooted in the Nation's history and tradition. In sections of the opinion joined by Justice Thomas, the majority reviewed the *Heller* decision and reaffirmed that the "central component" of the Second Amendment right is "individual self-defense," a right fundamental in American history and tradition.

The Court's conclusion that the Second Amendment protected a fundamental right became the key factor in the plurality's incorporation analysis. The plurality reasoned that, "if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States . . . ." Although the plurality hinted in a footnote *stare decisis* concerns might counsel against incorporating the Fifth Amendment grand jury right or the Seventh Amendment civil jury right because many states had relied on earlier Supreme Court decisions refusing to incorporate these rights, such precedential concerns did not prevent the incorporation of the Second Amendment right recognized in *Heller*. Justice Thomas concurred that the arms right was applicable to the states, but maintained that the proper vehicle for incorporation was not the Due Process Clause, but rather the Privileges or Immunities Clause.

Justice Stevens dissented, arguing that the incorporation of substantive rights (as distinguished from procedural rights) through the Due Process Clause did not require jot-for-jot (or identical)

incorporation, and the analysis should depend on whether there is a constitutionally protected liberty to keep handguns in the home under substantive due process, which he did not believe existed due to the "fundamentally ambivalent relationship" of firearms to liberty. Justice Breyer, joined by Justices Ginsburg and Sotomayor, also dissented, arguing that the right to keep and bear arms should not be incorporated under the Due Process Clause because it did not protect the politically powerless, was outside the scope of judicial expertise, and intruded upon state police power concerns regarding the public safety.

As discussed in more detail in a subsequent chapter, the Supreme Court has returned to the right to keep and bear arms in two subsequent decisions. First, in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), the Court addressed the constitutionality of a New York law prohibiting carrying a concealed pistol or revolver without establishing proper cause for doing so by demonstrating a special need for self-protection over that of the general public. In declaring the New York law unconstitutional, the Court, in an opinion by Justice Thomas, explained that the first step is determining whether the Second Amendment's plain text covers an individual's actual or intended conduct. If so, the conduct is presumptively constitutionally protected; to rebut the presumption, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation, with the focus on the regulations existing at the time of the ratification of the Second Amendment in 1791 and the Fourteenth Amendment in 1868. The Court engaged in a lengthy historical analysis of the allegedly analogous licensing regulations existing during those periods, distinguishing many and then dismissing the remaining examples (including a Reconstruction-era law from Texas) as outliers. Justice Breyer, joined by Justices Sotomayor and Kagan, dissented, objecting both to the Court's methodology and to the Court's cherry picking of the relevant history.

In the second case, *United States v. Rahimi*, 602 U.S. __ (2024), Rahimi challenged his conviction for violating a federal statute prohibiting individuals subject to a domestic violence restraining order from possessing a firearm. The Fifth Circuit Court of Appeals agreed with Rahimi that the restriction did not "fit within our Nation's historical tradition of firearm regulation" and therefore violated the Second Amendment as interpreted in *Bruen*. But the Supreme Court, in an opinion by Chief Justice Roberts, reversed, holding that America's firearm laws since the founding included regulations to prevent individuals who threatened harm to others from misusing firearms, such as surety laws authorizing magistrates to require the posting of a bond by those likely to engage in future breaches of the peace and criminal laws punishing those menacing others with firearms. While acknowledging that these historic regulations were "by no means identical to" the federal statute's proscription on firearm possession, the Court held that the prohibition was "'relevantly similar' to those founding era regimes in both why and how it burdens the Second Amendment right." While the majority opinion was relatively concise, several lengthy concurring opinions debated the roles of history and precedent in Second Amendment doctrine and constitutional jurisprudence more broadly. Justice Thomas, the author of *Bruen*, dissented, arguing that "the founding generation addressed the same societal problem . . . through the 'materially different means' of surety laws."

In the meantime, the Supreme Court returned to the question of incorporation in 2019, with all the Justices agreeing that the Eighth Amendment's Excessive Fines Clause applied against the states.

TIMBS v. INDIANA
586 U.S. 146 (2019)

JUSTICE GINSBURG delivered the opinion of the Court.

Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. . . . At the time of Timbs's arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about $42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died.

The State engaged a private law firm to bring a civil suit for forfeiture of Timbs's Land Rover, charging that the vehicle had been used to transport heroin. After Timbs's guilty plea in the criminal case, the trial court held a hearing on the forfeiture demand. Although finding that Timbs's vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for $42,000, more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, hence unconstitutional under the Eighth Amendment's Excessive Fines Clause. The . . . Indiana Supreme Court reversed, [holding] that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions.

The question presented: Is the Eighth Amendment's Excessive Fines Clause an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause? Like the Eighth Amendment's proscriptions of "cruel and unusual punishment" and "[e]xcessive bail," the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard, we hold, is "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition." *McDonald v. Chicago* (2010). The Excessive Fines Clause is therefore incorporated. . . .

When ratified in 1791, the Bill of Rights applied only to the Federal Government. *Barron v. Baltimore* (1833). The constitutional Amendments adopted in the aftermath of the Civil War, however, "fundamentally altered our country's federal system." *McDonald*. With only "a handful" of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States. A Bill of Rights protection is incorporated, we have explained, if it is "fundamental to our scheme of ordered liberty," or "deeply rooted in this Nation's history and tradition." *Id.*

Incorporated Bill of Rights guarantees are "enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id.* Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires. . . .

The Excessive Fines Clause traces its venerable lineage back to at least 1215, when Magna Carta guaranteed that "[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement . . . ." As

relevant here, Magna Carta required that economic sanctions "be proportioned to the wrong" and "not be so large as to deprive [an offender] of his livelihood." . . . Despite Magna Carta, imposition of excessive fines persisted. . . . When James II was overthrown in the Glorious Revolution, the attendant English Bill of Rights reaffirmed Magna Carta's guarantee by providing that "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted."

Across the Atlantic, this familiar language was adopted almost verbatim, first in the Virginia Declaration of Rights, then in the Eighth Amendment, which states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." . . . In 1787, the constitutions of eight States . . . forbade excessive fines. An even broader consensus obtained in 1868 upon ratification of the Fourteenth Amendment. By then, the constitutions of 35 of the 37 States—accounting for over 90% of the U.S. population—expressly prohibited excessive fines.

Notwithstanding the States' apparent agreement that the right guaranteed by the Excessive Fines Clause was fundamental, abuses continued. Following the Civil War, Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy. Among these laws' provisions were draconian fines for violating broad proscriptions on "vagrancy" and other dubious offenses. When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead. Congressional debates over the Civil Rights Act of 1866, the joint resolution that became the Fourteenth Amendment, and similar measures repeatedly mentioned the use of fines to coerce involuntary labor.

Today, acknowledgment of the right's fundamental nature remains widespread. As Indiana itself reports, all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality. . . .

For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. . . . In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. . . .

The State of Indiana does not meaningfully challenge the case for incorporating the Excessive Fines Clause as a general matter. Instead, the State argues that the Clause does not apply to its use of civil *in rem* forfeitures because, the State says, the Clause's specific application to such forfeitures is neither fundamental nor deeply rooted. . . .

In considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, we ask whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted. . . . For example, in *Packingham v. North Carolina* (2017), we held that a North Carolina statute prohibiting registered sex offenders from accessing certain commonplace social media websites violated the First Amendment right to freedom of speech. In reaching this conclusion, we noted that the First Amendment's Free Speech Clause was "applicable to the States under the Due Process Clause of the Fourteenth Amendment." We did not, however, inquire whether the Free Speech Clause's application specifically to social media websites was

fundamental or deeply rooted. . . . Similarly here, regardless of whether application of the Excessive Fines Clause to civil *in rem* forfeitures is itself fundamental or deeply rooted, our conclusion that the Clause is incorporated remains unchanged. . . .

JUSTICE GORSUCH, concurring.

The majority faithfully applies our precedent and, based on a wealth of historical evidence, concludes that the Fourteenth Amendment incorporates the Eighth Amendment's Excessive Fines Clause against the States. I agree with that conclusion. As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause. But nothing in this case turns on that question, and, regardless of the precise vehicle, there can be no serious doubt that the Fourteenth Amendment requires the States to respect the freedom from excessive fines enshrined in the Eighth Amendment.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that the Fourteenth Amendment makes the Eighth Amendment's prohibition on excessive fines fully applicable to the States. But I cannot agree with the route the Court takes to reach this conclusion. Instead of reading the Fourteenth Amendment's Due Process Clause to encompass a substantive right that has nothing to do with "process," I would hold that the right to be free from excessive fines is one of the "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment. . . .

What methodology did the Court employ in *McDonald* and *Timbs* to ascertain whether a right in the Bill of Rights should be incorporated as a "liberty" applicable under the Fourteenth Amendment to state and local governments? Justice Alito's opinion in *McDonald* pronounced incorporation depended on whether the right at issue "is fundamental to our scheme of ordered liberty, or as we have said in a related context, whether this right is 'deeply rooted in this Nation's history and tradition.'" *Timbs* reiterated portions of this phrasing: a right should be incorporated when "'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'" Yet each case then analyzed both the right's importance in the scheme of ordered liberty *and* the right's American historical pedigree, holding the rights at issue were incorporated because they were "'fundamental to our scheme of ordered liberty,' with 'dee[p] root[s] in [our] history and tradition.'" *See Timbs* (quoting *McDonald*). What if a right fundamental to our modern scheme of ordered liberty does not have deep historical roots?

While this will be a key debate in recognizing nontextual substantive due process rights, the textual guarantees in the first eight Amendments of the Bill of Rights ratified in 1791 are all historically rooted. Only three have yet to be incorporated: the Third Amendment's protections against quartering soldiers in private homes, the Fifth Amendment's grand jury requirement, and the Seventh Amendment's civil jury trial guarantees. Of these, a relatively safe assumption is that the Fifth Amendment's grand jury requirement and the Seventh Amendment will not be incorporated, in accordance with Justice Alito's footnoted hint regarding *stare decisis* in *McDonald*. The Third

Amendment, though, does not have the same *stare decisis* concerns. Yet the Supreme Court likely will never be presented with a case addressing the Third Amendment's incorporation; soldiers have not been quartered in private homes since the Civil War. The Court has never resolved a case interpreting the Third Amendment, and the problem is so seldom encountered in modern times that the constitutions of other nations written in the last century do not include a similar proscription.

B. SUBSTANTIVE DUE PROCESS NONTEXTUAL RIGHTS

Incorporation is one form of substantive due process, but substantive due process also protects certain unenumerated or nontextual fundamental constitutional rights from government interference and voids arbitrary government interferences with individual liberty. The doctrine emanates from the word "liberty" in the Due Process Clauses, with perhaps additional support from the structural implications of the Ninth Amendment, which provides that the constitutional enumeration "of certain rights shall not be construed to disparage others retained by the people."

The modern substantive due process framework for nontextual rights typically proceeds in four steps (although Supreme Court decisions may not separately address each of these steps in order):

(1) Define the "liberty" at stake: The first step is describing or defining the liberty interest that is being threatened by the government action. Sometimes this is easy. If the government outlaws the use of contraceptives, the claimed liberty interest at stake will be the right to use contraceptives. But in other cases, the appropriate definition of the threatened liberty interest divides the Court. A frequently recurring issue is the appropriate level of abstraction for defining the threatened liberty. In a challenge to a state law prohibiting the recognition of same-sex marriage, is the threatened liberty the "right to marry," or is it the "right of two members of the same sex to marry"? In studying the cases below, make sure to identify the liberty at stake, and pay particular attention to those situations in which separate opinions disagree with the majority opinion on the appropriate definition of the threatened liberty.

(2) Determine whether the asserted liberty is "fundamental" or otherwise subject to heightened scrutiny: Most asserted liberties are subject only to rational basis review, encountered earlier in cases such as *Williamson v. Lee Optical* and Justice Holmes's dissent in *Lochner v. New York*. If the asserted liberty is the freedom of contract, the right to pursue an occupation, the right to use illegal drugs, etc., the reviewing court will apply the rational basis test, upholding the regulation if there is any basis to conclude that the regulation is rationally related to some non-prohibited, legitimate government objective. The government regulation is presumed constitutional, and the challenger has the burden to establish the absence of any rational relationship to a legitimate government interest.

But some asserted liberties are considered "fundamental rights," or otherwise trigger heightened judicial scrutiny from the Court, as seen in cases such as *Griswold v. Connecticut* and *Loving v. Virginia*. To determine whether a right is fundamental or otherwise obtains heightened scrutiny, the Supreme Court's approach for the five decades before *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), traditionally examined three factors: (1) precedent, comparing the asserted liberty interest to the rights recognized as fundamental (or non-fundamental) in its prior decisions; (2) history, determining whether the right is "deeply rooted in this Nation's history and

tradition"; and (3) ethical principles of ordered liberty, examining whether liberty or justice would be impaired if the asserted liberty interest was sacrificed. Many decisions also appeared to be cognizant of prudential concerns regarding the effect of recognizing a fundamental right in the presented context, although such concerns often were implicit rather than explicitly stated.

The Supreme Court revised this methodology in *Dobbs*, which overruled decades of precedent protecting the right to choose an abortion. Instead of employing the factors above as considerations or guideposts, which previously was the Court's predominant approach (with some exceptions), *Dobbs* specified two methods for identifying fundamental rights. The right must be either (1) deeply rooted in the nation's history and tradition ***and*** essential to the nation's scheme of ordered liberty, or (2) an integral part of a broader entrenched right supported by other precedents. In evaluating a right's historical roots, *Dobbs* emphasized original practices from the Founding to Reconstruction.

Before this new methodology, fundamental rights often expanded based on prior precedents and the ongoing legal traditions of the American people. *Dobbs* limits fundamental rights to those recognized by the generation ratifying the Fourteenth Amendment, unless the right can be viewed as a subset of a broader entrenched right supported by other precedents. *Loving v. Virginia* likely provides an illustration of the latter avenue. Although interracial marriage was not a protected right in 1868, the right to marry an individual of another race is presumably an integral part of the broader entrenched right to marry, which has been recognized by the Court for generations. But the extent to which *Dobbs* may impact the previous recognition of fundamental rights is uncertain.

(3) Consider whether the asserted liberty has been infringed or substantially impaired by the government: Not every law which makes a right more difficult to exercise is a sufficient infringement on the right for purposes of triggering heightened judicial scrutiny. The fundamental right to marry is made a little more difficult to exercise as a result of waiting periods for marriage licenses, or marital status may have economic consequences with respect to taxes and social security benefits. Yet such incidental impacts are not a substantial enough infringement on the right to marry to warrant strict judicial review. In most cases, though, this is not an issue, because the law at issue either criminalizes or sharply curtails the right's exercise, which is a sufficient infringement for heightened review. The Supreme Court's decisions thus rarely address this issue separately.

(4) Apply the appropriate level of scrutiny: Unless the challenged law substantially interferes with a fundamental right or other liberty triggering heightened judicial review, the appropriate level of judicial scrutiny is rational basis. Under this standard, the law is presumed constitutional; the law will be unconstitutional only if the challenger establishes that there is no basis to conclude that the law has any conceivable rational relationship to any possible legitimate government interest.

But for those laws that substantially interfere with a fundamental right, the appropriate level of scrutiny is strict scrutiny. Under strict scrutiny, the law is unconstitutional, unless the government establishes that the law is necessary (or the least restrictive means) to serve a compelling government purpose, such as winning a war, protecting life, safeguarding the welfare of children, preserving public health, or avoiding infringements of other fundamental rights.

Despite this apparent two-tiered model, the Court sometimes fails to use either test, instead applying

a level of scrutiny that balances in some manner the government's interest against the individual's liberty interest.

The Court's abortion precedents illustrate all these standards of review. The Court announced a fundamental right to an abortion subject to strict scrutiny in *Roe v. Wade*, then viewed the right to an abortion as a protected liberty subject to the undue burden test that balanced abortion regulations' benefits and burdens in *Casey v. Planned Parenthood*, and finally reversed course in *Dobbs* to hold that the Constitution offers no protection to the right to choose an abortion, subjecting the right to rational basis review. The next subpart will first overview reproductive autonomy and the abortion right to illustrate the substantive due process framework. Other substantive due process rights that have been recognized regarding medical autonomy and familial-and-intimate relationships autonomy will then be studied before returning to a fuller consideration of *Dobbs*.

1. OVERVIEW OF REPRODUCTIVE AUTONOMY AND THE ABORTION RIGHT

Skinner v. Oklahoma, discussed in the previous chapter, found that the right to procreate was "one of the basic civil rights of man" and "fundamental to the very existence and survival of the race." Thus, a government attempt to sterilize an individual without consent must meet strict scrutiny.

The Supreme Court next determined that the right to use contraceptives—in order to prevent procreation—was also fundamental. In *Griswold v. Connecticut*, also in the last chapter, the Court held that a state statute criminalizing the use of contraceptives to prevent pregnancy violated the right of marital privacy. The Court later extended *Griswold* in *Einsenstadt v. Baird*, 405 U.S. 438 (1972), holding that "[if] the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* held that a Massachusetts law prohibiting the distribution of contraceptives to unmarried individuals and allowing only physicians to distribute contraceptives to married individuals violated equal protection by providing dissimilar treatment for married and unmarried persons who were similarly situated. Later, in *Carey v. Population Services International*, 431 U.S. 678 (1977), the Court, applying strict scrutiny, enjoined a New York law that criminalized, under any and all circumstances, distributing contraceptives to those under 16 (even with parental approval), and also limited lawful distribution of contraceptives to those 16 and older to licensed pharmacists. The Court concluded that the New York law was not appropriately tailored to serve any compelling government purpose.

