CONSTITUTIONAL LAW

2026–27

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IV. LIBERTY RIGHTS UNDER THE FOURTEENTH AMENDMENT

Watch Video: Recap and Transition

We are now transitioning from considering the vertical and horizontal allocation of government power under the Constitution—the subject of Sections II and III—to considering the rights conferred on individuals, especially under the Fourteenth Amendment. That will be our focus for the remainder of the semester. And this first section of the rights material, which includes five classes' worth of readings, is dedicated to noncomparative or liberty-based rights in particular. (In Section V, we'll turn to comparative or equality-based rights, and in Section VI we'll conclude with some questions about the respective roles of Congress and the courts in enforcing rights in general.)

This section is divided into two subsections, each of which corresponds to two or three classes. Subsection A is largely historical and traces the arc from the Civil War—which gave rise to the Fourteenth Amendment—through the emergence of a central modern rule about claimed liberty rights: namely, they are ordinarily rejected, because in most cases the challenged law need only have some "rational basis." Subsection B then focuses on some of the important areas where the Court's jurisprudence has departed from that baseline by applying "heightened scrutiny" to a challenged law instead.

A. From the Civil War to the Modern "Rational Basis" Baseline

1. Citizenship and Its "Privileges or Immunities" (39 PAGES)

The Reconstruction Amendments—the Thirteenth Amendment, abolishing slavery; the Fourteenth Amendment, defining American citizenship and prohibiting states to abridge certain rights; and the Fifteenth Amendment, prohibiting racial discrimination in voting rights—fundamentally altered the constitutional structure. Indeed, "[s]o profound were these changes that the amendments should be seen … as a 'second founding' … that created a fundamentally new document with a new definition of both the status of blacks and the rights of all Americans."[*] A central feature of this new regime is the Fourteenth Amendment, ratified in 1868, which remains the principal basis of constitutional rights claims today. As relevant here, the Amendment provides:

[*] ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

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

Understanding the Fourteenth Amendment, its significance, and some of the debates over its meaning requires understanding at least the broad outlines of the history from which it emerged. In this section, you'll first read *Dred Scott v. Sandford* (1857), an infamous Supreme Court decision that helped to bring about the Civil War, as well as excerpts of an article grappling with the decision's "anticanonical" status. You'll then read excerpts of a constitutional history that introduces the Thirteenth and Fourteenth Amendments, including by explaining how the Fourteenth Amendment was framed to overrule *Dred Scott*. Finally, you'll read the *The Slaughter-House Cases* (1872), the Supreme Court's first decision interpreting the Fourteenth Amendment's rights guarantees.

As you'll see, one other constitutional provision figures importantly in this story. While the Fourteenth Amendment newly prohibited a state to "abridge the privileges or immunities of citizens of the United States," Article IV has always provided that "[t]he Citizens of each State shall be entitled to the Privileges and Immunities of Citizens in the Several States." Art. IV, § 2, cl. 1. This original provision is sometimes called the "Comity Clause" (as well as the "Privileges and Immunities Clause"), which captures the gist of its purpose: it promised the citizens of each state some sort of protection when present in other states. Exactly what protection this is has been disputed, as you'll see in *Dred Scott*, though modern doctrine mainly treats the clause as a presumptive bar on discrimination against out-of-state residents.[*]

INTRODUCTION TO *DRED SCOTT*

At the Constitution's ratification in 1789, slavery was lawful in eight states and forbidden in five. From the beginning, the slave states feared that an unsympathetic national government could undermine or outlaw slavery, and so the Constitution included a number of compromises intended to appease them. The Three-Fifths Clause artificially inflated the representation of the slave states by giving them credit, not only for their free populations,

[*] *See, e.g.*, *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 288 (1985) (striking down New Hampshire's residency requirement for membership in the state bar).

but also for three-fifths of their populations of enslaved people as well. The Migration and Importation Clause guaranteed that Congress would not ban the importation of enslaved people at least until 1808. And the Fugitive Slave Clause essentially gave putative owners a right to "reclaim" enslaved people who escaped to a free state.

These concessions to slavery did not resolve the fundamental division between the slave states and free states. As the nation expanded in the early nineteenth century, the point of fiercest contention was whether slavery would be permitted in the newly acquired territories. Because it was widely assumed that the territories would eventually become states, the decision whether these areas would be "slave soil" or "free soil" bore directly on the future balance of power between slave and free states. The Missouri Compromise, enacted by Congress in 1820, was one of the most significant legislative compromises on this issue. Under the statute, Maine was admitted as a new free state, Missouri was admitted as a new slave state, and slavery was otherwise prohibited in the territories north of Missouri's southern border (including what was then the Wisconsin Territory).

Both the facts and the legal issues in *Dred Scott* turn on that last aspect of the Missouri Compromise. Dred Scott was an enslaved man putatively owned by John Emerson, an army surgeon stationed in Missouri. Emerson brought Scott with him to a posting in the Wisconsin Territory, where slavery was now prohibited by federal law, and then later back to Missouri, where slavery was legal. At the time, there was a formidable argument, rooted in principles of international law, that an enslaved person who was brought to a place where slavery was unlawful retained their freedom even if they later returned to slave soil. Antislavery lawyers thus helped Scott file a suit against John Sanford—who had inherited Emerson's rights—in federal court, claiming that Scott was no longer lawfully enslaved. The asserted basis of federal jurisdiction was Article III, Section 2, which confers jurisdiction over cases "between Citizens of different States." (Sanford was a citizen of New York, and Scott still resided in Missouri.)

Scott lost in the federal trial court and appealed to the Supreme Court. The Supreme Court ultimately addressed both the jurisdictional question and the question of whether Congress had the power to prohibit slavery in the territories in the first place.

Dred Scott v. Sandford

60 U.S. 393 (1857)*

■ CHIEF JUSTICE TANEY delivered the opinion of the Court.

There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And

2. If it had jurisdiction, is the judgment it has given erroneous or not?

[The plaintiff] was, with his wife and children, held as slaves by the defendant, in the State of Missouri; and he brought this action [in federal court] to assert the title of himself and his family to freedom. [He invoked the court's jurisdiction on the ground] that he and the defendant are citizens of different States; that is, that he is a citizen of Missouri, and the defendant a citizen of New York.

The defendant [contested] the jurisdiction of the court [on the ground] that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves.

[It] becomes, therefore, our duty to decide whether the facts stated [by the defendant] are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States.

This is certainly a very serious question, and one that now for the first time has been brought for decision before this court. But it is brought here by those who have a right to bring it, and it is our duty to meet it and decide it.

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, guarantied 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.

* [Sanford's name was misspelled as "Sandford" by the clerk in the Supreme Court. — BE]

[The] words "people of the United States" and "citizens" are synonymous terms [for] the political body [who] form the sovereignty, and who hold the power and conduct the Government through their representatives. [The] question before us is, whether the class of persons described [compose] a portion of these 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] 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. [No] State can, by any act or law of its own [introduce] a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State[.] Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognised as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. [It] becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognised as the people or citizens of a State, whose rights and liberties had been outraged by the English Government[.]

In the opinion of the court, 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 free or not, were then acknowledged as part of the people, nor intended to be included[.]

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people. [This] opinion [was] naturally impressed upon the colonies they founded on this side of the Atlantic. [A] negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies[.]. [N]o one seems to have doubted the correctness of the prevailing opinion of the time.

The legislation of the different colonies furnishes positive and indisputable proof of this fact. [It] would be tedious [to] enumerate the various laws they passed upon this subject. It will be sufficient [to] give the laws of two of them; one being still a large slaveholding State, and the other the first State in which slavery ceased to exist.

The province of Maryland, in 1717, [passed] a law [prohibiting] "any free negro or mulatto [from] intermarry[ing] with any white [person.]"

The other colonial law to which we refer was passed by Massachusetts in 1705. [It] provides, that "if any negro or mulatto shall presume to smite or strike any person of the English or other Christian nation, such negro or mulatto shall be severely whipped[,]" [and] "that none of her Majesty's English or Scottish subjects [shall] contract matrimony with any negro or mulatto; nor shall any person, duly authorized to solemnize marriage, presume to join any such in marriage, on pain of forfeiting the sum of fifty pounds[]."

[These laws] show, too plainly to be misunderstood, the degraded condition of this unhappy race. They were still in force when the Revolution began, and are a faithful index to the state of feeling towards the class of persons of whom they speak, and of the position they occupied throughout the thirteen colonies, in the eyes and thoughts of the men who framed the Declaration of Independence and established the State Constitutions and Governments. They show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes[.]. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

[The] language of the Declaration of Independence is equally conclusive: [It says] "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed."

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.

This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.[The Preamble] declares that it is formed by the people of the United States; that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the people of the United States, and of citizens of the several States, [using these] as terms so well understood, that no further description or definition was necessary.

But 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[.] [T]he other provision [guarantees each State will] deliver[] up to [the master] any slave who may have escaped from his service[.][*] [T]hese 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.

[It] is obvious that they were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.[†] Indeed, when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileged were intended to be extended to them. [I]n no part of the country except Maine, did the African race, in point

[*] [The Fugitive Slave Clause (Art. IV, § 2, cl. 3) provided: "No person held to service or labor 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 labor, but shall be delivered up on claim of the party to whom such service or labor may be due." —BE]

[†] [This is a reference to the Privileges and Immunities Clause of Article IV, which provides: "The Citizens of each State shall be entitled to the Privileges and Immunities of Citizens in the Several States." Art. IV, § 2, cl. 1. —BE]

of fact, participate equally with whites in the exercise of civil and political rights. [It] is hardly consistent [to] suppose that [these States] regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized[.]

[It] cannot be believed that the large slaveholding States regarded [Black persons] as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered necessary for their own safety. [It] would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased [and] it would give them the full liberty of speech in public [and] to keep any carry arms wherever they went.

[The Privileges and Immunities Clause] is confined to citizens of a State who are temporarily in another State without taking up their residence there. It gives them no political rights in the State, as to voting or holding office, or in any other respect. For a citizen of one State has no right to participate in the government of another. But if he ranks as a citizen in the State to which he belongs, within the meaning of the Constitution of the United States, then, whenever he goes into another State, the Constitution clothes him, as to the rights of person, with all the privileges and immunities which belong to citizens of the State. And if persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding. And if the States could limit or restrict them, or place the party in an inferior grade, this clause of the Constitution would be unmeaning, and could have no operation; and would give no rights to the citizen when in another State. He would have none but what the State itself chose to allow him. This is evidently not the construction or meaning of the clause in question. It guaranties rights to the citizen, and the State cannot withhold them. And these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States.