ROE v. WADE, 410 U.S. 113 (1973), embarked the Court on the right to an abortion. *Roe* enjoined the enforcement of a Texas law (first enacted in 1857) criminalizing all abortions except those necessary to save the mother's life. Justice Blackmun's opinion for the Court began with a detailed history of abortion laws and attitudes, from ancient Greece and Rome (which practiced abortion) to the English common law (which allowed abortion before "quickening," the first fetal movement) and finally to the United States, where the states began adopting statutory prohibitions against abortion in the 1850s until almost all states criminalized the procedure.

The Court then turned to its prior precedents on the right to procreate and use contraceptives, as well as some of its family autonomy decisions, before concluding that the Fourteenth Amendment's

concept of personal liberty was broad enough to encompass the decision to terminate a pregnancy. After expressing that abortion was a "fundamental right," the Court noted that any state regulation limiting a fundamental right had to be "narrowly drawn" to serve a "compelling state interest."

The Court rejected the state's claim that the unborn were "persons" under the Fourteenth Amendment. Examining the word "person" in other portions of the Constitution, including in the Fourteenth Amendment's National Citizenship Clause providing citizenship for "persons born or naturalized in the United States," the Court reasoned that most of the clauses presupposed only postnatal application, and none suggested with any assurance prenatal application.

Yet the Court recognized that the state did have certain compelling interests at specified junctures during the pregnancy. The Court reasoned that the state had a compelling interest in protecting the woman's health after the first trimester of pregnancy, because then abortion was riskier than childbirth. The Court continued that the state had a compelling interest in the developing life at the point of viability, that is, when the fetus has the capability of meaningful life outside the womb, which (under medical science when *Roe* was decided) was after the second trimester.

This created a "trimester framework" for abortions, under which no regulation was allowed of abortions during the first trimester (except requiring physicians to perform the procedure), and only regulations reasonably related to protecting the health of the woman could be made during the second trimester. But during the third and final trimester, after viability, the state could regulate and even ban abortion, except when an abortion was necessary to preserve the woman's life or health.

For almost two decades after *Roe*, the Supreme Court strictly applied the trimester framework to interferences with the fundamental right to an abortion, which invalidated most legislative attempts to regulate abortion. The Court held that the government did not have to fund abortions, even for those too poor to obtain one on their own, on the theory that, although the government could not interfere with the choice to have an abortion, it did not have to assist. The Court also held that minors could be required to obtain parental consent or to notify their parents before undergoing an abortion, as long as a judicial bypass procedure was available for the minor to establish that she was mature and well-informed enough to make the decision on her own, parental consent or notification was not in her best interests, or parental consent or notification could lead to abuse. But the Supreme Court routinely precluded other legislative attempts to regulate abortion, including statutes imposing waiting periods before having an abortion and informed consent requirements.

Presidents Reagan and Bush campaigned to overrule *Roe*. Briefs were filed from the Solicitor General's office during their administrations in pending abortion cases which requested that the Court overturn the decision. And both of them promised supporters that they would appoint Justices to the Supreme Court opposed to *Roe*. After Reagan and Bush had appointed five new Justices to the Supreme Court (Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, and Clarence Thomas), the issue of whether *Roe* should be overruled returned to the Court.

PLANNED PARENTHOOD OF SOUTHEAST PENNSYLVANIA v. CASEY, 505 U.S. 833 (1992), refused to overrule *Roe*. A plurality of the Reagan/Bush appointees, consisting of Justices O'Connor, Kennedy, and Souter, reaffirmed "the essential holding of *Roe v. Wade*," but substituted

a new "undue burden" test for the prior trimester framework. Justice Blackmun, the author of *Roe*, and Justice Stevens joined parts of the plurality's affirmation of *Roe*, which rendered those parts a majority opinion, although both argued that the plurality's application of the undue burden test authorized impermissible regulations of abortion. Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, urged that "*Roe* was wrongly decided, and that it can and should be overruled."

The *Casey* Court first analyzed the appropriate methodology for addressing protected nontextual rights under the substantive component of the Due Process Clause:

> The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office. . . .
>
> It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. *See, e.g.*, *Williamson v. Lee Optical of Oklahoma, Inc.* That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, we have ruled that a State may not compel or enforce one view or the other.
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> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.
>
> These considerations begin our analysis of the woman's interest in terminating her pregnancy but cannot end it, for this reason: though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. . . .
>
> Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society. . . .

The Court continued that "the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*." The Court then analyzed such factors as the workability of the *Roe* rule, reliance interests on the rule that would create special hardships in overruling the decision, the development of other related principles of law that may have left its rule a "remnant of abandoned doctrine," and changes in facts robbing the rule of its original justifications or applications. After discussing each factor, the Court continued to discuss *stare decisis* in light of "the sustained and widespread debate *Roe* has provoked," concluding that to overrule *Roe* "under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."

But instead of applying *Roe*'s strict scrutiny analysis and trimester framework, the joint plurality opinion adopted a new approach:

> *Roe* established a trimester framework to govern abortion regulations. Under this elaborate but rigid construct, almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake. . . .
>
> [But we] reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*. . . . The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*. . . .
>
> As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. . . . The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause. . . .
>
> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends. . . .

> As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right. . . .

The plurality opinion, joined in parts by other Justices, then turned to Pennsylvania's challenged abortion law. Despite prior Supreme Court holdings that laws requiring informed consent and waiting periods before obtaining an abortion were unconstitutional, the plurality upheld Pennsylvania's informed consent and 24-hour waiting period requirements, reasoning the state had in interest in enacting persuasive measures favoring childbirth over abortion, even if those measures did not further a health interest. The plurality continued that, although a waiting period would make an abortion more difficult in terms of time and expense, "a particular burden is not of necessity a substantial obstacle." But the plurality viewed the spousal notification requirement as an undue burden, as it would be "likely to prevent a significant number of women from obtaining an abortion." Due to the prevalence of spousal abuse, the plurality explained that requiring an abused woman to notify her spouse did "not merely make abortions a little more difficult or expensive to obtain."

Justices Blackmun and Stevens separately concurred in part and dissented in part. Both would have retained the *Roe* trimester framework, and both also believed that the informed consent and waiting period requirements should have been declared unconstitutional. But both also commended the plurality for retaining the core right to an abortion. Justice Blackmun, the author of *Roe*, was nevertheless fearful for the future:

> . . . Three years ago . . . , four Members of this Court appeared poised to "cas[t] into darkness the hopes and visions of every woman in this country" who had come to believe that the Constitution guaranteed her the right to reproductive choice. All that remained between the promise of *Roe* and the darkness . . . was a single, flickering flame. . . . But now, just when so many expected the darkness to fall, the flame has grown bright. I do not underestimate the significance of today's joint opinion. [But] I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.

Chief Justice Rehnquist, who dissented in *Roe*, with Justice White (the other *Roe* dissenter), Justice Scalia, and Justice Thomas, argued that *Roe* should be overruled in its entirety:

> The joint opinion, following its newly-minted variation on *stare decisis*, retains the outer shell of *Roe v. Wade*, but beats a wholesale retreat from the substance of that case. We believe that *Roe* was wrongly decided, and that it can and should be overruled, consistently with our traditional approach to *stare decisis* in constitutional cases. We would . . . uphold the challenged provisions of the Pennsylvania statute in their entirety.

Justice Scalia, joined by the same Justices, argued similarly:

> My views on this matter are [that the] States may, if they wish, permit

> abortion-on-demand, but the Constitution does not require them to do so. 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. . . . A State's choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a "liberty" in the absolute sense. Laws against bigamy, for example—which entire societies of reasonable people disagree with—intrude upon men and women's liberty to marry and live with one another. But bigamy happens not to be a liberty specially "protected" by the Constitution.
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> That is, quite simply, the issue in this case: not whether the power of a woman to abort her unborn child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the "concept of existence, of meaning, of the universe, and of the mystery of human life." Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed. . . .

After *Casey*, the Supreme Court applied the undue burden test for abortion regulations in several decisions over the next three decades. *Stenberg v. Carhart*, 530 U.S. 914 (2000), declared Nebraska's partial-birth abortion ban unconstitutional because it lacked an exception for a patient's health and it imposed an undue burden on abortion rights, as the scope of the Nebraska law was vague and therefore might inhibit doctors from using the standard procedure for abortions after the first trimester, thereby effectively banning such abortions. But *Gonzales v. Carhart*, 550 U.S. 124 (2007), subsequently upheld the federal Partial-Birth Abortion Ban Act of 2003, which was enacted by Congress in response to *Stenberg*. Although the Partial-Birth Abortion Ban Act alleviated the vagueness concerns that plagued the Nebraska law, it did not include any "health" exception, instead incorporating legislative findings into the Act that the partial-birth procedure was never medically necessary for the woman's health. The Supreme Court upheld it in a 5-4 decision, with the dissenters from *Stenberg* being joined by two new Justices, Chief Justice Roberts (who replaced Chief Justice Rehnquist) and Justice Alito (who replaced Justice O'Connor, the *Stenberg* "swing" vote).

The Court next addressed whether laws requiring abortion providers to have hospital admitting-privileges and abortion facilities to meet the standards of surgical centers violated the undue burden test. *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016), declared a Texas law imposing such requirements unconstitutional. The Court reasoned that *Casey* "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." Because the Texas requirements were not targeted at any significant health-related problem (abortion was much safer than many other medical procedures that did not impose such requirements), while the requirements imposed a substantial obstacle in the path of a woman choosing to have an abortion by reducing abortion facilities in Texas from 40 to under 10, the law was declared unconstitutional. Justice Thomas and Justice Alito (joined by Chief Justice Roberts) dissented in separate opinions.

But the Court's subsequent abortion decision in *June Medical Services LLC v. Russo*, 591 U.S. 299 (2020), threw the rationale employed in *Whole Woman's Health* in flux. The Louisiana law under review was "almost word-for-word identical to Texas' admitting privileges law" invalidated in *Whole Woman's Health*. A plurality opinion, authored by Justice Breyer and joined by Justices Ginsburg, Sotomayor, and Kagan, followed the rationale in *Whole Woman's Health* to hold that the Louisiana statute was also unconstitutional. But since Justice Kennedy had retired two years after *Whole Woman's Health*, the plurality did not have the necessary fifth vote for a majority opinion. Instead, the case turned on the separate concurrence of Chief Justice Roberts. While acknowledging that he "joined the dissent in *Whole Woman's Health* and continue[s] to believe that the case was wrongly decided," he reasoned that "*stare decisis* requires us, absent special circumstances to treat like cases alike." Justices Thomas, Alito, Gorsuch, and Kavanaugh each filed separate dissents.

DOBBS v. JACKSON WOMEN'S HEALTH ORGANIZATION, 597 U.S. 215 (2022), overruled *Roe*, *Casey*, and over twenty other Supreme Court decisions, holding that the right to an abortion is not a fundamental right or protected constitutional liberty under the Constitution. The case addressed the constitutionality of a Mississippi law banning abortions after 15 weeks of pregnancy, with narrow exceptions for medical emergencies or a severe fetal abnormality. Justice Alito's opinion for the Court, which was joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett (who recently had been appointed to the Court after Justice Ginsburg's passing), held that only rational basis review should be applied to Mississippi's law. The Court held that *Roe* and *Casey* were "egregiously wrong" for providing constitutional protection to the abortion right when such a right was neither deeply rooted in the history and tradition of our nation nor an integral part of a broader entrenched right.

Chief Justice Roberts concurred in the judgment, urging that the Mississippi law under review should be upheld, but without entirely overruling *Roe* and *Casey*. Justices Breyer, Sotomayor, and Kagan dissented in a joint opinion, chastising the majority for adopting a new substantive due process framework freezing rights as of 1868, failing to recognize the interconnection of the abortion right with other fundamental rights and liberties, discounting women's equality and reliance on reproductive freedom, and upsetting the foundations of other fundamental nontextual rights with its cavalier dismissal of *stare decisis* concerns.

The abortion right has thus come full circle. Before *Roe*, the right to an abortion had not been recognized. After *Roe*, the abortion right was a fundamental right subject to a strict scrutiny review that generated the trimester framework. *Casey* upheld the core abortion right from *Roe*, but without declaring it a fundamental right. *Casey* instead adopted an undue burden test that balanced an abortion regulation's benefits against the burdens imposed on the exercise of the right. Finally, *Dobbs* overruled *Roe* and *Casey*, applying only a rational basis test to abortion regulations.

Because the various *Dobbs* opinions disagree on the appropriate substantive due process framework, the abortion right's interconnection with other fundamental rights, and the decision's impact on these other rights, *Dobbs* will be revisited in more detail after studying the other nontextual substantive due process rights that the majority (with the exception of Justice Thomas) expressed were not impacted by its decision. These other rights may be grouped in different ways but will be grouped here into rights of medical autonomy and rights related to the family and intimate relationships.

2. MEDICAL AUTONOMY

Individuals have a constitutionally protected liberty interest in refusing medical treatment and making certain medical decisions. *Jacobson v. Massachusetts*, discussed in the last chapter, implicitly acknowledged this right, while holding that, under the circumstances of the case, the state's public health needs sustained the challenged statute. *Jacobson* involved a challenge to a Massachusetts law requiring vaccinations for the inhabitants of a city or town when, in the opinion of the board of health, it was necessary for the public safety. After a smallpox outbreak in Cambridge, the board imposed a fine on those refusing to be vaccinated, which Jacobson challenged as violating the liberty protected by the Fourteenth Amendment's Due Process Clause. But the Supreme Court held the vaccination program had the necessary "real and substantial relation" to the public health and safety to be a reasonable police power regulation under prevailing *Lochner*-era doctrine (*Jacobson* in fact predated *Lochner* by a few months).

The frequently dispositive issue in cases involving the refusal of medical care is whether the government has made the necessary showing to outweigh this liberty, as seen below.

CRUZAN v. DIRECTOR, MISSOURI DEPARTMENT OF HEALTH
497 U.S. 261 (1990)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Nancy Beth Cruzan was rendered incompetent as a result of severe injuries sustained during an automobile accident. Copetitioners Lester and Joyce Cruzan, Nancy's parents and coguardians, sought a court order directing the withdrawal of their daughter's artificial feeding and hydration equipment after it became apparent that she had virtually no chance of recovering her cognitive faculties. The Supreme Court of Missouri held that because there was no clear and convincing evidence of Nancy's desire to have life-sustaining treatment withdrawn under such circumstances, her parents lacked authority to effectuate such a request. We . . . affirm. . . .

At common law, even the touching of one person by another without consent and without legal justification was a battery. Before the turn of the century, this Court observed that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. . . .

The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment. Until about 15 years ago . . . , the number of right-to-refuse-treatment decisions was relatively few. Most of the earlier cases involved patients who refused medical treatment forbidden by their religious beliefs, thus implicating First Amendment rights as well as common-law rights of self-determination. More recently, however, with the advance of medical technology capable of sustaining life well past the point where natural forces would have brought certain death in earlier times, cases involving the right to refuse life-sustaining treatment have burgeoned. . . . [The Court then discussed a number of state court

decisions on the right to refuse lifesaving treatment.]

As these cases demonstrate, the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment. Beyond that, these cases demonstrate both similarity and diversity in their approaches to decision of what all agree is a perplexing question with unusually strong moral and ethical overtones. State courts have available to them for decision a number of sources—state constitutions, statutes, and common law—which are not available to us. In this Court, the question is simply and starkly whether the United States Constitution prohibits Missouri from choosing the rule of decision which it did. This is the first case in which we have squarely been presented with the issue whether the United States Constitution grants what is in common parlance referred to as a "right to die." . . .

The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions. In *Jacobson v. Massachusetts*, for instance, the Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease. . . .

Just this Term, we recognized that prisoners possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Washington v. Harper* (1990). Still other cases support the recognition of a general liberty interest in refusing medical treatment. . . .

But determining that a person has a "liberty interest" under the Due Process Clause does not end the inquiry; "whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests."

Petitioners insist that under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person's liberty interest. Although we think the logic of the cases discussed above would embrace such a liberty interest, the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible. But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.

Petitioners go on to assert that an incompetent person should possess the same right in this respect as is possessed by a competent person. . . . The difficulty with petitioners' claim is that in a sense it begs the question: an incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right. Such a "right" must be exercised for her, if at all, by some sort of surrogate. Here, Missouri has in effect recognized that under certain circumstances a surrogate may act for the patient in electing to have hydration and nutrition withdrawn in such a way as to cause death, but it has established a procedural safeguard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent. Missouri requires that evidence of the incompetent's wishes as to the withdrawal of treatment be proved by clear and convincing evidence. The question, then, is whether

the United States Constitution forbids the establishment of this procedural requirement by the State. We hold that it does not.

Whether or not Missouri's clear and convincing evidence requirement comports with the United States Constitution depends in part on what interests the State may properly seek to protect in this situation. Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest. As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide. We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.

But in the context presented here, a State has more particular interests at stake. The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements. It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment. Not all incompetent patients will have loved ones available to serve as surrogate decisionmakers. And even where family members are present, "there will, of course, be some unfortunate situations in which family members will not act to protect a patient." A State is entitled to guard against potential abuses in such situations. . . .

We believe that Missouri may permissibly place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment. An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction. . . .

In sum, we conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state. . . . We cannot say that the Supreme Court of Missouri committed constitutional error in reaching the conclusion that [that the testimony at trial did not amount to clear and convincing proof of the patient's desire to have hydration and nutrition withdrawn].

JUSTICE O'CONNOR, concurring.

I agree that a protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions, and that the refusal of artificially delivered food and water is encompassed within that liberty interest. . . . [This] liberty interest . . . flows from decisions involving the State's invasions into the body. Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause. . . .

Today's decision, holding only that the Constitution permits a State to require clear and convincing evidence of Nancy Cruzan's desire to have artificial hydration and nutrition withdrawn, does not preclude a future determination that the Constitution requires the States to implement the decisions of a patient's duly appointed surrogate. Nor does it prevent States from developing other approaches for protecting an incompetent individual's liberty interest in refusing medical treatment. . . .