[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.

[This] correction of one error in the court below does not deprive [this] appellate court of the power of [correcting] any other material errors which may have been committed by the inferior court. [We] proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom.

[The Missouri Enabling Act] declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all [the territory acquired in the Louisiana Purchase] 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 laws of any one of the States.

[T]he 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. [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. [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.

[For] example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances. Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding. These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. [The] fifth amendment to the Constitution[] 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.

[And] if Congress itself cannot do this — if it is beyond the powers conferred on the Federal Government — it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It could confer no power on any local Government, established by its authority, to violate the provisions of the Constitution.

It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which Governments may exercise over it, have been dwelt upon in the argument.

But [the] powers of the Government, and the rights of the citizen under it, are positive and practical regulations plainly written down. [If] the Constitution recognises the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.

[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; [neither] Dred Scott himself, nor any of his family, were made free by being carried into this territory[.]

■ JUSTICE WAYNE, concurring.

[The] court neither sought nor made [this] case. It was brought to us in the course of that administration of the laws which Congress has enacted, for the review of cases from [lower federal courts]. [In] our action upon it, we have only discharged our duty as a distinct and efficient department of the Government, as the framers of the Constitution meant the judiciary to be, and as the States of the Union and the people of those States intended it should be, when they ratified the Constitution of the United States.

The case involves private rights of value, and constitutional principles of the highest importance, about which there had become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision.

[The] opinion of the court has my unqualified assent.

■ JUSTICE CURTIS, dissenting.

[To] determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of [any] of the States under the Confederation, at the time of the adoption of the Constitution. [Of] this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.

[I] shall not enter into an examination of the existing opinions of that period respecting the African race, nor into any discussion concerning the meaning of those who [signed] the Declaration of Independence[.] My own opinion is, that a calm comparison of these assertions of universal abstract truths, and of their own individual opinions and acts, would not leave these men under any reproach of inconsistency; that the great truths they asserted on that solemn occasion, they were ready and anxious to make effectual, wherever a necessary regard to circumstances [would] allow; and that it would not be just to them [to] allege that they intended to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts. But this is not the place to vindicate their memory. As I conceive, we should deal here [with] those substantial facts evinced by the written Constitutions of States, and by the notorious practice under them. And they show [that] in some of the original thirteen States, free colored persons [were] citizens of those States.

[Did] the Constitution of the United States deprive them or their descendants of citizenship? [These] colored persons were not only included in the body of "the people of the United States," by whom the Constitution was ordained and established, but in at least five of the States they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption. It would be strange, if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.

I can find nothing in the Constitution which [of its own force] deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption[.] And my 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] objected, that if free colored persons born within a particular State, and made citizens of that State by its Constitution and laws, are thereby made citizens of the United States, then, under the [Privileges and Immunities Clause,] such persons would be entitled to all the privileges and immunities of citizens in the several States; and if so, then colored persons could vote and be eligible [to] offices even in those States whose Constitutions disqualify colored persons from voting or being elected to office.

But this position rests on an assumption which I deem untenable. Its basis is, that no one can be deemed a citizen of the United States who is not entitled to enjoy all the privileges and franchises which are conferred on any citizens. That is not true[.] To what citizens the elective franchise shall be confided, is a question to be determined by each State, in accordance with its own views of the necessities and expediencies of its condition. What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same [are] to be determined in the same way. [This clause] does not confer on the citizens of one State, in all the other States, specific and enumerated privileges and immunities. They are entitled to such as belong to citizenship, but not to such as belong to particular citizens attended by other qualifications. [It] rests with the States themselves to frame their Constitutions and laws as not to attach a particular privilege or immunity to mere naked citizenship.

[With respect to the merits, 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 [the Fifth Amendment] which declares that no person shall be deprived of his life, liberty, or property, without due process of law. [To assess this claim, it] is necessary, first, to have a clear view of the nature and incidents of that particular species of property which is now in question.

[Slavery] is created only by municipal law. [As a result, the] status of slavery is not necessarily always attended with the same powers on the part of the master. [This] must depend on the municipal law which creates and upholds it. [Likewise, liability for torts committed by or against an enslaved person, the rules of emancipation, and many other subjects are regulated, in slave states, by state law.]

[Is] it conceivable that the Constitution has conferred the right on every citizen to become a resident on the territory of the United States with his slaves, and there to hold them as such, but has neither made nor provided for any municipal regulations which are essential to the existence of slavery? Is it not more rational to conclude that those 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 no 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?

[T]he position, that a prohibition to bring slaves into a Territory deprives any one of his property without due process of law [does not] bear examination. It must be remembered that this restriction on the legislative power is not peculiar to the Constitution of the United States; it was borrowed from Magna Charta; was brought to America by our ancestors, as part of their inherited liberties, and has existed in all the States, usually in the very words of the great charter. It existed in every political community in America in 1787, when the ordinance prohibiting slavery north and west of the Ohio was passed.

And if a prohibition of slavery in a Territory in 1820 violated this principle of Magna Charta, the ordinance of 1787 also violated it; and what power had, I do not say the Congress of the Confederation alone, but the Legislature of Virginia, or the Legislature of any or all the States of the Confederacy, to consent to such a violation? The people of the States had conferred no such power. I think I may at least say, if the Congress did then violate Magna Charta by the ordinance, no one discovered that violation.

[In] my opinion, the judgment of the Circuit Court should be reversed.*

In a few pages, we will pick up from the Court's decision in *Dred Scott* and trace the historical arc to the ratification and early interpretation of the Fourteenth Amendment. First, though, it is worth pausing to think about the role that this and other reviled cases play in the social practice of constitutional law. As Jamal Greene explains in the next excerpt, one striking feature of that practice is that there is an "anticanon" of cases that operate as a kind of negative precedent. What accounts for *Dred Scott*'s place in that anticanon? Is Chief Justice Taney's majority opinion one of the "worst" in the sense of being especially poorly argued? Or did it just reach a morally unconscionable result? Put another way, was the problem here an atrocious Supreme Court decision, or was it perhaps a faithful application of an atrocious Constitution? The excerpt that follows grapples with these and related questions.

The Anticanon

Jamal Greene†

It is a curious feature of American constitutional law that the project of identifying the Supreme Court's worst decisions is not solely a normative one. There is a stock answer to the question, not adduced by anyone's reflective legal opinion but rather preselected by the broader legal and political culture. We know these cases by their petitioners: *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu*. They are the American anticanon. Each case embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute. Together, they map out the land mines of

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* [Several additional concurrences, and an additional dissent by JUSTICE MCLEAN, are omitted. —BE]

† Excerpt from Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

the American constitutional order, and thereby help to constitute that order: we are what we are not.

The anticanon poses a distinct problem for teachers and students of constitutional law. Professional competence in law is established by one's ability to distinguish strong from weak legal arguments and to predict how judges or other relevant legal actors might decide cases or resolve controversies. Most constitutional law courses identify a set of materials that students may draw from to perform these tasks with respect to constitutional cases: constitutional text, structure, and history; judicial and political precedent; and prudential or policy considerations. It is tempting to say that the anticanon constitutes those decisions in which the Court did an especially poor job of navigating and synthesizing these traditional materials, and anticanon Courts are frequently accused of just this error. As I will show, however, the status of a decision as anticanonical does not depend on the magnitude, or even the presence, of contemporaneous analytic errors by the deciding Court. Rather, it depends on the attitude the constitutional interpretive community takes toward the ethical propositions that the decision has come to represent, and the susceptibility of the decision to *use* as an antiprecedent. These factors might not relate to the decision's internal logic. A professor could explain anticanonical decisions through the lens of historicism, but she would not then be indoctrinating her students in the norms of professional legal practice; she would not be "doing" constitutional law.

A parallel problem exists with respect to the constitutional canon, the set of decisions whose correctness participants in constitutional argument must always assume. *Brown v. Board of Education* is the classic example of such a case: all legitimate constitutional decisions must be consistent with *Brown*'s rightness, and all credible theories of constitutional interpretation must accommodate the decision. And yet *Brown* was inconsistent with longstanding precedent, was in tension with the original expected application of the Fourteenth Amendment, was not compelled by the text of the Equal Protection Clause, and has required a Herculean effort—one well beyond the Court's competence—to implement comprehensively. Justifying *Brown* in the face of all that bad news requires reaching somewhat beyond the traditional tools of constitutional argument. Still, constitutional law professors persevere, and few these days find *Brown* a hard sell.

I will argue, though, that the presence of *anti*canonical decisions in textbooks, in syllabi, and as decisional precedents poses a more acute problem for constitutional lawyers. All but the stingiest formalist accept that constitutional law is not simply constructed from a series of doctrinal algorithms, that some decisions reflect the triumph of a particular community's ethical values, or *nomos*; or a judge's perception of moral imperative; or whimsy; or mistake. And we accept that many such decisions, though not produced by the conventional tools of constitutional analysis, may yet become part of the legal fabric and worthy of our respect as precedent, whether because of significant reliance interests, out of a Burkean prudence that counsels deference to past decisions of long standing, or indeed because the legal culture's acceptance of a case works a kind of informal constitutional amendment that acquires democratic purchase.[15] It is therefore important to teach these cases, commensurate with their doctrinal and political significance, and to seek to accommodate them within accepted modes of constitutional reasoning—they are, after all, the law.

But anticanonical cases are not the law; they are its opposite. Their holdings cannot reasonably be relied upon, and it is not obvious how the law would be any different were they never cited, taught, or thought about again. Yet we cite them, we teach them, and we think about them, and it would border on professional malpractice for us not to. This practice is in need of explanation. [The] presence of the anticanon within our constitutional discourse, and its particular use in briefs, in cases, and in classrooms, is a distinct phenomenon requiring distinct theoretical treatment.