JUSTICE SCALIA, concurring.

The various opinions in this case portray quite clearly the difficult, indeed agonizing, questions that are presented by the constantly increasing power of science to keep the human body alive for longer than any reasonable person would want to inhabit it. The States have begun to grapple with these problems through legislation. I am concerned, from the tenor of today's opinions, that we are poised to confuse that enterprise as successfully as we have confused the enterprise of legislating concerning abortion—requiring it to be conducted against a background of federal constitutional imperatives that are unknown because they are being newly crafted from Term to Term. That would be a great misfortune.

While I agree with the Court's analysis today, and therefore join in its opinion, I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field; that American law has always accorded the State the power to prevent, by force if necessary, suicide—including suicide by refusing to take appropriate measures necessary to preserve one's life; that the point at which life becomes "worthless," and the point at which the means necessary to preserve it become "extraordinary" or "inappropriate," are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory; and hence, that even when it is demonstrated by clear and convincing evidence that a patient no longer wishes certain measures to be taken to preserve his or her life, it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored. It is quite impossible (because the Constitution says nothing about the matter) that those citizens will decide upon a line less lawful than the one we would choose; and it is unlikely (because we know no more about "life and death" than they do) that they will decide upon a line less reasonable. . . .

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

. . . Today the Court, while tentatively accepting that there is some degree of constitutionally protected liberty interest in avoiding unwanted medical treatment, including life-sustaining medical treatment such as artificial nutrition and hydration, affirms the decision of the Missouri Supreme Court. The majority opinion, as I read it, would affirm that decision on the ground that a State may require "clear and convincing" evidence of Nancy Cruzan's prior decision to forgo life-sustaining treatment under circumstances such as hers in order to ensure that her actual wishes are honored. Because I believe that Nancy Cruzan has a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State, and because I find that the improperly biased procedural obstacles imposed by the Missouri Supreme Court impermissibly burden that right, I respectfully dissent. Nancy Cruzan is entitled to choose to die with

dignity. . . .

JUSTICE STEVENS, dissenting.

. . . The Court . . . permits the State's abstract, undifferentiated interest in the preservation of life to overwhelm the best interests of Nancy Beth Cruzan, interests which would, according to an undisputed finding, be served by allowing her guardians to exercise her constitutional right to discontinue medical treatment. Ironically, the Court reaches this conclusion despite endorsing three significant propositions which should save it from any such dilemma. First, a competent individual's decision to refuse life-sustaining medical procedures is an aspect of liberty protected by the Due Process Clause . . . . Second, upon a proper evidentiary showing, a qualified guardian may make that decision on behalf of an incompetent ward. Third, in answering the important question presented by this tragic case, it is wise "not to attempt, by any general statement, to cover every possible phase of the subject." . . . In my view, the Constitution requires the State to care for Nancy Cruzan's life in a way that gives appropriate respect to her own best interests.

What was the asserted liberty interest in *Cruzan*? Did Justice Brennan's dissent indicate a potentially different formulation of the interest at stake?

While the Court recognized a competent person's "constitutionally protected liberty interest in refusing unwanted medical treatment," the majority opinion never identified this interest as "fundamental," and merely assumed—without deciding—that such an interest would extend to a "constitutionally protected right to refuse lifesaving hydration and nutrition." Why did the majority opinion proceed in this fashion? How did Justice O'Connor's separate opinion approach the issue? What about Justice Scalia's separate opinion? In contrast, the dissenters all viewed this as a "fundamental right." Should there be at least some constitutionally protected right of a competent adult to refuse lifesaving hydration and nutrition after *Cruzan*?

What were the state interests that allowed the imposition of a "clear and convincing" evidentiary standard? Is that standard appropriate in this context? Why is the state in a better position than her parents to ascertain her wishes?

The Court returned to the "right to die" in the following case, but this time the issue was not the refusal of medical care, but whether an individual has a substantive due process right to have a physician's assistance in ending life.

WASHINGTON v. GLUCKSBERG
521 U.S. 702 (1997)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented in this case is whether Washington's prohibition against "causing" or "aiding" a suicide offends the Fourteenth Amendment to the United States Constitution. We hold that it does not.

It has always been a crime to assist a suicide in the State of Washington. In 1854, Washington's first Territorial Legislature outlawed "assisting another in the commission of self-murder." Today, Washington law provides: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." . . . At the same time, Washington's Natural Death Act . . . states that the "withholding or withdrawal of life-sustaining treatment" at a patient's direction "shall not, for any purpose, constitute a suicide."

. . . [P]hysicians who practice in Washington, [who] occasionally treat terminally ill, suffering patients, . . . declare that they would assist these patients in ending their lives if not for Washington's assisted-suicide ban. [They], along with three gravely ill, pseudonymous plaintiffs who have since died and Compassion in Dying, a nonprofit organization that counsels people considering physician-assisted suicide, sued in the United States District Court, seeking a declaration that [Washington's assisted-suicide ban] is, on its face, unconstitutional [due to] "the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide." . . .

We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices. *See Casey* (1992); *Cruzan* (1990). In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States' assisted-suicide bans are . . . longstanding expressions of the States' commitment to the protection and preservation of all human life. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide. . . . More specifically, for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide. . . .

Though deeply rooted, the States' assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed. Because of advances in medicine and technology, Americans today are increasingly likely to die in institutions, from chronic illnesses. Public concern and democratic action are therefore sharply focused on how best to protect dignity and independence at the end of life, with the result that there have been many significant changes in state laws and in the attitudes these laws reflect. Many States . . . permit "living wills," surrogate health-care decisionmaking, and the withdrawal or refusal of life-sustaining medical treatment. At the same time, however, voters and legislators continue for the most part to reaffirm their States' prohibitions on assisting suicide. . . .

[Our] laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decisionmaking, we have not retreated from this prohibition. Against this backdrop of history, tradition, and practice, we now turn to respondents' constitutional claim.

. . . 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* (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson* (1942); to direct the education and

upbringing of one's children, *Meyer v. Nebraska* (1923); to marital privacy, *Griswold v. Connecticut* (1965); to use contraception, *ibid*; *Eisenstadt v. Baird* (1972); to bodily integrity, *Rochin v. California* (1952); and to abortion, *Casey*. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*.

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. . . .

[The] development of this Court's substantive-due-process jurisprudence . . . has been a process whereby the outlines of the "liberty" specially protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review. In addition, by establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.

Turning to the claim at issue here, the Court of Appeals stated that "properly analyzed, the first issue to be resolved is whether there is a liberty interest in determining the time and manner of one's death," or, in other words, "is there a right to die?" Similarly, respondents assert a "liberty to choose how to die" and a right to "control of one's final days," and describe the asserted liberty as "the right to choose a humane, dignified death" and "the liberty to shape death." As noted above, we have a tradition of carefully formulating the interest at stake in substantive-due-process cases. For example, although *Cruzan* is often described as a "right to die" case, we were, in fact, more precise: We assumed that the Constitution granted competent persons a "constitutionally protected right to refuse lifesaving hydration and nutrition." The Washington statute at issue in this case prohibits "aiding another person to attempt suicide," and, thus, 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.

We now inquire whether this asserted right has any place in our Nation's traditions. Here, as

discussed [above], 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 in *Cruzan* we "acknowledged that competent, dying persons have the right to direct the removal of life-sustaining medical treatment and thus hasten death," and that "the constitutional principle behind recognizing the patient's liberty to direct the withdrawal of artificial life support applies at least as strongly to the choice to hasten impending death by consuming lethal medication." . . . 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. Indeed, the two acts are widely and reasonably regarded as quite distinct. . . .

The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, 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. [The court identified and discussed six state interests: (1) preserving life; (2) preventing suicide, especially in vulnerable groups like the elderly; (3) avoiding the involvement of third parties and use of arbitrary, unfair, or undue influence; (4) protecting family members and loved ones; (5) protecting the integrity and ethics of the medical profession; and (6) avoiding future movement toward euthanasia.]

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 [Washington's assisted-suicide ban] 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."

Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society. . . .

JUSTICE O'CONNOR, concurring.

Death will be different for each of us. For many, the last days will be spent in physical pain and perhaps the despair that accompanies physical deterioration and a loss of control of basic bodily and mental functions. Some will seek medication to alleviate that pain and other symptoms.

The Court frames the issue in [this case] as whether the Due Process Clause of the Constitution protects a "right to commit suicide which itself includes a right to assistance in doing so," and concludes that our Nation's history, legal traditions, and practices do not support the existence of such a right. I join the Court's opinion[] because I agree that there is no generalized right to "commit suicide." But respondents urge us to address the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death. I see no need to reach that question in the context of the facial challenges to the . . . laws at issue here [that permit] a patient who is suffering from a terminal illness and who is experiencing great pain [to obtain] medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death. In this light, even assuming that we would recognize such an interest, I agree that the State's interests in protecting those who are not truly competent or facing imminent death, or those whose decisions to hasten death would not truly be voluntary, are sufficiently weighty . . . .

JUSTICE STEVENS, concurring in the judgments.

The Court ends its opinion with the important observation that our holding today is fully consistent with a continuation of the vigorous debate about the "morality, legality, and practicality of physician-assisted suicide" in a democratic society. I write separately to make it clear that there is also room for further debate about the limits that the Constitution places on the power of the States to punish the practice. . . .

Today, the Court decides that Washington's statute prohibiting assisted suicide is not invalid "on its face," that is to say, in all or most cases in which it might be applied. That holding, however, does not foreclose the possibility that some applications of the statute might well be invalid. . . .

JUSTICE SOUTER, concurring in the judgment.

. . . The question is whether the statute sets up one of those "arbitrary impositions" or "purposeless restraints" at odds with the Due Process Clause of the Fourteenth Amendment. *Poe v. Ullman* (1961) (Harlan, J., dissenting). I conclude that the statute's application to the doctors has not been shown to be unconstitutional, but I write separately to give my reasons for analyzing the substantive due process claims as I do, and for rejecting this one. . . .

[Justice Ginsburg concurred in "the Court's judgments in these cases substantially for the reasons stated by Justice O'Connor in her concurring opinion."]

JUSTICE BREYER, concurring in the judgments.

I believe that Justice O'Connor's views, which I share, have greater legal significance than the Court's opinion suggests. I join her separate opinion, except insofar as it joins the majority. And I concur in the judgments. I shall briefly explain how I differ from the Court.

. . . I do not agree . . . with the Court's formulation of that claimed "liberty" interest. The Court describes it as a "right to commit suicide with another's assistance." But I would not reject the

respondents' claim without considering a different formulation, for which our legal tradition may provide greater support. That formulation would use words roughly like a "right to die with dignity." But irrespective of the exact words used, at its core would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering—combined. . . .

I do not believe, however, that this Court need or now should decide whether or not such a right is "fundamental." That is because, in my view, the avoidance of severe physical pain (connected with death) would have to comprise an essential part of any successful claim and because . . . the laws before us do not *force* a dying person to undergo that kind of pain. Rather, the laws . . . do not prohibit doctors from providing patients with drugs sufficient to control pain despite the risk that those drugs themselves will kill. . . .

What does the majority assert is the liberty interest at stake in *Glucksberg*? What broader alternative formulations might exist? Why did Justice Breyer, even while accepting such a broader formulation of the asserted liberty, contend that it was not infringed under the laws under review?

Why did the majority conclude that the liberty interest at stake was not fundamental? What test was then applied, and how did the Court apply it? Were the Court's conclusions appropriate?

Several concurring opinions highlighted that the case involved a facial challenge to Washington's assisted-suicide ban for any competent, terminally ill adult. A facial challenge attacks "the statute itself as opposed to a particular application" of the law. *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015). In other words, a successful facial challenge results in the challenged statute being declared unconstitutional in all its applications, whereas a successful as-applied challenge renders the statute judicially unenforceable in specific contexts that are raised by the facts of the case. Facial challenges are "the most difficult . . . to mount successfully," as typically the challenger must establish that the challenged statute *always* operates unconstitutionally when it actually applies to require or prohibit conduct, even though sometimes the challenger's burden is less onerous under the free speech overbreadth doctrine that will be studied later. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Although the concurring opinions in *Glucksberg* agreed that the Washington ban was not facially unconstitutional or unconstitutional as to any competent, terminally ill adult, the concurrences appear open to the possibility of an as-applied challenge if a state enacted an assisted-suicide ban so strict that it prevented dying persons from using drugs to control pain.

Also notice the majority's reliance on the democratic process. At the time of *Glucksberg*, only one state, Oregon, allowed physician-assisted suicide. Since then, several more jurisdictions—including California, Colorado, District of Columbia, Hawaii, Maine, Montana, New Jersey, New Mexico, Vermont, and Washington—have done so, either by legislation or state judicial decision. Should the democratic process be allowed to continue? If, sometime in the future, the vast majority of states authorize physician-assisted suicide, could it become a fundamental right? Or does *Glucksberg*'s specification that a fundamental right must be "deeply rooted in our history and traditions" bar ever recognizing a right as fundamental that was not protected when the Fourteenth Amendment was ratified?

3. FAMILY AND INTIMATE RELATIONSHIP AUTONOMY

The Supreme Court's substantive due process decisions also provide constitutional protection for several different rights related to establishing and maintaining a family and other intimate relationships, including the right to marry, the right to custody of one's children, the right to keep the family together, the right to control the upbringing of one's children, and some liberty to engage in private, intimate non-procreative sexual conduct. *Meyer v. Nebraska* defined "liberty" as including, among other rights, the right "to marry" and "establish a home and bring up children." As detailed in the last chapter, *Meyer* relied on the liberty of parents to control the education and upbringing of their children in declaring unconstitutional a Nebraska law prohibiting the teaching of modern foreign languages to schoolchildren who had not completed the eighth grade. *Loving v. Virginia*, also covered in the last chapter, then confirmed the fundamental nature of the right to marry, holding Virginia violated the Constitution by prohibiting marriages between whites and non-whites. Under these cases, any law that substantially impairs the right to marry, or the right to custody and control of one's children, is subject to strict judicial scrutiny.

But this does not mean that the government cannot regulate aspects of family life. With respect to children, the state has compelling interests that may sometimes trump the rights of parents, including protecting the physical and emotional health of children and safeguarding their welfare. The government may, for example, enforce laws prohibiting child labor, even if the labor is at the parents' direction. *See Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding application of child labor laws to nine-year-old Jehovah's Witness who was soliciting at the direction of her parents).

Defining the parameters of constitutionally protected family autonomy rights is challenging with ongoing changes to societal norms. Should there be a fundamental right of a same-sex couple to marry? What is the extent of a biological father's right to custody if he is not married to the mother, or the mother is married to someone else? Do family rights extend beyond the nuclear family, to encompass grandparents, aunts, or uncles? If so, whose rights prevail in cases of conflict? And what kinds of constitutional protection, if any, should be afforded to intimate sexual activity outside a marital relationship? These are just some of the many questions the Supreme Court has confronted.

MOORE v. CITY OF EAST CLEVELAND
431 U.S. 494 (1977)

Mr. JUSTICE POWELL announced the judgment of the Court, and delivered an opinion in which Mr. JUSTICE BRENNAN, Mr. JUSTICE MARSHALL, and Mr. JUSTICE BLACKMUN joined.

East Cleveland's housing ordinance, like many throughout the country, limits occupancy of a dwelling unit to members of a single family. But the ordinance contains an unusual and complicated definitional section that recognizes as a "family" only a few categories of related individuals. Because her family, living together in her home, fits none of those categories, appellant stands convicted of a criminal offense. The question in this case is whether the ordinance violates the Due Process Clause of the Fourteenth Amendment.

Appellant, Mrs. Inez Moore, lives in her East Cleveland home together with her son, Dale Moore,

Sr., and her two grandsons, Dale, Jr., and John Moore, Jr. The two boys are first cousins rather than brothers; we are told that John came to live with his grandmother and with the elder and younger Dale Moores after his mother's death.

In early 1973, Mrs. Moore received a notice of violation from the city, stating that John was an "illegal occupant" and directing her to comply with the ordinance. When she failed to remove him from her home, the city filed a criminal charge. Mrs. Moore moved to dismiss, claiming that the ordinance was constitutionally invalid on its face. Her motion was overruled, and upon conviction she was sentenced to five days in jail and a $ 25 fine. . . .

The city argues that our decision in *Village of Belle Terre v. Boraas* (1974) requires us to sustain the ordinance attacked here. Belle Terre, like East Cleveland, imposed limits on the types of groups that could occupy a single dwelling unit. Applying the constitutional standard announced in this Court's leading land-use case, *Euclid v. Ambler Realty Co.* (1926), we sustained the Belle Terre ordinance on the ground that it bore a rational relationship to permissible state objectives.

But one overriding factor sets this case apart from *Belle Terre*. The ordinance there affected only *unrelated* individuals. It expressly allowed all who were related by "blood, adoption, or marriage" to live together . . . . East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. This is no mere incidental result of the ordinance. On its face it selects certain categories of relatives who may live together and declares that others may not. In particular, it makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here.

When a city undertakes such intrusive regulation of the family, neither *Belle Terre* nor *Euclid* governs; the usual judicial deference to the legislature is inappropriate. "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." A host of cases, tracing their lineage to *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925), have consistently acknowledged a "private realm of family life which the state cannot enter." Of course, the family is not beyond regulation. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.

When thus examined, this ordinance cannot survive. The city seeks to justify it as a means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system. Although these are legitimate goals, the ordinance before us serves them marginally, at best. For example, the ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation. The ordinance would permit a grandmother to live with a single dependent son and children, even if his school-age children number a dozen, yet it forces Mrs. Moore to find another dwelling for her grandson John, simply because of the presence of his uncle and cousin in the same household. We need not labor the point. [The ordinance] has but a tenuous relation to alleviation of the conditions

mentioned by the city. . . .