II. Defending the Anticanon

[The] claims a legal culture makes about past cases tend to be historicist in nature. The meaning we ascribe to legal precedents is determined not at the time of decision, but over time by subsequent normative communities. [And] yet it is common practice to describe anticanonical cases not in terms of cultural evolution but in terms of analytic errors that should have been obvious at the time. [We] like to believe that such cases were wrong the day they were decided. [Legal scholars and others tend to] associat[e] anticanonicity with their preferred analytic defect. The burden for these commentators is not simply to show that the deciding Courts committed analytic errors, but also to show that those errors were so monumental, indeed historic, that the cases must be burned in effigy for all to bear witness. [T]hey cannot meet this burden. [N]one of the four anticanon cases is unusually wrong, either by contemporaneous legal standards or by the conventional forms of legal argument that remain popular today. Moreover, although all of the anticanonical cases can be accused of moral failings of varying magnitudes, [those] failings are inadequate to justify their modern-day treatment.

A. The Anticanon's Errors

[There] are errors and there are damned errors. We can imagine, in principle, how to construct each category as it relates to judicial review. Ordinary errors are good faith mistakes of judgment, with manageable consequences, the commission of which forms a central attribute of the human condition. A judge who respects the conventional tools of legal analysis and remains in role but simply arrives at the legally incorrect result deserves, on sober reflection, our sympathy more than our anger. He is not, after all, the judge who recklessly or intentionally disregards an important input into the process of judicial decisionmaking, or harbors delusions of

[15] *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 47–50 (1991).

political grandeur, or is unforgivably narrow-minded or incompetent. Conceptually, it seems as if the errors committed by this second type, often identifiable at the time of decision, should be the ones for which we reserve our deepest and most consistent condemnation. This section seeks to demonstrate that, with respect to *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu*, this is not so. The degree to which we collectively renounce these decisions is not nearly in proportion to the outrageousness of their errors. Part of the reason for that is fundamental: the conceptual dichotomy described above, between judicial errors and damned judicial errors, is contingent and unstable in practice. What is surprising is that it is no less so with respect to the few cases that we all agree are wrong.

1. Dred Scott v. Sandford. — The *Dred Scott* case involved a slave, Dred Scott, who sued his nominal master, John Sanford, for his freedom. Scott claimed that because a former master had taken him first to the free state of Illinois and then to Fort Snelling in the Wisconsin Territory, where slavery was prohibited by federal statute, he could not legally be re-enslaved in the slave state of Missouri, where he resided. [In] a convoluted opinion, Chief Justice Taney ruled that the Court did not have jurisdiction to hear the case because neither Scott nor any black American could be a citizen of the United States within the meaning of Article III's grant of diversity jurisdiction. The Court also ruled, in a holding sometimes described as dicta and at other times called in-the-alternative, that Scott's argument failed on the merits: Congress could not constitutionally forbid slavery in U.S. territories, as doing so would deprive traveling slaveholders of their property without due process of law.

The decision is, to say the least, troubling. Taney reached his conclusion that blacks could not be United States citizens through flawed analysis. His major premise was that blacks could be citizens now only if they could have been citizens at the time of the Constitution's drafting. His minor premise was that they could not have been citizens at the Founding for any number of reasons, chief among them that the Privileges and Immunities Clause of Article IV would entail their equal treatment with whites, which was a nonstarter. Both of these premises are routinely challenged in the literature, and with good reason. Taney's self-conscious embrace of originalism even when it leads to moral depravity is often cited as Exhibit A in the case against originalism as a viable method of constitutional interpretation. His originalism, moreover, was bad originalism. The notion that even free blacks could not be citizens at the Founding is embarrassed by the fact that many free blacks were in fact citizens at that time. And Taney's privileges-and-immunities argument was a non sequitur: the fact that, under Article IV, citizens in one state are entitled to the privileges and immunities available to citizens in another state does not mean that they may not be subjected to racial discrimination. These errors raise a suspicion that Taney's aggressive positivism was but a façade for his abject racism.

That is not all. Taney's further holding that Congress could not ban slavery in the territories adds injury to insult. For one thing, it was premised on the notion that slaves are not people but property, and as such have no Fifth Amendment rights to liberty competitive with their masters' Fifth Amendment rights to own them. For another, those who reject the idea of "substantive" due process will wonder what *process* was found wanting in the decision of Congress to ban slavery in the territories. Most importantly, perhaps, the *Dred Scott* decision rendered unconstitutional the political positions both of the nascent Republican Party and of Stephen Douglas and other northern Democrats on the question of slavery in the territories. The Republicans maintained that the territories should remain free, and southern Democrats insisted that they should not. Douglas and other northern Democrats adopted the compromise position that residents of the territories should be able to determine for themselves whether to permit slavery. Taney's decision made only the pro-slavery position constitutionally viable, causing a deep rift in the Democratic Party and preventing a compromise that could have averted the bloodiest war in American history. And as if that were not enough, he did so in dicta!

Can such errata be defended? Mark Graber has tried, somewhat, to do so (post-tenure, I hasten to add).[161] Graber argues that because the original Constitution rested on a set of political accommodations for slavery—and therefore abided "constitutional evil"—the *Dred Scott* majority was armed with a set of interpretive resources that made its claims just as plausible as the dissent's. He notes that the argument typically criticized by modern commentators as the most odious—that black Americans could not be U.S. citizens—"reflected beliefs held by the overwhelming majority of antebellum jurists in both the North and the South" and was consistent with the views of large segments of the American public. Taney's historical case against black citizenship was flawed but, on Graber's view, the case would have come out no differently if it were flawless. Graber may or may not be persuasive on these points, some of which I explore further below, but remember the burden we are concerned with—not whether *Dred Scott* was wrong but whether it deserves to serve as a prime example of how to be wrong.

I'm not so sure. In Taney's defense—not words one reads every day—some of *Dred Scott*'s critics miss the big picture. Let us bracket for the moment Taney's actual opinion and reconsider the case with fresh eyes. [The] basic question in *Dred Scott* was whether free blacks were entitled to the constitutionally conferred benefits of state citizenship. The Court had never before been so directly called upon to define the central features of citizenship, and it is difficult to dispute the conception Taney settled on: citizens have rights. In 1857, as in 1787, it offended no constitutional prohibition for states to protect the right to keep blacks as chattel slaves, and, a fortiori, for a state to deny, even to free blacks, the right to marry, to sue, to enter into contracts, or to own property, much less to deny them political rights such

[161] MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006).

as voting and jury service. Blacks were subjected to all manner of discriminatory treatment that no government would dare visit upon its white population. As Taney infamously wrote, blacks were "regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."

Let us also keep in mind a doctrinal point[.] Under the Court's holding in *Prigg v. Pennsylvania* (1842), which remained good law at the time of *Dred Scott*, a free state was constitutionally *forbidden* from providing a free black with due process of law if that person were kidnapped by a slave catcher. To hold in the face of such precedent that the same Constitution recognizes the citizenship of free blacks feels like the rankest sophistry. No nation worth its salt could abide the treatment of its citizens in this way. Either the treatment of blacks or their designation as citizens had to go. Only the designation was before the Court, and the war came.

Dred Scott's other "holding"—that prohibiting slavery in federal territories offended the due process clause of the Fifth Amendment—is also flawed, but not for the reasons often given. First, it was not at all clear at the time of Dred Scott that the Constitution applied to the actions of Congress in federal territories. Second, we do not ordinarily perceive substantive due process difficulties when regulations in one state reduce the value of chattels transported across state lines. If one state permits the carrying of marijuana and another prohibits it, it does not violate the Fourteenth Amendment Due Process Clause for the regulating state to confiscate a visitor's hash, much less simply to define it as contraband. Perhaps most significantly, the argument that Congress could not prohibit slavery in the territories not only rendered the Missouri Compromise not a compromise at all, but also would have invalidated the Northwest Ordinance, which was passed by the same Continental Congress that authorized the Philadelphia Convention, and which was unanimously reaffirmed by the First Congress. The First Congress not only comprised many delegates to the federal and state constitutional conventions, but it was also the same Congress that referred the Bill of Rights, whose Fifth Amendment Taney claimed made the Northwest Ordinance unconstitutional. This was a curious originalism indeed, one that prompted Abraham Lincoln in 1858 to call Taney's misdirection "an astonisher in legal history" and "a new wonder of the world."

These points do not, however, form the usual case against *Dred Scott*'s substantive due process holding. It is not uncommon, particularly in popular discourse, to see assertions that *Dred Scott*'s chief failing is its assumption that the Constitution countenanced the treatment of blacks as personal property. That assumption, though, was unassailable. A slightly more nuanced criticism faults Taney for resorting to substantive due process at all. Robert Bork writes: "[O]nce it is conceded that a judge may give the due process clause substantive content, *Dred Scott*, *Lochner*, and *Roe* are equally valid examples of constitutional law." Here is not the place to rehearse the arguments for and against substantive due process, but suffice to say that any federal constitutional claim to freedom that Scott had also would have been grounded in substantive due process. Had Taney adopted the Republican argument that the Fifth Amendment actually *forbids* slavery in federal territories—likely a correct claim today—surely *Dred Scott* would not be regarded as anticanonical, or even wrong.

There is a broader point that extends beyond doctrinal minutiae. *Dred Scott* does not gnaw at us because it misused syllogism or invented constitutional rights; we hate it because it abided constitutional evil. The conclusions Taney reached were morally insufferable, and so should have counted as dispositive evidence that his position was incorrect. But if this is what makes *Dred Scott* anticanonical, then there is incongruity in the conservative critique of the Warren Court, many of whose members envisioned their role precisely as we wish Taney had envisioned his.

In his time, Taney could not easily have held other than he did. His commentary on the status of slavery in the territories, though unnecessary to his holding, was at the invitation of prominent members of Congress, President Buchanan, and even Abraham Lincoln.[185] The more obvious route to war would have been a holding that Scott was made free based on his residence at Fort Snelling [in the Wisconsin Territory] or, better still, in Illinois. Had Taney instead remained silent on the Missouri Compromise, the standard account of *Dred Scott* tells us that he might have enabled Stephen Douglas to win the Presidency in 1860 and might therefore have put off the War. If this is the fate Taney denied us, then we should celebrate the decision. If *Dred Scott*'s legacy is existential military conflict, then it is also emancipation for millions of enslaved Americans, the new birth of freedom that the Fourteenth Amendment promised, and confrontation with the moral inadequacy of our original commitments. *Dred Scott* told us we had to take or leave a Constitution that enshrined white supremacy. We left it, and we are better for it.