The city would distinguish the cases based on *Meyer* and *Pierce*. It points out that none of them "gives grandmothers any fundamental rights with respect to grandsons," and suggests that any constitutional right to live together as a family extends only to the nuclear family—essentially a couple and their dependent children.

To be sure, these cases did not expressly consider the family relationship presented here. They were immediately concerned with freedom of choice with respect to childbearing, or with the rights of parents to the custody and companionship of their own children, or with traditional parental authority in matters of child rearing and education. But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.

Understanding those reasons requires careful attention to this Court's function under the Due Process Clause. Mr. Justice Harlan described it eloquently:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint. . . .

Poe v. Ullman (1961) (Harlan, J., dissenting opinion).

Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family.

Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and] solid recognition of the basic values that underlie

our society." *Griswold v. Connecticut* (1965) (Harlan, J., concurring). Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. . . .

[The] choice of relatives in this degree of kinship to live together may not lightly be denied by the State. *Pierce* struck down on Oregon law requiring all children to attend the State's public schools, holding that the Constitution "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." By the same token the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.

Mr. JUSTICE BRENNAN, with whom Mr. JUSTICE MARSHALL joins, concurring.

I join the plurality's opinion. I agree that the Constitution is not powerless to prevent East Cleveland from prosecuting as a criminal and jailing a 63-year-old grandmother for refusing to expel from her home her now 10-year-old grandson who has lived with her and been brought up by her since his mother's death when he was less than a year old. . . . I write only to underscore the cultural myopia of the arbitrary boundary drawn by the East Cleveland ordinance . . . .

In today's America, the "nuclear family" is that pattern so often found in much of white suburbia. The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living. The "extended family" that provided generations of early Americans with social services and economic and emotional support in times of hardship, and was the beachhead for successive waves of immigrants remains . . . a prominent pattern—virtually a means of survival—for large numbers of the poor and deprived minorities of our society. . . .

The "extended" form is especially familiar among black families. . . . Even in husband and wife households, 13% of black families compared with 3% of white families include relatives under 18 years old, in addition to the couple's own children. In black households whose head is an elderly woman, as in this case, the contrast is even more striking: 48% of such black households, compared with 10% of counterpart white households, include related minor children not offspring of the head of the household.

. . . [The] prominence of other than nuclear families among ethnic and racial minority groups,

including our black citizens, surely demonstrates that the "extended family" pattern remains a vital tenet of our society. . . . [A]ppellee city has chosen a device that deeply intrudes into family associational rights that historically have been central, and today remain central, to a large proportion of our population. . . .

Mr. JUSTICE STEVENS, concurring in the judgment.

In my judgment the critical question presented by this case is whether East Cleveland's housing ordinance is a permissible restriction on appellant's right to use her own property as she sees fit. . . .

The holding in *Euclid v. Ambler Realty Co.* that a city could use its police power, not just to abate a specific use of property which proved offensive, but also to create and implement a comprehensive plan for the use of land in the community, vastly diminished the rights of individual property owners. It did not, however, totally extinguish those rights. On the contrary, that case expressly recognized that the broad zoning power must be exercised within constitutional limits. . . .

[A] community has . . . legitimate concerns in zoning an area for single-family use including prevention of overcrowding in residences and prevention of traffic congestion. A community which attacks these problems by restricting the composition of a household is using a means not reasonably related to the ends it seeks to achieve. To prevent overcrowding, a community can certainly place a limit on the number of occupants in a household, either in absolute terms or in relation to the available floor space. Indeed, the city of East Cleveland had on its books an ordinance requiring a minimum amount of floor space per occupant in every dwelling. Similarly, traffic congestion can be reduced by prohibiting on-street parking. To attack these problems through use of a restrictive definition of family is, as one court noted, like "[burning] the house to roast the pig." More narrowly, a limitation on which of the owner's grandchildren may reside with her obviously has no relevance to these problems.

. . . East Cleveland's unprecedented ordinance constitutes a taking of property without due process and without just compensation.

Mr. JUSTICE STEWART, with whom Mr. JUSTICE REHNQUIST joins, dissenting.

. . . When the Court has found that the Fourteenth Amendment placed a substantive limitation on a State's power to regulate, it has been in those rare cases in which the personal interests at issue have been deemed "implicit in the concept of ordered liberty." The interest that the appellant may have in permanently sharing a single kitchen and a suite of contiguous rooms with some of her relatives simply does not rise to that level. To equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition. . . .

[The separate dissenting opinions of Chief Justice Burger and Justice White have been omitted.]

What did the plurality believe was the liberty interest at stake in *Moore*? How did Justice Stewart's dissent describe the individual's interest? Is it possible that Stewart's description caused Justice Brennan to write separately to fully respond to the dissent's claim?

While using similar techniques for ascertaining the existence of a fundamental right, did the plurality create a "fundamental right" in the extended family? What test did the plurality apply rather than strict scrutiny? How did the plurality apply the test?

Why might the plurality have been concerned about describing the asserted interest as "fundamental"? Here's a potential hint: how might that impact a claim between grandparents and parents in child visitation or custody hearings?

Does the plurality's approach properly balance the government and individual interests at stake? Is the plurality correct that, while substantive due process can be "treacherous," the evolving history and traditions of our nation provide a basis for judges to exercise reasoned judgment and restraint rather than their own personal predilections? Is the approach of Justice Stevens in his concurring opinion a better way to exercise restraint, or does it have its own dangers? And what happens when the right asserted is new enough in our society that no tradition has developed?

MICHAEL H. v. GERALD D.

491 U.S. 110 (1989)

JUSTICE SCALIA announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, joins, and in all but footnote 6 of which JUSTICE O'CONNOR and JUSTICE KENNEDY join.

Under California law, a child born to a married woman living with her husband is presumed to be a child of the marriage. Cal. Evid. Code § 621. The presumption of legitimacy may be rebutted only by the husband or wife, and then only in limited circumstances. The instant appeal presents the claim that this presumption infringes upon the due process rights of a man who wishes to establish his paternity of a child born to the wife of another man, and the claim that it infringes upon the constitutional right of the child to maintain a relationship with her natural father.

I

The facts of this case are, we must hope, extraordinary. On May 9, 1976, in Las Vegas, Nevada, Carole D., an international model, and Gerald D., a top executive in a French oil company, were married. The couple established a home in Playa del Rey, California, in which they resided as husband and wife when one or the other was not out of the country on business. In the summer of 1978, Carole became involved in an adulterous affair with a neighbor, Michael H. In September 1980, she conceived a child, Victoria D., who was born on May 11, 1981. Gerald was listed as father on the birth certificate and has always held Victoria out to the world as his daughter. Soon after delivery of the child, however, Carole informed Michael that she believed he might be the father.

In the first three years of her life, Victoria remained always with Carole, but found herself within a variety of quasi-family units. In October 1981, Gerald moved to New York City to pursue his

business interests, but Carole chose to remain in California. At the end of that month, Carole and Michael had blood tests of themselves and Victoria, which showed a 98.07% probability that Michael was Victoria's father. In January 1982, Carole visited Michael in St. Thomas, where his primary business interests were based. There Michael held Victoria out as his child. In March, however, Carole left Michael and returned to California, where she took up residence with yet another man, Scott K. Later that spring, and again in the summer, Carole and Victoria spent time with Gerald in New York City, as well as on vacation in Europe. In the fall, they returned to Scott in California.

In November 1982, rebuffed in his attempts to visit Victoria, Michael filed a filiation action in California Superior Court to establish his paternity and right to visitation. In March 1983, the court appointed an attorney and guardian ad litem to represent Victoria's interests. Victoria then filed a cross-complaint asserting that if she had more than one psychological or *de facto* father, she was entitled to maintain her filial relationship, with all of the attendant rights, duties, and obligations, with both. In May 1983, Carole filed a motion for summary judgment. During this period, from March through July 1983, Carole was again living with Gerald in New York. In August, however, she returned to California, became involved once again with Michael, and instructed her attorneys to remove the summary judgment motion from the calendar.

For the ensuing eight months, when Michael was not in St. Thomas he lived with Carole and Victoria in Carole's apartment in Los Angeles and held Victoria out as his daughter. In April 1984, Carole and Michael signed a stipulation that Michael was Victoria's natural father. Carole left Michael the next month, however, and instructed her attorneys not to file the stipulation. In June 1984, Carole reconciled with Gerald and joined him in New York, where they now live with Victoria and two other children since born into the marriage.

In May 1984, Michael and Victoria, through her guardian ad litem, sought visitation rights for Michael . . . . [A few months later,] Gerald, who had intervened in the action, moved for summary judgment on the ground that under Cal. Evid. Code § 621 there were no triable issues of fact as to Victoria's paternity. This law provides that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." The presumption may be rebutted by blood tests, but only if a motion for such tests is made, within two years from the date of the child's birth, either by the husband or, if the natural father has filed an affidavit acknowledging paternity, by the wife. . . . On appeal, Michael asserted . . . § 621[, which is more than a century old,] . . . violated his procedural and substantive due process rights. . . .

III

. . . Michael contends as a matter of substantive due process that, because he has established a parental relationship with Victoria, protection of Gerald's and Carole's marital union is an insufficient state interest to support termination of that relationship. This argument is, of course, predicated on the assertion that Michael has a constitutionally protected liberty interest in his relationship with Victoria.

It is an established part of our constitutional jurisprudence that the term "liberty" in the Due Process Clause extends beyond freedom from physical restraint. . . . In an attempt to limit and guide

interpretation of the Clause, we have insisted not merely that the interest denominated as a "liberty" be "fundamental" . . . , but also that it be an interest traditionally protected by our society. . . .

This insistence that the asserted liberty interest be rooted in history and tradition is evident, as elsewhere, in our cases according constitutional protection to certain parental rights. Michael reads the landmark case of *Stanley v. Illinois* (1972) [and subsequent cases] as establishing that a liberty interest is created by biological fatherhood plus an established parental relationship—factors that exist in the present case as well. We think that distorts the rationale of those cases. As we view them, they rest not upon such isolated factors but upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family. . . . As Justice Powell stated for the plurality in *Moore v. East Cleveland* (1977), "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."

Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. . . . [Our] traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts. . . .

What Michael asserts here is a right to have himself declared the natural father and *thereby to obtain parental prerogatives*. What he must establish, therefore, is not that our society has traditionally allowed a natural father in his circumstances to establish paternity, but that it has traditionally accorded such a father parental rights, or at least has not traditionally denied them. Even if the law in all States had always been that the entire world could challenge the marital presumption and obtain a declaration as to who was the natural father, that would not advance Michael's claim. Thus, it is ultimately irrelevant, even for purposes of determining *current* social attitudes towards the alleged substantive right Michael asserts, that the present law in a number of States appears to allow the natural father—including the natural father who has not established a relationship with the child—the theoretical power to rebut the marital presumption. What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made.[6]

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[6]Justice Brennan criticizes our methodology in using historical traditions specifically relating to the rights of an adulterous natural father, rather than inquiring more generally "whether parenthood is an interest that historically has received our attention and protection." . . . We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-a-vis a child whose mother is married to another man, Justice Brennan would choose to focus instead upon "parenthood." Why should the relevant category not be even more general—perhaps "family relationships"; or "personal relationships"; or even "emotional attachments in general"? Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent.

In *Lehr v. Robertson* (1983), a case involving a natural father's attempt to block his child's adoption by the unwed mother's new husband, we observed that "the significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring," and we assumed that the Constitution might require some protection of that opportunity. Where, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter. . . .

We do not accept Justice Brennan's criticism that this result "squashes" the liberty that consists of "the freedom not to conform." It seems to us that reflects the erroneous view that there is only one side to this controversy—that one disposition can expand a "liberty" of sorts without contracting an equivalent "liberty" on the other side. Such a happy choice is rarely available. Here, to provide protection to an adulterous natural father is to deny protection to a marital father, and vice versa. If Michael has a "freedom not to conform" (whatever that means), Gerald must equivalently have a "freedom to conform." One of them will pay a price for asserting that "freedom"—Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit he and Victoria have established. Our disposition does not choose between these two "freedoms," but leaves that to the people of California. . . .

[The plurality also rejected Victoria's substantive due process claim to maintain a relationship with both Gerald and Michael because "the claim that a State must recognize multiple fatherhood has no support in the history and traditions of this country."]

JUSTICE O'CONNOR, with whom JUSTICE KENNEDY joins, concurring in part.

I concur in all but footnote 6 of Justice Scalia's opinion. This footnote sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area. *See Griswold v. Connecticut* (1965). . . . On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be "the most specific level" available. *See Loving v. Virginia* (1967). . . . I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

. . . [The] plurality . . . finds [a] limitation [on the concept of liberty] in "tradition." Apparently oblivious to the fact that this concept can be as malleable and as elusive as "liberty" itself, the plurality pretends that tradition places a discernible border around the Constitution. The pretense is seductive; it would be comforting to believe that a search for "tradition" involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history. Yet, as Justice White observed in his dissent in *Moore v. East Cleveland*, "What the deeply rooted traditions of the country are is arguable." . . .

Even if we could agree, moreover, on the content and significance of particular traditions, we still

would be forced to identify the point at which a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer. The plurality supplies no objective means by which we might make these determinations. Indeed, as soon as the plurality sees signs that the tradition upon which it bases its decision (the laws denying putative fathers like Michael standing to assert paternity) is crumbling, it shifts ground and says that the case has nothing to do with that tradition, after all. "[W]hat is at issue here," the plurality asserts after canvassing the law on paternity suits, "is not entitlement to a state pronouncement that Victoria was begotten by Michael." But that is precisely what is at issue here, and the plurality's last-minute denial of this fact dramatically illustrates the subjectivity of its own analysis.

It is ironic that an approach so utterly dependent on tradition is so indifferent to our precedents. . . . Throughout our decisionmaking in this important area runs the theme that certain interests and practices—freedom from physical restraint, marriage, childbearing, childrearing, and others—form the core of our definition of "liberty." Our solicitude for these interests is partly the result of the fact that the Due Process Clause would seem an empty promise if it did not protect them, and partly the result of the historical and traditional importance of these interests in our society. In deciding cases arising under the Due Process Clause, therefore, we have considered whether the concrete limitation under consideration impermissibly impinges upon one of these more generalized interests.

Today's plurality, however, does not ask whether parenthood is an interest that historically has received our attention and protection; the answer to that question is too clear for dispute. Instead, the plurality asks whether the specific variety of parenthood under consideration—a natural father's relationship with a child whose mother is married to another man—has enjoyed such protection.

If we had looked to tradition with such specificity in past cases, many a decision would have reached a different result. Surely the use of contraceptives by unmarried couples, *Eisenstadt v. Baird* (1972), or even by married couples, *Griswold v. Connecticut* (1965); the freedom from corporal punishment in schools, *Ingraham v. Wright* (1977); . . . and even the right to raise one's natural but illegitimate children, *Stanley v. Illinois* (1972), were not "interest[s] traditionally protected by our society," at the time of their consideration by this Court. If we had asked, therefore, in [those cases] whether the specific interest under consideration had been traditionally protected, the answer would have been a resounding "no." That we did not ask this question in those cases highlights the novelty of the interpretive method that the plurality opinion employs today.

. . . In the plurality's constitutional universe, we may not take notice of the fact that the original reasons for the conclusive presumption of paternity are out of place in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child and in which the fact of illegitimacy no longer plays the burdensome and stigmatizing role it once did. Nor, in the plurality's world, may we deny "tradition" its full scope by pointing out that the rationale for the conventional rule has changed over the years. . . . [T]he plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States. . . .

In construing the Fourteenth Amendment to offer shelter only to those interests specifically protected by historical practice, moreover, the plurality ignores the kind of society in which our Constitution exists. . . . Even if we can agree, therefore, that "family" and "parenthood" are part of the good life,

it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do. In a community such as ours, "liberty" must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty. . . .

The atmosphere surrounding today's decision is one of make-believe. Beginning with the suggestion that the situation confronting us here does not repeat itself every day in every corner of the country, moving on to the claim that it is tradition alone that supplies the details of the liberty that the Constitution protects, and passing finally to the notion that the Court always has recognized a cramped vision of "the family," today's decision lets stand California's pronouncement that Michael—whom blood tests show to a 98 percent probability to be Victoria's father—is not Victoria's father. When and if the Court awakes to reality, it will find a world very different from the one it expects.

[The concurring opinion of Justice Stevens, who would not have foreclosed the possibility that Michael had a constitutionally protected liberty interest to assert visitation rights but then concluded that California law provided the necessary opportunity, and the dissenting opinion of Justice White, joined by Justice Brennan, have been omitted.]

How did the *Michael H.* plurality define the substantive liberty at issue? Would the liberty at issue have been different if Carole and Gerald had never been married, or if they had subsequently divorced after Gerald discovered her relationship with Michael? How did the dissent view the issue?

Is Justice Scalia's view (joined only by Chief Justice Rehnquist in footnote 6) that liberty interests must be defined at the most specific level of abstraction appropriate? Did Justice Scalia correctly define the most specific level of abstraction as an adulterous natural father's parental rights to a child conceived and born during an existing marriage, or was there another relevant consideration when the natural father enjoyed a relationship with the child and held her out as his own child in a manner not possible historically?

The California evidentiary statute at issue codified the common law's presumption of legitimacy for children born to a married mother, which could only be rebutted by proof that a husband was incapable of procreation or had no access to his wife because he was outside the kingdom of England or beyond the four surrounding English seas for more than nine months. The presumption served to resolve paternal responsibilities in a time without blood or DNA tests in a manner that protected the child's interests; illegitimate children born outside a marital relationship were denied rights of inheritance and succession and frequently became wards of the state. As Justice Brennan highlighted in his dissent, though, non-marital children today are not straddled with such disabilities and modern paternity testing is highly accurate. Should a historical tradition be of less relevance when its underlying rationale no longer applies?