[Placing] a case in the anticanon carries with it the implication that the central problem with the case is bad judging. The prevailing *Dred Scott* narrative, for example, casts Roger Taney as a villain who ignored the Constitution in order to implement his personal racist preferences. Taney might be perfectly villainous, but this is a distraction from the reasonable possibility that the Constitution itself enabled Scott to lose. As Graber argues, *Dred Scott*'s status as anticanonical sanitizes the Constitution and prevents us from confronting the problem of "constitutional evil."

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[185] [Buchanan] said in his 1857 inaugural address that the issue of slavery in the territories "is a judicial question, which legitimately belongs to the Supreme Court of the United States before whom it is now pending, and will, it is understood, be speedily and finally settled." [In his 1856 speech at Galena, Illinois, Lincoln had said:]"The Supreme Court of the United States is the tribunal to decide [the extension of slavery to the territories], and [Republicans] will submit to its decisions."

[Maintaining] an anticanon helps avoid such cognitive dissonance about our history. While it can be valuable in promoting a sense of possibility about our constitutional culture, exalting a flawed Constitution can have unfortunate consequences. For one, it complicates the position of those of us who believe that we should not aspire to originalist modes of constitutional argument. The primary appeal of originalism lies less in the rule-of-law claims advanced by some constitutional theorists than in the cultural resonance of the founding generation and its political work. Certain uses of the anticanon may impede serious engagement with that generation's dangerous bargain with slavery interests, and with the ways in which features of that bargain continue to manifest themselves in our constitutional structure. Justice Scalia's, Judge Bork's, and Justice Black's disproportionate invocations of the anticanon might reflect a need for originalists in particular to imagine what Henry Monaghan calls a "perfect" Constitution, one shorn of any insufferable commitments.

For those who profess support for originalism, there is something in deemphasizing the anticanon as well. Pretending that judges rather than the Constitution are always responsible for the most objectionable results reinforces judicial supremacy and discourages the American people from taking ownership over the Constitution. If indeed the Constitution may rightly, or at least not wrongly, be interpreted to embrace constitutional evil, then all the better that we strive constantly to engage with it, that we may better it through appropriate democratic channels.

Much of the work of transforming how we think about the anticanon can perhaps be accomplished through a change in emphasis. It is tempting to teach *Dred Scott* as part of the anticanon because of its devotion to racism or to originalism or to substantive due process. But it is more accurate to change those "or"s to "and"s. Legal professionals—including, especially, law professors—might emphasize that what cases like *Dred Scott* best symbolize are not errors in constitutional reasoning, but limitations upon it. Some of those limitations inhere in the document itself, which might contain text that is too inflexible to permit a judge to come to what we now understand to be the correct decision. Other limitations are imposed by traditional conceptions of the judicial role. In either case, these limitations should be discussed openly and challenged where appropriate. Rather than succumb to, ignore, or (in vain, perhaps) seek to eliminate the anticanon, we might reimagine it in the service of a contextual view of the judicial role.

Chief Justice Taney had hoped that an authoritative decision on the status of slavery in the territories would soothe dangerously mounting tensions over that issue.[*] (Indeed, as Greene notes, political leaders had also seemed

[*] Recall Chief Justice Marshall's assertion, in *McCulloch*, that if constitutional questions were to "be decided peacefully," rather than to become "a source … of hostility of a still more serious nature," then "by this tribunal alone can the decision be made." *Supra*, p. II-5. That is what Taney seems to have thought as well.

to support a judicial resolution.) As it turned out, though, Taney was wrong: the decision severely aggravated the simmering conflict, both by outraging Republicans who wanted to curb slavery's expansion and by taking the leading compromise option—allowing territorial residents to decide the slavery question for themselves (known as "popular sovereignty")—off the table. *See supra* p. IV-11 ("[Congress] could confer no power on any local Government, established by its authority, to violate the provisions of the Constitution.").

Anger over *Dred Scott* contributed to the election of Abraham Lincoln, whose platform called for its reversal, and his election led to secession and the Civil War. During the war, Lincoln issued the Emancipation Proclamation, a military order freeing the enslaved people in the rebel states. And after the war, the country ratified the Reconstruction Amendments; in fact, the rebel states were required to ratify the Fourteenth Amendment as a condition of regaining their representatives in Congress.

The next excerpt recounts aspects of this story in more detail and offers some context for interpreting the different provisions of the Reconstruction Amendments. (In light of our focus on the Fourteenth Amendment in this course, the discussion of the Thirteenth Amendment is very compressed, and the discussion of the Fifteenth Amendment is omitted entirely.)

A New Birth of Freedom

Akhil Reed Amar*

Four score years after the Founding, a new generation arose to transform what their fathers had brought forth on the continent. In what can only be described as a constitutional revolution, the nation ended slavery, made every person born under the flag an equal citizen, guaranteed a host of civil rights to all Americans, and extended equal political rights to black men.

[Though] the Constitution of 1787–88 did not abolish slavery, it would be nice to think that the Founding Fathers designed a document whose arc would inexorably bend toward freedom and equality. Alas, the facts do not bear out this comforting thought. [In] fact, the Constitution's basic structure tilted the long-run game against the forces of freedom. To recap: For every slave bought or bred (both before and after 1808) the slavocracy's clout in Congress and the electoral college would increase, thanks to the three-fifths clause. In a process akin to compound interest, the effects of this one little number would grow exponentially as time passed, giving the Slave Power far more than its fair share of federal House seats, state legislative (and therefore federal Senate) seats, and electoral-college seats (and therefore far more chances to dominate the presidency, the cabinet, and the Court).