How does the position that there must be a historical tradition protecting the liberty at the most specific level of abstraction compare to the Court's other substantive due process jurisprudence? In *Stanley v. Illinois*, 405 U.S. 645 (1972), discussed in Justice Brennan's dissent, an Illinois statute

provided that children of unwed fathers became wards of the state upon the death of the mother. Peter Stanley had lived (at least most of the time) with Joan for 18 years, and the couple had three children, even though they never married. The Supreme Court held, based on its prior precedents, that the right to conceive and raise children was one of the essential, basic rights of man; therefore, the Illinois statute violated due process and equal protection by taking away the children that Peter had actively been involved in raising without any showing that he was an unfit father. But notice that there was no national tradition at that time protecting the specific right of unwed fathers to their illegitimate children. Similarly, as Justice O'Connor pointed out in her *Michael H.* concurrence, the due process holding in *Loving v. Virginia* was based upon the right to marry—not the more specific right to marry someone of another race, a right which had not traditionally been protected in this nation despite the lack of such a prohibition at common law.

Justice Scalia's approach also clashes with the Court's post-*Michael H.* holdings (issued over his dissent) finding constitutional protections for certain intimate non-procreative sexual conduct and same-sex marriage. Although the Supreme Court has recognized a fundamental procreative right since *Skinner*, the Court has been less clear regarding the extent of liberty to engage in non-procreative sexual intimate conduct. The cases that have been decided involve challenges to statutes criminalizing certain non-procreative intimate sexual acts brought by gay and lesbian individuals.

BOWERS v. HARDWICK, 478 U.S. 186 (1986), was the first case, involving a challenge to a Georgia law that criminalized "sodomy" (oral or anal sex), whether between a same-sex or opposite-sex couple, and provided for punishment of 1-20 years in jail for an offense. The police had arrested Hardwick when they found him (after his roommate directed them to his bedroom for delivery of a bench warrant) engaging in a sexual act with another man. Although the district attorney declined to present the matter to the grand jury, Hardwick, joined by a married opposite-sex couple, filed suit seeking a declaratory judgment that the Georgia statute was unconstitutional. The heterosexual couple's claim was dismissed by the district court for lack of standing. The court of appeals ruled that Hardwick had a fundamental right to private and intimate association and that Georgia had to satisfy the strict scrutiny standard to justify its anti-sodomy law.

But the Supreme Court, in an opinion by Justice White, disagreed and, in a 5 to 4 decision, reversed. The Court first held that there was no substantive due process fundamental right to "engage in sodomy." The Court viewed its prior precedents recognizing fundamental rights as distinguishable: "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated." The Court continued that the "ancient roots" of sodomy prohibitions continuing to the present day belied any claim that sodomy was "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." Since there was no fundamental right, the Court applied only the rational basis standard. The Court then held that, for purposes of the rational basis test, majoritarian notions of morality were a "legitimate governmental interest." Justice Powell concurred, agreeing there was no fundamental right at stake for due process purposes, but highlighting that Georgia law allowed the imposition of up to a 20-year sentence for a conviction, which might raise Eighth Amendment issues.

Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, dissented. He argued that the case was not about "a fundamental right to engage in homosexual sodomy," but rather was about

whether individuals had the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity. He contended that "depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do." Justice Stevens, joined by Justices Brennan and Marshall, also filed a separate dissent, detailing that the Georgia statute expressed "the traditional view that sodomy is an immoral kind of conduct regardless of the identity of the persons who engage in it," which clearly was unconstitutional as applied to opposite-sex couples and therefore could not be selectively enforced against same-sex couples.

Justice Blackmun's dissent closed by expressing the "hope" that "the Court soon will reconsider its analysis." Seventeen years later, it did so.

LAWRENCE v. TEXAS
539 U.S. 558 (2003)

JUSTICE KENNEDY delivered the opinion of the Court.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

I

. . . In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody overnight, and charged and convicted before a Justice of the Peace.

The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." The applicable state law is Tex. Penal Code §21.06(a). It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." . . .

The petitioners . . . challenged the statute [under] the Fourteenth Amendment [and a] like provision of the Texas Constitution. Those contentions were rejected. The petitioners, having entered a plea of nolo contendere, were each fined $200 and assessed court costs of $141.25.

[After the state court of appeals, relying on *Bowers v. Hardwick*, rejected their constitutional challenges and affirmed their convictions, we] granted certiorari to consider [whether the Texas law violated the Fourteenth Amendment's Equal Protection Clause and Due Process Clause.]

The petitioners were adults at the time of the alleged offense. Their conduct was private and consensual.

II

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause . . . . For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers*. . . .

The facts in *Bowers* had some similarities to the instant case. . . . One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. . . . The Court, in an opinion by Justice White, sustained the Georgia law. . . . Four Justices dissented.

The Court began its substantive discussion in *Bowers* as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: "Proscriptions against that conduct have ancient roots." In academic writing, and in many of the scholarly amicus briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by . . . *Bowers*. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. [The Court then traced prohibitions on sodomy from the

English Reformation Parliament of 1533 to the American colonies and then states, demonstrating that these acts prohibited both relations between men and women and men and men.] The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. [The Court then detailed common-law evidentiary rules that made enforcement against consenting adults nearly impossible before concluding:] The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character. . . .

It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. . . . In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." . . .

[We] think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. . . .

. . . In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private." . . . A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. Parliament enacted the substance of those recommendations 10 years later.

Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. . . . The Court held that the laws proscribing [consensual homosexual] conduct were invalid under the European

Convention on Human Rights. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances.

. . . In *Planned Parenthood of Southeastern Pa. v. Casey* (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right. . . .

The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons. . . .

The foundations of *Bowers* have sustained serious erosion from our recent decisions. . . . In the United States criticism of *Bowers* has been substantial and continuing . . . . The courts of five different State have declined to follow it in interpreting their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment. . . . [The] reasoning and holding in *Bowers* have been rejected elsewhere [in the world.] . . .

Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two

adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses . . . known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

JUSTICE O'CONNOR, concurring in the judgment.

The Court today overrules *Bowers v. Hardwick*. I joined *Bowers*, and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional. . . . I base my conclusion on the . . . Equal Protection Clause. . . .

This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons. . . .

A State can of course assign certain consequences to a violation of its criminal law. But the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. . . .

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

[M]ost of . . . today's opinion has no relevance to its actual holding—that the Texas statute "furthers no legitimate state interest which can justify" its application to petitioners under rational-basis review (overruling *Bowers* to the extent it sustained Georgia's anti-sodomy statute under the rational-basis test). Though there is discussion of "fundamental proposition[s]," and "fundamental decisions," nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a "fundamental right." Thus, while overruling the *outcome* of *Bowers*, the Court leaves strangely untouched its central legal conclusion: "[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do." Instead the Court simply describes petitioners' conduct as "an

exercise of their liberty"—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case. . . .

Texas Penal Code § 21.06(a) undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to "liberty" under the Due Process Clause, though today's opinion repeatedly makes that claim. The Fourteenth Amendment *expressly allows* States to deprive their citizens of "liberty," so long as *"due process of law" is provided* . . . .

Our opinions applying the doctrine known as "substantive due process" hold that the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. . . . *Bowers*' conclusion that homosexual sodomy is not a fundamental right "deeply rooted in this Nation's history and tradition" is utterly unassailable.

Realizing that fact, the Court instead says: "[W]e think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Apart from the fact that such an "emerging awareness" does not establish a "fundamental right," the statement is factually false. States continue to prosecute all sorts of crimes by adults "in matters pertaining to sex" . . . .

The Court's discussion of . . . foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is meaningless dicta. Dangerous dicta, however, since "this Court . . . should not impose foreign moods, fads, or fashions on Americans."

. . . I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. . . . The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable"—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this was a legitimate state interest. The Court today reaches the opposite conclusion. . . . If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review. . . .

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada. At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Do not believe it. . . . Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between

heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,"what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution"? Surely not the encouragement of procreation, since the sterile and elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so. . . .

JUSTICE THOMAS, dissenting.

I join Justice Scalia's dissenting opinion. I write separately to note that the law before the Court today "is . . . uncommonly silly." *Griswold v. Connecticut* (1965) (Stewart, J., dissenting). If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.

Notwithstanding this, I recognize that as a Member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to "decide cases 'agreeably to the Constitution and laws of the United States.'" . . .

What liberty did the Court find was at stake in *Lawrence*? How does this definition of the asserted liberty differ from the majority's characterization of the liberty in *Bowers*, and Justice Scalia's characterization of the liberty at stake in his *Lawrence* dissent?

How did the *Lawrence* Court view the historical analysis in *Bowers*? What history and traditions did the Court view most important? Are these history and traditions "deeply rooted" in America? Is that one of the reasons why the majority might have failed to find a "fundamental right" in *Lawrence*? What else might have been the effect of a "fundamental right" for all adult couples, whether same-sex or opposite-sex, to engage in intimate, consensual sexual activity? What immediate impact might that have had on same-sex marriage?

But while not describing the right as "fundamental," did the Court apply a traditional rational basis review, or did the Court require the state to justify the intrusion? The key sentence appears to be the last sentence in the second to the last paragraph of the majority opinion. Why wasn't "morality" a sufficient justification, especially considering the old police power formulation that the government has the power to regulate to serve the public health, safety, welfare, and *morals*?

How did Justice O'Connor's approach differ from that of the *Lawrence* majority? Would her approach have invalidated laws like the one at issue in *Bowers*, which criminalized all non-procreative intimate sexual activity? What are the advantages and disadvantages of her approach?

What arguments did Justice Scalia marshal in his dissent? Is he correct that the majority employed "an unheard-of form of rational-basis review," or does it have similarities to *Moore v. City of East Cleveland*? Is he right that *Lawrence* sounds the death-knell for laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity? Or are some of those laws potentially distinguishable? What does Justice Scalia believe with respect to the influence of the majority's opinion on same-sex marriage? Here he was somewhat prophetic: the first state court decision requiring same-sex marriage under a state constitution, *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), was decided within months of *Lawrence* and frequently cited *Lawrence* for support, even while reaching its holding solely under the Massachusetts Constitution. After *Goodridge*, other states began recognizing marital equality through state constitutional judicial decisions and legislative enactments. And twelve years to the day after *Lawrence*, the Supreme Court held that same-sex couples could exercise the fundamental right to marry protected by the Due Process Clause of the Fourteenth Amendment.

OBERGEFELL v. HODGES

576 U.S. 644 (2015)

JUSTICE KENNEDY delivered the opinion of the Court.

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

I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. . . . The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit [which] reversed the judgments of the District Courts. . . .

This Court granted review, limited to two questions. The first . . . is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second . . . is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II

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

A

. . . The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. . . . There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

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

[But far] from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. [The Court then described the details of these cases, including the refusal of Ohio to recognize the Maryland marriage of James Obergefell and John Arthur on Arthur's death certificate when the couple had spent more than twenty years together before Arthur died of ALS, the failure of Michigan to allow nurses April DeBoer and Jayne Rowse to marry and both be listed as the parents of the special needs children they adopted, and the failure of Tennessee to recognize the New York marriage of military veteran Ijpe DeKoe to Thomas Kostura.]

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time. [The Court then described some of the changes in Western society's understanding of marriages, from arranged marriages to voluntary unions and the abandonment of the coverture legal doctrine that treated a married man and woman as a single, male-dominated legal entity.]

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid–20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. . . . Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. [And for] much of the 20th century, . . . homosexuality was treated as an illness. . . .

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick* (1986). . . . Ten years later, in *Romer v. Evans* (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers* [in] *Lawrence v. Texas*.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife."

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. . . . Two Terms ago, in *United States v. Windsor* (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community." . . .

III

. . . The fundamental liberties protected by [the Due Process] Clause include most of the rights enumerated in the Bill of Rights. *See Duncan v. Louisiana* (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. *See, e.g.*, *Eisenstadt v. Baird* (1972); *Griswold v. Connecticut* (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." *Poe v. Ullman* (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. *See Lawrence*. That method respects our history and learns from it without allowing the past alone to rule the present. . . .

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia* (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* (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. . . .

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, a one-line summary

decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected.

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. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. 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. . . .

Choices about marriage shape an individual's destiny. . . . The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. . . .

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold v. Connecticut* . . . . As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. . . . [While] *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. *See Pierce v. Society of Sisters* (1925). The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki* (quoting *Meyer*). . . . By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." . . . Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. . . .

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 . . . . In *Maynard v. Hill* (1888), the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." . . .

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order. . . . Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. . . .

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* (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. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. *See Loving*; *Lawrence*.

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. . . .

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. . . .

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. . . . The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." It was the essential nature of the marriage right . . . that made apparent the law's incompatibility with requirements of equality. . . .

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. . . .

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. . . . [The] Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. . . . [But]

individuals need not await legislative action before asserting a fundamental right. . . .

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

V

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

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

* * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. . . . As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. . . . They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

CHIEF JUSTICE ROBERTS, with whom JUSTICES SCALIA and THOMAS join, dissenting.

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

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

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. . . . 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* (1905) (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." *Id.* (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. . . .

JUSTICE ALITO, with whom JUSTICES SCALIA and THOMAS join, dissenting.

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

To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are "'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*. And it is beyond dispute that the right to same-sex marriage is not among those rights [as it did not exist anywhere in the United States until 2003]. . . .

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to

same-sex couples. This reasoning is dependent upon a particular understanding of the purpose of civil marriage. Although the Court expresses the point in loftier terms, its argument is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides emotional fulfillment and the promise of support in times of need. And by benefitting persons who choose to wed, marriage indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens. It is for these reasons, the argument goes, that States encourage and formalize marriage, confer special benefits on married persons, and also impose some special obligations. This understanding of the States' reasons for recognizing marriage enables the majority to argue that same-sex marriage serves the States' objectives in the same way as opposite-sex marriage.

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

[The separate dissenting opinions of Justice Scalia, joined by Justice Thomas, and Justice Thomas, joined by Justice Scalia, have been omitted.]

What was the liberty at stake in *Obergefell*, the right to marry, or the more specific right of same-sex couples to marry? Did the Court's decision, as Chief Justice Roberts argued, change the definition of marriage? Did it therefore violate the principles established for defining the boundaries of substantive due process pronounced in *Washington v. Glucksberg*? Or was the holding consistent with a modern understanding of marriage and the Court's decisions in *Griswold* and *Lawrence*?

What principles did the Court rely upon to demonstrate the same right to marry extends to same-sex couples? What was the source of these principles? How did the Equal Protection Clause contribute to the analysis of these laws? Would it have been more persuasive for the Court to emphasize equal protection instead of substantive due process?

What are the competing concerns regarding the Court's use of judicial review in a democratic society? Is Chief Justice Roberts correct that *Obergefell* harkens to *Lochner*, or is the majority correct that the relevant precedents are *Griswold* and *Lawrence*? And does the Court's subsequent decision in *Dobbs* impact *Obergefell*?

4. THE *DOBBS* FRAMEWORK AND ABORTION REVISITED

As witnessed in cases such as *Obergefell*, *Lawrence*, and *Griswold*, the Court's substantive due process decisions traditionally were not limited to those rights recognized when the Fourteenth Amendment was ratified. But the Court imposed a new framework in overruling *Roe* and *Casey* in the following case. Future rights must either be part of a broader entrenched right that is supported by other precedents or the particular right at issue must be both rooted in the nation's history and tradition and an essential component of ordered liberty. And the Court repeatedly described *Roe* and *Casey* as "egregiously wrong" and decided on "exceptionally weak grounds" for not following this

methodology. How many of the Court's past substantive due process decisions on nontextual autonomy rights studied in this chapter had supported such a methodology before *Dobbs*?

DOBBS v. JACKSON WOMEN'S HEALTH ORGANIZATION

597 U.S. 215 (2022)

JUSTICE ALITO delivered the opinion of the Court.

Abortion presents a profound moral issue on which Americans hold sharply conflicting views. . . . 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.* Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. . . . After cataloging a wealth of . . . 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. . . .

Eventually, in *Planned Parenthood of Southeastern Pa. v. Casey* (1992), the Court revisited *Roe*, but the Members of the Court split three ways. Two Justices expressed no desire to change *Roe* in any way. Four others wanted to overrule the decision in its entirety. And the three remaining Justices, who jointly signed the controlling opinion, . . . did not endorse *Roe*'s reasoning . . . . But the opinion concluded that *stare decisis* . . . 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. . . . 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. . . .

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* . . . . On the other side, respondents and the Solicitor General ask us to reaffirm *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] 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* (1997). The right to abortion does not fall within this category. . . .

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. . . .

I

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

[Respondents, an abortion clinic and a doctor, filed suit against various Mississippi officials in federal district court challenging the Act's constitutionality. The district court enjoined enforcement of the Act and the Fifth Circuit affirmed. The Supreme Court] granted certiorari to resolve the question whether "all pre-viability prohibitions on elective abortions are unconstitutional." . . .

II

We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion. . . . [We] address that question in three steps. First, we explain the standard that our cases have used in determining whether the Fourteenth Amendment's reference to "liberty" protects a particular right. Second, we examine whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as "ordered liberty." Finally, we consider whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents.

A

. . . Constitutional analysis must begin with "the language of the instrument," *Gibbons v. Ogden* (1824), 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 . . . . *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. Neither *Roe* nor

Casey saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the "heightened scrutiny" that applies to such classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other." *Geduldig v. Aiello* (1974). 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, *Barron v. Mayor of Baltimore* (1833), but this Court has held that the Due Process Clause of the Fourteenth Amendment "incorporates" the great majority of those rights and thus makes them equally applicable to the States. *See McDonald v. City of Chicago* (2010). The second category—which is the one in question here—comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.

In deciding whether a right falls into either of these categories, the Court has long asked whether the right is "deeply rooted in [our] history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty." *Timbs v. Indiana* (2019); *McDonald*; *Glucksberg*. 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 . . . [to] 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," *Moore v. East Cleveland* (1977), and it has sometimes led the Court to usurp authority that the Constitution entrusts to the people's elected representatives. . . .

B

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. . . .

We begin with the common law, under which abortion was a crime at least after "quickening"—*i.e.*, the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy. . . . The "eminent common-law authorities (Blackstone, Coke, Hale, and the like)," *all* describe abortion after quickening as criminal. . . . English cases dating all the way back to the 13th century corroborate the treatises' statements that abortion was a crime. . . . Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was permissible at common law—much less that abortion was a *legal right*. *Cf. Glucksberg* (removal of "common law's harsh sanctions did not represent an acceptance of suicide"). . . .

In this country, the historical record is similar. The "most important early American edition of Blackstone's Commentaries," reported Blackstone's statement that abortion of a quick child was at least "a heinous misdemeanor[.]" Manuals for justices of the peace printed in the Colonies in the 18th century typically restated the common-law rule on abortion, and some manuals repeated Hale's and Blackstone's statements that anyone who prescribed medication "unlawfully to destroy the child" would be guilty of murder if the woman died. . . .

The few cases available from the early colonial period corroborate that abortion was a crime. . . . And by the 19th century, courts frequently explained that the common law made abortion of a quick child a crime. . . .

The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. . . . The Solicitor General offers a different explanation . . . that before quickening the common law did not regard a fetus "as having a 'separate and independent existence.'" . . . At any rate, the original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century. . . .

In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening. Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910. . . . This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court's own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother. And though *Roe* discerned a "trend toward

liberalization" in about "one-third of the States," those States still criminalized some abortions and regulated them more stringently than *Roe* would allow. . . .

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

Resort to this argument is a testament to the lack of any real historical support for the right that *Roe* and *Casey* recognized. This Court has long disfavored arguments based on alleged legislative motives. . . . [I]nquiries into legislative motives "are a hazardous matter." Even when an argument about legislative motive is backed by statements made by legislators who voted for a law, we have been reluctant to attribute those motives to the legislative body as a whole. . . .

Here, the argument about legislative motive is not even based on statements by legislators, but on statements made by a few supporters of the new 19th-century abortion laws, and it is quite a leap to attribute these motives to all the legislators whose votes were responsible for the enactment of those laws. . . . Are we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?

There is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being. Many judicial decisions from the late 19th and early 20th centuries made that point. . . .

C

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

The Court did not claim that this broadly framed right is absolute, and no such claim would be plausible. While individuals are certainly free *to think* and *to say* what they wish about "existence," "meaning," the "universe," and "the mystery of human life," they are not always free to *act* in accordance with those thoughts. License to act on the basis of such beliefs may correspond to one of the many understandings of "liberty," but it is certainly not "ordered liberty."

Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life." But the people of the various States may evaluate those interests differently. . . .

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* (1967); the right to marry while in prison, *Turner v. Safley* (1987); the right to obtain contraceptives, *Griswold v. Connecticut* (1965), *Eisenstadt v. Baird* (1972), *Carey v. Population Services Int'l* (1977); the right to reside with relatives, *Moore v. East Cleveland* (1977); the right to make decisions about the education of one's children, *Pierce v. Society of Sisters* (1925), *Meyer v. Nebraska* (1923); the right not to be sterilized without consent, *Skinner v. Oklahoma* (1942); and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures, *Washington v. Harper* (1990), *Rochin v. California* (1952). Respondents and the Solicitor General also rely on post-*Casey* decisions like *Lawrence v. Texas* (2003) (right to engage in private, consensual sexual acts), and *Obergefell v. Hodges* (2015) (right to marry a person of the same sex).

These attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. None of these rights has any claim to being deeply rooted in history.

What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being." 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.

In drawing this critical distinction between the abortion right and other rights, it is not necessary to dispute *Casey*'s claim (which we accept for the sake of argument) that "the specific practices of States at the time of the adoption of the Fourteenth Amendment" do not "mar[k] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless.

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

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

D

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

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

Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin. . . .

III

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey*. *Stare decisis* . . . protects the interests of those who have taken action in reliance on a past decision. . . . 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." . . . [W]hen it comes to the interpretation of the Constitution . . . we place a high value on having the matter "settled right." In addition, when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. . . .

Some of our most important constitutional decisions have overruled prior precedents. [The Court discussed *Brown v. Board of Education* (1954) repudiating *Plessy*'s "separate but equal" doctrine, *West Coast Hotel Co. v. Parrish* (1937) signaling the demise of an individual liberty right against socioeconomic legislation, and *West Virginia v. Barnette* (1943) overruling a decision from three years earlier to hold that public school students could not be compelled against their conscience to salute the flag.]

On many other occasions, this Court has overruled important constitutional decisions. [A partial listing was included in a footnote, including *Obergefell*, *Lawrence*, *Seminole Tribe of Florida v. Florida* (1996), *Batson v. Kentucky* (1986), and many others.] Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country.

No Justice of this Court has ever argued that the Court should *never* overrule a constitutional decision, but overruling a precedent is a serious matter. . . . Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision.

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

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

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

Roe was 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. Under our precedents, the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered. In Part II, we explained why *Roe* was incorrectly decided, but that decision was more than just wrong. It stood on exceptionally weak grounds [because it ignored history and extended distinguishable precedent.]

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. . . .

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

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

Traditional reliance interests arise "where advance planning of great precision is most obviously a necessity." *Casey*. In *Casey*, the controlling opinion conceded that those traditional reliance interests were not implicated because getting an abortion is generally "unplanned activity," and "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." For these reasons, we agree with the *Casey* plurality that conventional, concrete reliance

interests are not present here.

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

Unable to show concrete reliance on *Roe* and *Casey* themselves, the Solicitor General suggests that overruling those decisions would "threaten the Court's precedents holding that the Due Process Clause protects other rights." That is not correct for reasons we have already discussed. . . . 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. . . .

[Part IV of the majority opinion argued that the Court could not foresee the response of the political system and society to the decision and that such a response could not be considered in any event. Part V then responded to Chief Justice Roberts' concurrence that judicial restraint counseled upholding the Mississippi law without overruling *Roe* and *Casey*. The Court maintained that neither party believed that was an acceptable outcome and that the Court would be confronted with multiple line drawing problems if it followed that course.]

VI

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

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

It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." That respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance.

A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity." It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. *Williamson v. Lee Optical* (1955). These legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal

pain; and the prevention of discrimination on the basis of race, sex, or disability. *Roe*; *cf. Glucksberg* (identifying similar interests). . . .

These legitimate interests justify Mississippi's Gestational Age Act. Except "in a medical emergency or in the case of a severe fetal abnormality," the statute prohibits abortion "if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." The Mississippi Legislature's findings recount the stages of "human prenatal development" and assert the State's interest in "protecting the life of the unborn." The legislature also found that abortions performed after 15 weeks typically use the dilation and evacuation procedure, and the legislature found the use of this procedure "for nontherapeutic or elective reasons [to be] a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents' constitutional challenge must fail. . . .

JUSTICE THOMAS, concurring.

. . . [T]he Due Process Clause at most guarantees process. . . . The resolution of this case is thus straightforward. Because the Due Process Clause does not secure any substantive rights, it does not secure a right to abortion. . . .

For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," we have the duty to "correct the error" established in those precedents. After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment. . . .

[The concurring opinion of Justice Kavanaugh has been omitted.]

CHIEF JUSTICE ROBERTS, concurring in the judgment.

. . . 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. . . . Surely we should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating a constitutional right we have not only previously

recognized, but also expressly affirmed applying the doctrine of *stare decisis*. . . .

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

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

For half a century, *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. 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. . . . Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

Roe and *Casey* well understood the difficulty and divisiveness of the abortion issue. The Court knew that Americans hold profoundly different views about the "moral[ity]" of "terminating a pregnancy, even in its earliest stage." *Casey*. And the Court recognized that "the State has legitimate interests from the outset of the pregnancy in protecting" the "life of the fetus that may become a child." *Id.* So the Court struck a balance, as it often does when values and goals compete. . . .

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. [State laws can now ban abortions at any time] from the moment of fertilization. States have already passed such laws, in anticipation of today's ruling. More will follow. Some States have enacted laws extending to all forms of abortion procedure, including taking medication in one's own home. They have passed laws without any exceptions for when the woman is the victim of rape or incest. . . .

Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. . . . As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. . . . 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": Not until *Roe*, the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. The same could be said, though, of most of the rights the majority claims it is not tampering with. . . . 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. . . .

One piece of evidence on that score seems especially salient: The majority's cavalier approach to overturning this Court's precedents. . . . *Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives. The legal framework *Roe* and *Casey* developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed. Indeed, the Court in *Casey* already found all of that to be true. *Casey* is a precedent about precedent. It reviewed the same arguments made here in support of overruling *Roe*, and it found that doing so was not warranted. The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. . . . Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent.

I

. . . 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. . . . *Roe* and *Casey* were from the beginning, and are even more now, embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. . . .

A

. . . *Roe* and *Casey* invoked powerful state interests in [the] protection [of prenatal life], operative at every stage of the pregnancy and overriding the woman's liberty after viability. The strength of those state interests is exactly why the Court allowed greater restrictions on the abortion right than on other rights deriving from the Fourteenth Amendment. But what *Roe* and *Casey* also recognized—which today's majority does not—is that a woman's freedom and equality are likewise involved. . . . Today's Court . . . does not think there is anything of constitutional significance attached to a woman's control of her body and the path of her life. . . . The constitutional regime we have lived in for the last 50 years recognized competing interests, and sought a balance between them. The constitutional regime we enter today erases the woman's interest and recognizes only the State's (or the Federal Government's).

B

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

The majority's core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again. If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

As an initial matter, note a mistake in the just preceding sentence. We referred there to the "people" who ratified the Fourteenth Amendment: What rights did those "people" have in their heads at the time? But, of course, "people" did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase "We the People." In 1868, the first wave of American feminists were explicitly told—of course by men—that it was not their time to seek constitutional protections. (Women would not get even the vote for another half-century.) . . . Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship. . . .

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

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

Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of "liberty" and "equality" for all. And nowhere has that approach produced prouder moments, for this country and the Court. Consider an example *Obergefell* used a few years ago. The Court there confronted a claim, based on *Washington v. Glucksberg*, that the Fourteenth Amendment "must be defined in a most circumscribed manner, with central reference to specific historical practices"—exactly the view today's majority follows. And the Court specifically rejected that view. In doing so, the Court reflected on what the proposed, historically circumscribed approach would have meant for interracial marriage. The Fourteenth Amendment's ratifiers did not think it gave black and white people a right to marry each other. To the contrary, contemporaneous practice deemed that act quite as unprotected as abortion. Yet the Court in *Loving v. Virginia* read the Fourteenth Amendment to embrace the Lovings' union. . . .

That does not mean anything goes. The majority wishes people to think there are but two alternatives: (1) accept the original applications of the Fourteenth Amendment and no others, or (2) surrender to judges' "own ardent views," ungrounded in law, about the "liberty that Americans should enjoy." At least, that idea is what the majority *sometimes* tries to convey. At other times, the majority (or, rather, most of it) tries to assure the public that it has no designs on rights (for example, to contraception) that arose only in the back half of the 20th century—in other words, that it is happy to pick and choose, in accord with individual preferences. . . . [In any event,] applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. The second Justice Harlan discussed how to strike the right balance when he explained why he would have invalidated a State's ban on contraceptive use. Judges, he said, are not "free to roam where unguided speculation might take them." *Poe v. Ullman* (1961) (dissenting opinion). Yet they also must recognize that the constitutional "tradition" of this country is not captured whole at a single moment. Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions. That is why Americans, to go back to *Obergefell*'s example, have a right to marry across racial lines. And it is why, to go back to Justice Harlan's case, Americans have a right to use contraceptives so they can choose for themselves whether to have children.

. . . [The] Court has "vindicated [the] principle" over and over that (no matter the sentiment in 1868) "there is a realm of personal liberty which the government may not enter"—especially relating to "bodily integrity" and "family life." . . . The Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives . . . .

Consider first . . . the line of this Court's cases protecting "bodily integrity." *Casey*. "No right," in this Court's time-honored view, "is held more sacred, or is more carefully guarded," than "the right of every individual to the possession and control of his own person." . . . Or to put it more simply: Everyone, including women, owns their own bodies. So the Court has restricted the power of government to interfere with a person's medical decisions or compel her to undergo medical procedures or treatments. *See, e.g.*, *Rochin v. California* (forced stomach pumping); *Washington v. Harper* (forced administration of antipsychotic drugs).

. . . There are few greater incursions on a body than forcing a woman to complete a pregnancy and give birth. For every woman, those experiences involve all manner of physical changes, medical treatments (including the possibility of a cesarean section), and medical risk. Just as one example, an American woman is 14 times more likely to die by carrying a pregnancy to term than by having an abortion. . . . And for some women, as *Roe* recognized, abortions are medically necessary to prevent harm. The majority does not say—which is itself ominous—whether a State may prevent a woman from obtaining an abortion when she and her doctor have determined it is a needed medical treatment. . . .

Faced with all these connections between *Roe*/*Casey* and judicial decisions recognizing other constitutional rights, the majority tells everyone not to worry. It can (so it says) neatly extract the right to choose from the constitutional edifice without affecting any associated rights. (Think of someone telling you that the Jenga tower simply will not collapse.) Today's decision, the majority first says, "does not undermine" the decisions cited by *Roe* and *Casey*—the ones involving "marriage, procreation, contraception, [and] family relationships"—"in any way." . . .

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

Nor does it even help just to take the majority at its word. Assume the majority is sincere in saying, for whatever reason, that it will go so far and no further. . . . Still, the future significance of today's opinion will be decided in the future. And law often has a way of evolving without regard to original intentions—a way of actually following where logic leads, rather than tolerating hard-to-explain lines. . . .

Even before we get to *stare decisis*, we dissent.

II

By overruling *Roe*, *Casey*, and more than 20 [Supreme Court] cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to the rule of law. . . .

The majority today lists . . . cases . . . overruling precedent, and argues that they support overruling

Roe and *Casey*. But none does, as . . . [those cases] relied on one or more of the traditional *stare decisis* factors in reaching its conclusion. The Court found, for example, (1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old. (The majority is wrong when it says that we insist on a test of changed law or fact alone, although that is present in most of the cases.) None of those factors apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives.

First, for all the reasons we have given, *Roe* and *Casey* were correct. . . . Contrary to the majority's view, the legal status of abortion in the 19th century does not weaken those decisions. And the majority's repeated refrain about "usurp[ing]" state legislatures' "power to address" a publicly contested question does not help it on the key issue here. . . . The point of a right is to shield individual actions and decisions "from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." However divisive, a right is not at the people's mercy.

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

And indeed, the majority comes close to conceding that point. The majority barely mentions any legal or factual changes that have occurred since *Roe* and *Casey*. It suggests that the two decisions are hard for courts to implement, but cannot prove its case. In the end, the majority says, all it must say to override *stare decisis* is one thing: that it believes *Roe* and *Casey* "egregiously wrong." That rule could equally spell the end of any precedent with which a bare majority of the present Court disagrees. So how does that approach prevent the "scale of justice" from "waver[ing] with every new judge's opinion"? 1 Blackstone 69. It does not. It makes radical change too easy and too fast, based on nothing more than the new views of new judges. The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law. . . .

When overruling precedent would dislodge settled rights and expectations, *stare decisis* has added force. . . . Abortion is a common medical procedure and a familiar experience in women's lives. About 18 percent of pregnancies in this country end in abortion, and about one quarter of American women will have an abortion before the age of 45. Those numbers reflect the predictable and life-changing effects of carrying a pregnancy, giving birth, and becoming a parent. As *Casey* understood, people today rely on their ability to control and time pregnancies when making countless life decisions: where to live, whether and how to invest in education or careers, how to allocate financial resources, and how to approach intimate and family relationships. Women may count on

abortion access for when contraception fails. They may count on abortion access for when contraception cannot be used, for example, if they were raped. They may count on abortion for when something changes in the midst of a pregnancy, whether it involves family or financial circumstances, unanticipated medical complications, or heartbreaking fetal diagnoses. Taking away the right to abortion, as the majority does today, destroys all those individual plans and expectations. In so doing, it diminishes women's opportunities to participate fully and equally in the Nation's political, social, and economic life. See Brief for Economists . . . .

Rescinding an individual right in its entirety and conferring it on the State, an action the Court takes today for the first time in history, affects all who have relied on our constitutional system of government and its structure of individual liberties protected from state oversight. *Roe* and *Casey* have of course aroused controversy and provoked disagreement. But the right those decisions conferred and reaffirmed is part of society's understanding of constitutional law and of how the Court has defined the liberty and equality that women are entitled to claim.

After today, young women will come of age with fewer rights than their mothers and grandmothers had. The majority accomplishes that result without so much as considering how women have relied on the right to choose or what it means to take that right away. The majority's refusal even to consider the life-altering consequences of reversing *Roe* and *Casey* is a stunning indictment of its decision. . . .

III

"Power, not reason, is the new currency of this Court's decisionmaking." . . . With sorrow—for this Court, but more, for the millions of American women who have today lost a fundamental constitutional protection—we dissent.

Dobbs, as the dissent highlights, has an immeasurable impact on the liberty of women. The majority stated that it could not consider that impact because it was not an appropriate consideration in the due process analysis. But was the framework the Court applied consistent with other substantive due process decisions in the twenty-first century, such as *Obergefell* and *Lawrence*?

One move in Justice Alito's opinion was specifying that the framework for both incorporating provisions of the Bill of Rights to apply against the states and for recognizing nontextual rights was the same. The Court reasoned that the same approach had to apply, as it would be nonsensical to have an easier test for nontextual constitutional rights. This allowed the Court to extend the relevant substantive due process precedents to include *Timbs* and *McDonald*.

Yet there's been ongoing gamesmanship in these precedents on the appropriate conjunction between the historical analysis and the ordered liberty analysis. *Glucksberg* indicated that a substantive due process right had to be both deeply rooted in history *and* implicit in the concept of ordered liberty. Justice Ginsburg in *Timbs*, while citing *Glucksberg*, changed the "and" to an "or," such that either appeared sufficient, although *Timbs* examined both prongs. Justice Alito restored the "and" while citing *Timbs* in *Dobbs*. The issue of "and" versus "or" is significant: an "and" means that historical roots are a prerequisite for any right not integral to a pre-existing right, while an "or" would allow

the recognition of a right essential to ordered liberty even in the absence of deep historical roots.

Consider the Court's sole post-*Dobbs* substantive due process decision, *Department of State v. Muñoz*, 602 U.S. __ (2024). Muñoz, an American citizen and workers' rights lawyer, married a citizen of El Salvador and tried to obtain an immigrant visa for her husband, which was denied under a provision rendering inadmissible noncitizens likely to engage in unlawful activity. While suspecting that the denial was based on (the erroneous) suspicion he was a member of MS-13 due to his tattoos of Catholic imagery, she sued the Department of State and government officials for abridging her constitutional liberty interest in her husband's visa application by failing to provide sufficient reasoning. The Supreme Court, in an opinion by Justice Barrett, held that she did not have a fundamental liberty interest in having her husband admitted to the country that would circumvent the limitations on judicial review of consular admission decisions. Justice Barrett's opinion relied on *Glucksberg* without ever citing *Dobbs*, reasoning that the specific right at issue was not the fundamental right to marry but the right to reside with her noncitizen spouse in the United States. This right, according to the Court, was not "deeply rooted in the Nation's history and tradition," considering the longstanding immigration restrictions on noncitizen spouses. Justice Sotomayor, joined by Justices Kagan and Jackson, dissented, urging that an integral part of the right to marry was at stake as it was in *Obergefell*, with the majority making the same mistake it did in *Dobbs* by narrowly describing the right at issue and then only examining history to ascertain whether the right was fundamental.

But unlike in *Muñoz*, *Dobbs* also had to address *stare decisis* since the Supreme Court had affirmed or applied *Roe* and *Casey* over 20 times since the abortion right was recognized in 1973. What concerns were important to the majority? What were the counter-arguments of the dissent? Which side had the better of the debate?

Chief Justice Roberts desired to uphold the Mississippi 15-week ban in *Dobbs* by overruling the viability line from *Roe* and *Casey* while leaving for another day the constitutional status of the abortion right. Mississippi engaged in a bait-and-switch here: its petition for certiorari had not pressed entirely discarding *Roe* and *Casey*, although its merits briefing did.

Justice Thomas, in his separate *Dobbs* concurrence, repeated his longstanding view that the Due Process Clause is not a source of substantive rights, but only ensures the implementation of appropriate procedures before the government deprives a person of life, liberty, or property. This function of the Due Process Clause is commonly referred to as procedural due process (although it would just be due process to Justice Thomas). The next part of this chapter turns to this doctrine.

C. PROCEDURAL DUE PROCESS

Another aspect of the Due Process Clauses, in accord with their literal reading, provides procedural safeguards against government actions. The clauses indicate that the government can "deprive" individuals of "life, liberty, or property," as long as the individual is afforded "due *process* of law." This guarantee of procedural regularity ensures that the state has adopted adequate procedures to safeguard against erroneous deprivations of life, liberty, or property.

Procedural due process claims assert that the government has not provided adequate safeguards in applying the law to a specific person. The typical remedy is additional procedural safeguards regarding notice and an opportunity to be heard, such as more effective notice of the proceeding, additional or more extensive hearings, etc. Frequently the judgment in favor of a challenger in a procedural due process claim will not prohibit the government from trying again to deprive the individual of life, liberty, or property, but instead will order that such an action cannot be taken unless the government provides specified safeguards before the deprivation. The remedy is often a new "opportunity to be heard" with enhanced procedures to guard against an erroneous deprivation.

A procedural due process claim entails three specific issues:

(1) What "life, liberty, or property" interests are protected? A prerequisite to a procedural due process claim is a protected "life, liberty, or property" interest. "Life" is self-explanatory; the government cannot deprive an individual of his or her life without providing the required safeguards. But the judiciary has devoted considerable effort to defining the outer reaches of "liberty" and "property."

"Liberty" includes freedom from bodily restraint or injury. But it also includes all the "fundamental" substantive due process rights, as well as the protected "liberties" defined in *Meyer v. Nebraska*, including the right to pursue an occupation. Thus, before the government takes away an individual's right to pursue an occupation, the government must provide adequate procedural safeguards. Yet firing a person from a *particular* government job does not necessarily entail a deprivation of liberty. Moreover, one's reputation, standing alone, is not a protected liberty for due process purposes.

"Property" includes the personal ownership of real property, personal property, chattels, money, intangible property, etc. studied in property law. Yet it also includes some government benefits, as long as the individual has a legitimate claim of entitlement to the benefits under the relevant law creating the benefit. Thus, an individual may have a "property interest" in welfare benefits if the statute creating the benefits establishes a reasonable expectation of continued entitlement to the benefits, or a "property interest" may be created in a particular government job after obtaining tenure or a similar long-term status providing a reasonable expectation of continued employment.

(2) Has the interest been deprived by government action? The government must "deprive" the individual of the interest. This requires a *deliberate* action by the government, rather than mere negligence or even recklessness. Moreover, the deprivation must be through the action of the government, or at least through a private entity that has been deemed so closely interconnected with the government that it is a "state actor" for certain purposes, a topic that will be covered in more detail in a subsequent chapter.

(3) What procedural safeguards are required? The government must provide adequate safeguards against erroneous deprivations before it deprives an individual of a protected life, liberty, or property interest. To ascertain whether the existing safeguards are adequate, courts balance the private and government interests at stake and compare the existing safeguards to the value of adopting additional safeguards.

The following subsections provide illustrations of these three procedural due process requirements. While the groupings are based on cases that are predominantly important for their discussion of one requirement, some cases (especially in the last subsection) will address all the requirements, and you should pay attention to the Court's resolution of each of the presented issues.

1. PROTECTED LIBERTY AND PROPERTY INTERESTS

What types of "liberty" and "property" interests must be afforded "due process" before being deprived? Although the Supreme Court previously experimented with different formulations, the following materials illustrate the current definitions for—and limitations on—"liberty" and "property" for purposes of procedural due process.

BOARD OF REGENTS v. ROTH
408 U.S. 564 (1972)

Mr. JUSTICE STEWART delivered the opinion of the Court.

In 1968 the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969. The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

The respondent had no tenure rights to continued employment. Under Wisconsin statutory law a state university teacher can acquire tenure as a "permanent" employee only after four years of year-to-year employment. Having acquired tenure, a teacher is entitled to continued employment "during efficiency and good behavior." A relatively new teacher without tenure, however, is under Wisconsin law entitled to nothing beyond his one-year appointment. There are no statutory or administrative standards defining eligibility for re-employment. State law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials.

The procedural protection afforded a Wisconsin State University teacher before he is separated from the University corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be "discharged except for cause upon written charges" and pursuant to certain procedures. A nontenured teacher, similarly, is protected to some extent during his one-year term. Rules promulgated by the Board of Regents provide that a nontenured teacher "dismissed" before the end of the year may have some opportunity for review of the "dismissal." But the Rules provide no real protection for a nontenured teacher who simply is not re-employed for the next year. He must be informed by February 1 "concerning retention or non-retention for the ensuing year." But "no reason for non-retention need be given. No review or appeal is provided in such case."

In conformance with these Rules, the President of Wisconsin State University-Oshkosh informed the respondent before February 1, 1969, that he would not be rehired for the 1969-1970 academic year. He gave the respondent no reason for the decision and no opportunity to challenge it at any sort of hearing.

The respondent then brought this action in Federal District Court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights. He attacked the decision both in substance and procedure. First, he alleged that the true reason for the decision was to punish him for certain statements critical of the University administration, and that it therefore violated his right to freedom of speech. Second, he alleged that the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law.

The District Court granted summary judgment for the respondent on the procedural issue, ordering the University officials to provide him with reasons and a hearing. The Court of Appeals, with one judge dissenting, affirmed this partial summary judgment. We granted certiorari. The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year. We hold that he did not.

I

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite. . . .

"Liberty" and "property" are broad and majestic terms. They are among the "[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." For that reason, the Court has fully and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights. The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.

Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words "liberty" and "property" in the Due Process Clause of the Fourteenth Amendment must be given some meaning.

II

"While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska* (1923). . . .

There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." In such a case, due process would accord an opportunity to refute the charge before University officials. . . .

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. For "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury . . . ." The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner . . . that contravene[s] . . . Due Process," and, specifically, in a manner that denies the right to a full prior hearing. . . .

[On] the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another.

III

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.

Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg v. Kelly* (1970). Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, and college professors and staff members dismissed during the terms of their contracts, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle "proscribing summary dismissal from public employment without hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment.

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily

undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly* had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Just as the welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment . . . was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.

Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment. . . . [The] respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment. . . .

Mr. JUSTICE MARSHALL, dissenting.

. . . I would go further than the Court does in defining "liberty" and "property." . . . In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the "property" right that I believe is protected by the Fourteenth Amendment . . . . And it is also liberty—liberty to work . . . .

Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. . . .

[The concurring opinion of Chief Justice Burger, and the separate dissenting opinions of Justices Brennan and Douglas, have been omitted.]

How did *Roth* define "liberty" for purposes of procedural due process? Is this the right definition? Why didn't the definition cover Roth? Under different circumstances, could the university's decision

not to re-hire someone in Roth's circumstances trigger procedural due process safeguards?

How did the *Roth* Court define "property" for purposes of procedural due process? Is this an appropriate definition, or is the definition of "property" from Justice Marshall's dissent preferable? Why didn't the majority's definition cover Roth? Under different circumstances, could the university have triggered a property interest?

In a companion case decided the same day as *Roth*, *Perry v. Sindermann*, 408 U.S. 593 (1972), the Court, in an another opinion by Justice Stewart, held that Professor Robert Sindermann, who was not offered a new contract after his one-year contract expired at Odessa Junior College, had sufficiently alleged a property interest to survive a motion for summary judgment. He had alleged (1) that the college had a de facto tenure program through a provision in the college's official faculty guide providing that, while the college had no tenure system, the administration "wishes the faculty member to feel that he has permanent tenure," and (2) that guidelines promulgated by the college coordinating board granted him tenure since he had been teaching more than seven years in the state college system. The Court held that these allegations sufficed to give him an opportunity to prove that he had a reasonable expectation of continued employment under the policies and practices of the college. If he was able to do so, the Court continued, he would not have a right to reinstatement, but he would have the right to a hearing where he could be informed of the grounds for his non-retention and challenge their sufficiency.

Yet in the absence of a property or liberty interest, procedural due process is not implicated. The next case provides another example.

PAUL v. DAVIS
424 U.S. 693 (1976)

Mr. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to consider whether respondent's charge that petitioners' defamation of him, standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U.S.C. §1983 and the Fourteenth Amendment. For the reasons hereinafter stated, we conclude that it does not.

Petitioner Paul is the Chief of Police of the Louisville, Ky., Division of Police, while petitioner McDaniel occupies the same position in the Jefferson County, Ky., Division of Police. In late 1972 they agreed to combine their efforts for the purpose of alerting local area merchants to possible shoplifters who might be operating during the Christmas season. In early December petitioners distributed to approximately 800 merchants in the Louisville metropolitan area a "flyer," which [provided the name and photograph "of subjects known to be active" in shoplifting based on their arrests for shoplifting in 1971 or 1972. The photograph and name of respondent Edward Charles Davis III was included on page 2 because he was arrested for shoplifting on June 14, 1971, and the charges were still pending. After the flyer's circulation, the charges against him were dismissed by a municipal judge. In the meantime, his inclusion in the flyer came to the attention of his supervisor at the two affiliated newspapers where he worked as a photographer, and he was told he should "not

find himself in a similar situation" in the future or he presumably would lose his job.]

I

Respondent's due process claim is grounded upon his assertion that the flyer, and in particular the phrase "Active Shoplifters" appearing at the head of the page upon which his name and photograph appear, impermissibly deprived him of some "liberty" protected by the Fourteenth Amendment. His complaint asserted that the "active shoplifter" designation would inhibit him from entering business establishments for fear of being suspected of shoplifting and possibly apprehended, and would seriously impair his future employment opportunities. Accepting that such consequences may flow from the flyer in question, respondent's complaint would appear to state a classical claim for defamation actionable in the courts of virtually every State. . . .

[But respondent did not assert] a claim for defamation . . . , but a claim that he had been deprived of rights secured to him by . . . the United States Constitution. . . . [He] contends, since petitioners are respectively an official of city and of county government, his action is thereby transmuted into one for deprivation by the State of rights secured under the Fourteenth Amendment. . . .

If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim . . . . And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable . . . .

It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.

II

. . . The words "liberty" and "property" as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause.

. . . [The] Court of Appeals, in reaching a contrary conclusion, relied primarily upon *Wisconsin v. Constantineau* (1971). . . . There the Court held that a Wisconsin statute authorizing the practice of "posting" was unconstitutional because it failed to provide procedural safeguards of notice and an opportunity to be heard, prior to an individual's being "posted." Under the statute "posting"

consisted of forbidding in writing the sale or delivery of alcoholic beverages to certain persons who were determined to have become hazards to themselves, to their family, or to the community by reason of their "excessive drinking." The statute also made it a misdemeanor to sell or give liquor to any person so posted.

There is undoubtedly language in *Constantineau*, which is sufficiently ambiguous to justify the reliance upon it by the Court of Appeals:

> Yet certainly where the state attaches "a badge of infamy" to the citizen, due process comes into play. "[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."
>
> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.

The last paragraph of the quotation could be taken to mean that if a government official defames a person, without more, the procedural requirements of the Due Process Clause of the Fourteenth Amendment are brought into play. If read that way, it would represent a significant broadening of [our prior] holdings. . . .

We think that the [above] language in the last sentence quoted, "because of what the government is doing to him," referred to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry. "Posting," therefore, significantly altered her status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards. The "stigma" resulting from the defamatory character of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone, deprived Constantineau of any "liberty" protected by the procedural guarantees of the Fourteenth Amendment.

This conclusion is reinforced by . . . *Board of Regents v. Roth*. . . . While *Roth* recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected with any refusal to rehire would be actionable under the Fourteenth Amendment. . . .

This conclusion is quite consistent with our most recent holding in this area, *Goss v. Lopez* (1975), that suspension from school based upon charges of misconduct could trigger the procedural guarantees of the Fourteenth Amendment. While the Court noted that charges of misconduct could seriously damage the student's reputation, it also took care to point out that Ohio law conferred a right upon all children to attend school, and that the act of the school officials suspending the student there involved resulted in a denial or deprivation of that right.

III

It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status. In *Bell v. Burson* (1971), for example, the State by issuing drivers' licenses recognized in its citizens a right to operate a vehicle on the highways of the State. The Court held that the State could not withdraw this right without giving petitioner due process. In *Morrissey v. Brewer* (1972), the State afforded parolees the right to remain at liberty as long as the conditions of their parole were not violated. Before the State could alter the status of a parolee because of alleged violations of these conditions, we held that the Fourteenth Amendment's guarantee of due process of law required certain procedural safeguards.

In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the "liberty" or "property" recognized in those decisions. Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. . . . For these reasons we hold that the interest in reputation asserted in this case is neither "liberty" nor "property" guaranteed against state deprivation without due process of law. . . .

Mr. JUSTICE BRENNAN, with whom Mr. JUSTICE MARSHALL concurs and Mr. JUSTICE WHITE concurs in part, dissenting.

I dissent. The Court today holds that police officials, acting in their official capacities as law enforcers, may on their own initiative and without trial constitutionally condemn innocent individuals as criminals and thereby brand them with one of the most stigmatizing and debilitating labels in our society. . . .

The stark fact is that the police here have officially imposed on respondent the stigmatizing label "criminal" without the salutary and constitutionally mandated safeguards of a criminal trial. The Court concedes that this action will have deleterious consequences for respondent. For 15 years, the police had prepared and circulated similar lists, not with respect to shoplifting alone, but also for other offenses. Included in the five-page list in which respondent's name and "mug shot" appeared were numerous individuals who, like respondent, were never convicted of any criminal activity and whose only "offense" was having once been arrested. Indeed, respondent was arrested over 17 months before the flyer was distributed, not by state law enforcement authorities, but by a store's private security police, and nothing in the record appears to suggest the existence at that time of even constitutionally sufficient probable cause for that single arrest on a shoplifting charge. Nevertheless,

petitioners had 1,000 flyers printed (800 were distributed widely throughout the Louisville business community) proclaiming that the individuals identified by name and picture were "subjects known to be active in this criminal field [shoplifting]," and trumpeting the "fact" that each page depicted "Active Shoplifters."

. . . [The] Court characterizes the allegation as "mere defamation" involving no infringement of constitutionally protected interests . . . . [But there] is no attempt by the Court to analyze the question as one of reconciliation of constitutionally protected personal rights and the exigencies of law enforcement. No effort is made to distinguish the "defamation" that occurs when a grand jury indicts an accused from the "defamation" that occurs when executive officials arbitrarily and without trial declare a person an "active criminal." Rather, the Court by mere fiat and with no analysis wholly excludes personal interest in reputation from the ambit of "life, liberty, or property" under the Fifth and Fourteenth Amendments, thus rendering due process concerns never applicable to the official stigmatization, however arbitrary, of an individual. The logical and disturbing corollary of this holding is that no due process infirmities would inhere in a statute constituting a commission to conduct ex parte trials of individuals, so long as the only official judgment pronounced was limited to the public condemnation and branding of a person as a Communist, a traitor, an "active murderer," a homosexual, or any other mark that "merely" carries social opprobrium. The potential of today's decision is frightening for a free people. . . .

Our precedents clearly mandate that a person's interest in his good name and reputation is cognizable as a "liberty" interest within the meaning of the Due Process Clause, and the Court has simply failed to distinguish those precedents in any rational manner in holding that no invasion of a "liberty" interest was effected in the official stigmatizing of respondent as a criminal without any "process" whatsoever. . . .

[Justice Stevens did not participate in the case.]

Why did the majority conclude in *Paul v. Davis* that Davis did not have a protected liberty interest in his reputation? Why was Davis's claim viewed as distinguishable from earlier cases, such as *Constantineau* or *Goss*, which found a protected liberty interest? Is this distinction persuasive? Based on *Paul*, and the Court's other precedents, when does a protected liberty interest for procedural due process purposes exist?

What prudential concern appeared to underlie the Court's refusal to recognize reputation, standing alone, as a liberty interest? Did Justice Brennan believe that this concern could be alleviated by distinguishing between the types of "defamation" actions that might trigger constitutional protection? What contrary prudential concerns did Justice Brennan raise with respect to the majority's holding?

The Court's reluctance to constitutionalize state tort law is evident in many of its procedural due process cases, including the necessity of establishing a deliberate—rather than a negligent—government deprivation.

2. GOVERNMENT DEPRIVATIONS

DANIELS v. WILLIAMS
474 U.S. 327 (1986)

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner's claim in this case . . . rests on an alleged Fourteenth Amendment "deprivation" caused by the negligent conduct of a prison official . . . . We conclude that the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property.

[Petitioner] claims that, while an inmate at the city jail in Richmond, Virginia, he slipped on a pillow negligently left on the stairs by respondent, a correctional deputy stationed at the jail. Respondent's negligence, the argument runs, "deprived" petitioner of his "liberty" interest in freedom from bodily injury . . . .

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty or property. . . . No decision of this Court before *Parratt* [*v. Taylor* (1981) (concluding that a negligent loss of an inmate's hobby kit was a due process deprivation),] supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation under the Due Process Clause. The history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, was "'intended to secure the individual from the arbitrary exercise of the powers of government.'" By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions. . . .

We think that the actions of prison custodians in leaving a pillow on the prison stairs, or mislaying an inmate's property, are quite remote from the concerns just discussed. Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law. . . .

Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. . . . It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns. . . .

[The concurring opinions of Justices Blackmun and Stevens have been omitted.]

What modalities of constitutional argument did the Court rely upon to require that government

deprivations must be deliberate rather than just negligent? Are these arguments convincing? Should a "deprivation" exist on mental states between "deliberate decisions" and "negligence," such as "deliberate indifference"? Although the Supreme Court has held that "deliberate indifference" is not an appropriate standard in emergency situations (as no deliberation is possible), *see County of Sacramento v. Lewis*, 523 U.S. 833 (1998), most lower courts have held that deliberate indifference suffices to establish a "deprivation" in non-emergency situations allowing for deliberation.

3. THE PROCESS DUE

Assuming that a life, liberty, or property interest is deprived by a deliberate government action, the final issue in a procedural due process claim is ascertaining whether the existing safeguards are adequate to minimize the risk of an erroneous deprivation. This analysis entails balancing the private and government interests at stake and comparing the risk of erroneous deprivation under existing procedures against the value of additional safeguards.

MATHEWS v. ELDRIDGE
424 U.S. 319 (1976)

Mr. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.

I.

Cash benefits are provided to workers during periods in which they are completely disabled under the disability insurance benefit program created by the 1956 amendments to Title II of the Social Security Act. Respondent Eldridge was first awarded benefits in June 1968. [In March 1972, he completed a questionnaire from the state agency charged with monitoring his medical condition. In this questionnaire, he stated his condition had not improved and identified physicians from whom he recently received treatment. After reviewing his questionnaire and the reports of his physicians, the agency informed him that its tentative decision was that he was no longer disabled, but that he had the right to submit additional information pertaining to his condition. In his written response, Eldridge disputed one characterization of his medical condition but otherwise indicated that the agency had enough evidence to establish his disability. The state agency then made a final determination that his disability had ceased in May 1972, which was accepted by the Social Security Administration (SSA). The SSA notified Eldridge that he could seek reconsideration within six months. But instead of seeking reconsideration, he filed suit in federal district court challenging the administrative procedures used to terminate his benefits, arguing that he had a right to a pretermination hearing as had been required in *Goldberg v. Kelly* (1970) for the termination of welfare benefits.]

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, as has been implicit in our prior decisions, 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. . . .

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. In other cases requiring some type of pretermination hearing as a matter of constitutional right the Court has spoken sparingly about the requisite procedures. [The Court then discussed several of its prior precedents.]

. . . [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. *Goldberg v. Kelly*. . . .

B

[The Court described the procedures under the Social Security Act for eligibility and termination of benefits. To be eligible, a worker had to establish he had a physical or mental impairment of such severity that he could not obtain any kind of gainful work. These benefits continued until either the worker returned to work or was no longer disabled. The disability determination was made by a state agency on the basis of communications with the disabled worker and medical sources. If there was a conflict between the information provided, the agency could arrange for an examination by an independent consulting physician. If the agency determined tentatively to terminate benefits, it had to provide the recipient with a written notice, a summary of the evidence upon which the decision was based, and the opportunity for the recipient to respond in writing and submit additional evidence. The state agency then made its final decision, which was reviewed by a federal examiner who notified the recipient in writing of the decision and outlined his post-termination right to seek reconsideration by the state agency and then a de novo evidentiary hearing before a SSA administrative law judge.]

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 of his claim. His potential injury is thus similar in nature to that of the welfare recipient in *Goldberg* . . . .

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. . . . Eligibility for disability benefits, in contrast, is not based upon financial need. Indeed, it is wholly unrelated to the worker's income or support from many other sources. . . .

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. . . .

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," that he is unable "to engage in any substantial gainful activity by reason of any *medically determinable* physical or mental impairment . . . ." 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. . . .

[T]o 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*. . . .

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 . . . .

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.

But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative

burdens against the interests of a particular category of claimants. 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. . . . In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final.

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.

Mr. JUSTICE BRENNAN, with whom Mr. JUSTICE MARSHALL concurs, dissenting.

. . . I agree with the [lower courts] that, prior to termination of benefits, Eldridge must be afforded an evidentiary hearing . . . . I would add that the Court's consideration that a discontinuance of disability benefits may cause the recipient to suffer only a limited deprivation is no argument. It is speculative. Moreover, the very legislative determination to provide disability benefits, without any prerequisite determination of need in fact, presumes a need by the recipient which is not this Court's function to denigrate. Indeed, in the present case, it is indicated that because disability benefits were terminated there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife, and their children to sleep in one bed. Finally, it is also no argument that a worker, who has been placed in the untenable position of having been denied disability benefits, may still seek other forms of public assistance.

Why did Eldridge have a "property interest" in his Social Security disability benefits? Had these been deprived by the government's determination to discontinue benefits? Why, then, did the Court hold that he had received all the procedural requirements that were due? What three factors did the Court rely upon in making this determination? How did these factors apply in this case?

While Eldridge was not provided a right to a pre-termination *hearing* providing the right to confront adverse witnesses and present oral arguments and evidence (as was required in *Goldberg* for the termination of welfare benefits), the statutory scheme did provide him the opportunity to submit additional information and present his side of the story in writing. Without such an opportunity to at least present his side of the story, the statutory scheme likely would have been unconstitutional.

CLEVELAND BOARD OF EDUCATION v. LOUDERMILL

470 U.S. 532 (1985)

JUSTICE WHITE delivered the opinion of the Court.

In these cases we consider what pretermination process must be accorded a public employee who can be discharged only for cause.

I

In 1979 the Cleveland Board of Education, hired respondent James Loudermill as a security guard. On his job application, Loudermill stated that he had never been convicted of a felony. Eleven months later, as part of a routine examination of his employment records, the Board discovered that in fact Loudermill had been convicted of grand larceny in 1968. By letter dated November 3, 1980, the Board's Business Manager informed Loudermill that he had been dismissed because of his dishonesty in filling out the employment application. Loudermill was not afforded an opportunity to respond to the charge of dishonesty or to challenge his dismissal. . . .

Under Ohio law, Loudermill was a "classified civil servant." Such employees can be terminated only for cause, and may obtain administrative review if discharged. Pursuant to this provision, Loudermill filed an appeal with the Cleveland Civil Service Commission . . . . The Commission appointed a referee, who held a hearing . . . . Loudermill argued that he had thought that his 1968 larceny conviction was for a misdemeanor rather than a felony. The referee recommended reinstatement. [But] the full Commission heard argument and orally announced that it would uphold the dismissal. . . . Although the Commission's decision was subject to judicial review in the state courts, Loudermill instead brought the present suit . . . [alleging] that [the Ohio statute] was unconstitutional on its face because it did not provide the employee an opportunity to respond to the charges against him prior to removal. As a result, discharged employees were deprived of liberty and property without due process. . . .

The other case before us arises on similar facts and followed a similar course. Respondent Richard Donnelly was a bus mechanic for the Parma Board of Education. In August 1977, Donnelly was fired because he had failed an eye examination. He was offered a chance to retake the examination but did not do so. Like Loudermill, Donnelly appealed to the Civil Service Commission. After a year of wrangling about the timeliness of his appeal, the Commission heard the case. It ordered Donnelly reinstated, though without backpay. In a complaint essentially identical to Loudermill's, Donnelly challenged the constitutionality of the dismissal procedures. . . .

II

Respondents' federal constitutional claim depends on their having had a property right in continued employment. . . . Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth* (1972). The Ohio statute plainly creates such an interest. Respondents were "classified civil service employees," entitled to retain their positions "during good behavior and efficient service," who could not be dismissed "except . . . for . . . misfeasance, malfeasance, or nonfeasance in office." The statute plainly supports the conclusion, reached by both lower courts, that respondents possessed property rights in continued employment. Indeed, this question does not seem to have been disputed below.

The Parma Board argues, however, that the property right is defined by, and conditioned on, the legislature's choice of procedures for its deprivation. The Board stresses that in addition to specifying the grounds for termination, the statute sets out procedures by which termination may take place. The procedures were adhered to in these cases. According to petitioner, "[t]o require additional procedures would in effect expand the scope of the property interest itself."

This argument . . . has its genesis in the plurality opinion in *Arnett v. Kennedy* (1974). *Arnett* involved a challenge by a former federal employee to the procedures by which he was dismissed. The plurality reasoned that where the legislation conferring the substantive right also sets out the procedural mechanism for enforcing that right, the two cannot be separated:

> [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet.

This view garnered three votes in *Arnett*, but was specifically rejected by the other six Justices. . . . More recently, however, the Court has clearly rejected it. [The Court discussed two recent decisions rejecting the "bitter with the sweet" approach.]

In light of these holdings, it is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

In short, once it is determined that the Due Process Clause applies, "the question remains what process is due." The answer to that question is not to be found in the Ohio statute.

III

An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.* (1950). We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. *Board of Regents v. Roth.* . . . Even decisions finding no constitutional violation in termination procedures have relied on the existence of some pretermination opportunity to respond. . . .

The need for some form of pretermination hearing, recognized in these cases, is evident from a balancing of the competing interests at stake. These are the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination. *Mathews v. Eldridge* (1976).

First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened

by the questionable circumstances under which he left his previous job.

Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect.

The cases before us illustrate these considerations. Both respondents had plausible arguments to make that might have prevented their discharge. The fact that the Commission saw fit to reinstate Donnelly suggests that an error might have been avoided had he been provided an opportunity to make his case to the Board. As for Loudermill, given the Commission's ruling we cannot say that the discharge was mistaken. Nonetheless, in light of the referee's recommendation, neither can we say that a fully informed decisionmaker might not have exercised its discretion and decided not to dismiss him, notwithstanding its authority to do so. In any event, the termination involved arguable issues, and the right to a hearing does not depend on a demonstration of certain success.

The governmental interest in immediate termination does not outweigh these interests. As we shall explain, affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.

IV

The foregoing considerations indicate that the pretermination "hearing," though necessary, need not be elaborate. We have pointed out that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. *Mathews v. Eldridge*. . . .

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee. . . .

[The concurring opinion of Justice Marshall, the concurring and dissenting opinion of Justice Brennan, and the dissenting opinion of Justice Rehnquist (the author of the plurality opinion in

Arnett v. Kennedy) have been omitted.]

Why didn't the state's definition of the procedural rights afforded to a classified civil service employee foreclose a procedural due process claim? Should the government be able to qualify the property interests in employment it creates, as the plurality concluded in *Arnett*, or is the *Loudermill* Court correct that, once a property interest exists under a statute, the adequacy of the procedural protections is a federal constitutional—rather than a statutory—issue?

What types of "procedures" did the *Loudermill* Court require for a pretermination "hearing" for a public employee? Are these procedures adequate under the *Mathews v. Eldridge* factors? Are there other circumstances in which such a similar opportunity to present one's "side of the story" is all that due process requires? In *Goss v. Lopez*, 419 U.S. 565 (1975), the Court held that, while a student had a property and liberty interest in attending public high school, the only pretermination "hearing" required for a suspension of ten days or less was oral or written notice of the charges, an explanation of the school's evidence, and an opportunity for the student to present his side of the story. But in *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court provided essentially no additional protection for students from corporal punishment: while recognizing that the imposition of corporal punishment on a student was a deprivation of liberty, no separate constitutional due process protections were required, according the Court, as any unnecessary or excessive corporal punishment could lead to civil tort suits or criminal charges against the school teacher or administrator.

DUE PROCESS PROBLEMS

(1) The State of Olympia prevents state residents with child support obligations from marrying someone other than the child's mother unless the resident obtained permission from a court by showing compliance with all child support obligations and proving the child would not require state welfare assistance. John is an unemployed Olympia citizen who has an out-of-wedlock child for whom he was unable to meet his child support payments, and, even if he did, the child would still qualify for public welfare assistance. The state therefore denied his application for a marriage license to marry someone else. What challenges are available to the state's law, how is the state likely to defend, and is the statute constitutional? *Compare Zablocki v. Redhail*, 434 U.S. 374 (1978).

(2) Individuals who have committed specified criminal sexual offenses are required to register as sex offenders under state law. Under state law, the sex registry is maintained based on the fact of a prior conviction, not any showing with respect to whether the convicted offender is still currently dangerous. A sex offender sued, claiming that he had a procedural due process right to a hearing on his current dangerousness. What are the arguments for and against his procedural due process claim? What other due process claim could he potentially assert, and how would that be analyzed? *Cf. Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003).

(3) A state statute allows any non-parent to petition for visitation rights of a child, which is to be granted if the trial court finds the visitation is in the "best interests" of the child. Paternal grandparents used this statute to seek additional visitation rights with the out-of-wedlock child of their son after he passed away, suing the child's mother after she limited their visitation to one short

visit a month rather than the two weekends a month and two weeks in the summer they desired. What challenges are available against this statute if it is applied to override the wishes of a fit mother regarding visitation, and what are the arguments for and against the constitutionality of applying the statute in such a manner? *Compare Troxel v. Granville*, 530 U.S. 57 (2000).

(4) Several individuals living on the banks of a river suffered debilitating and incurable respiratory illnesses when a private manufacturing company located upstream discharged toxic chemicals over a period of several months into the river in violation of state environmental laws. The company is now bankrupt, so the individuals sued the county environmental agency that was charged with enforcing state environmental laws. The county environmental agency had failed to conduct any inspections of the company for over a year despite complaints from citizens and former company employees that the company was not properly handling toxic chemicals. The injured individuals claim that they have a substantive due process right for the government to protect their liberty interest against bodily invasions from toxic chemicals discharged by the private company. The individuals also claim a procedural due process right because the county environmental agency deprived them of their property interest in the enforcement of state environmental laws without any process by taking no action to inspect the company. What arguments would the county environmental agency assert in response to the lawsuit? How would a court likely resolve these competing arguments? *Compare Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005); *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989).

(5) In addition to banning all abortions that are not necessary to protect the life or prevent the substantial impairment of a major bodily function of the pregnant woman, a state enacts legislation that criminalizes the sale of any IUD or other birth-control device or medication that can prevent a fertilized egg from attaching to the wall of the uterus. The legislation specifies that an "unborn human being" comes into existence from the moment a sperm fertilizes an egg and that any deliberate interference with that unborn human being's development after fertilization through such a birth-control device or medication is an abortion subject to state criminal penalties. What due process challenges could be asserted against this legislation by women in the state with medical conditions that make the now-prohibited devices or medications their best option for birth control, and what are the arguments for and against the legislation's constitutionality?

(6) Several alleged terrorists who are U.S. citizens have been captured abroad and are being held in a U.S. military prison. They have been held for a year without being informed of the charges against them; all they know is that they are being held under a statute —enacted by Congress and signed into law by the President after a coordinated series of attacks by foreign terrorist groups —that granted the President broad authority to use force against those suspected of engaging in terrorism against the United States. Relying on this authority, the President has classified these prisoners as "enemy combatants" who are not entitled to access civilian courts or enjoy established criminal procedures. What due process arguments may the prisoners assert to challenge their continued detention and how should a court evaluate the competing interests at stake? *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).