[From] 1864 through 1870, Americans of all sorts—women and men, blacks and whites, civilians and soldiers, Easterners and Westerners, ex-

* Excerpt from AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY, ch. 10 (2005).

blues and ex-grays—engaged in a massive democratic struggle over the meaning of democracy itself. The result, breaking more than a half-century of constitutional silence, was a trilogy of constitutional amendments. First, in 1865, the Thirteenth Amendment ended slavery forever. Then came the Fourteenth Amendment, proposed in 1866 and ratified in 1868, making all persons born in America—blacks no less than whites, women no less than men—full and equal citizens, and pledging to protect all fundamental civil rights against state and federal encroachment. But this package of "civil" rights purposefully omitted the "political" right to vote and kindred "political" rights to hold office and serve on juries. Hence the need for yet another amendment—the Fifteenth, proposed in 1869 and ratified the next year—guaranteeing black men precisely these "political" rights.

From a modern perspective, this trilogy might seem to form an indivisible and inevitable postwar ensemble, but to Americans living through this tumultuous time, each amendment arose in its own unique historical moment; each raised its own set of issues[.] Let us, then, begin by pondering the first of this grand trilogy, the Abolition Amendment.

["Neither slavery nor involuntary servitude"]

[While] the Thirteenth Amendment clearly condemned traditional forms of unfree labor—chattel slavery itself, debt peonage, and so on—the antebellum experience had also dramatized a variety of other, less obviously economic forms of degradation, dehumanization, and unfreedom. While slave men had been worked against their will in the fields, paradigmatic slavery for women and children had taken other forms above and beyond field work—sexual exploitation and child abuse, for example. By banning *all* forms of "slavery [and] involuntary servitude," the Thirteenth Amendment cast a wide net not merely over the nation's economy but also over its social structure and its domestic institutions.

Government-sanctioned slavery was forever prohibited, but the amendment went even further, condemning various types of private domination perpetrated in the absence of formal legal authority or in the teeth of formal legal prohibition. Whenever one person improperly held another in bondage, the amendment applied: "slavery [and] involuntary servitude ... shall [not] exist." Hence, as soon as a state became aware of the existence of *de facto* slavery within its borders, the state had an obligation to end it.

Despite its seemingly traditional language, the Thirteenth Amendment thus marked a radical break with the antebellum federal Constitution. That prewar document had imposed few limits on what a state could do to its own inhabitants, whereas the Thirteenth pulverized bedrock legal principles and practices in more than one-third of the states and imposed new affirmative federal obligations on every state. The old Constitution had insulated property-holders from uncompensated takings, but the new one ratified and extended the largest redistribution of property in American history. Slaves were worth more than any other capital asset in the nation except land[,] yet the Thirteenth made no provision for compensation, even of loyal masters in true-blue states. [A] structurally proslavery Constitution became, in a flash, stunningly antislavery.

The naked constitutional text misleads: A casual reader encounters a Thirteenth Amendment whose words seem to follow smoothly after the first seven Articles and the first twelve amendments, in one continuous constitutional tradition linking the Founders to their twenty-first-century posterity. What the bare text does not show is the jagged gash between Amendments Twelve and Thirteen—a gash reflecting the fact that the Founders' Constitution *failed* in 1861–65. The system almost died, and more than half a million people did die. Without these deaths, the Thirteenth Amendment's new birth of freedom could never have occurred as it did.

"Congress shall have power"

America's first eleven amendments had all aimed to limit the federal government, and the Twelfth had neither added to nor detracted from federal authority. By contrast, the Thirteenth expanded the federal government's role in broad language, borrowed from some of the most sweeping passages of the Philadelphia document and antebellum case law.

Here, too, it is worth juxtaposing the Thirteenth Amendment as enacted in 1865 with the would-be Thirteenth Amendments that Congress proposed in 1861 and that Lincoln floated in 1862. The 1861 proposal would have forever forsworn congressional power over slavery in the states, and the 1862 plan likewise left the abolition issue to the several states (this time, with a federal financial sweetener [to encourage emancipation]). But the Thirteenth Amendment that prevailed at the end of the war reflected the spirit of nationalism that had been summoned up by the war itself. Not only did the amendment's opening words impose large duties on states, obliging them to prohibit slavery now and forever, but the amendment's closing words explicitly conferred new powers upon Congress: "Congress shall have power to enforce this [amendment] by appropriate legislation."

Whereas the Founders' first successful amendment told Congress that it could "make no law" over a certain domain (religion), the Reconstructors' first successful amendment told Congress that it could indeed make many laws over a different domain (emancipation). While the Founders' opening amendment had cleverly inverted the final paragraph of Article I, section 8 ("Congress shall have Power ... To make all Laws which shall be necessary and proper ... "), the Reconstructors' opening amendment essentially echoed this sweeping Article I language. Article I said that Congress would have all "proper" power; the Thirteenth Amendment said that Congress would have all "appropriate" power.

But why, we might wonder, did the amendment use a synonym (and etymological cousin) rather than track Article I's sweeping clause verbatim? Most likely because Congress preferred to use the language that the Supreme Court had itself used in construing congressional power broadly. In John Marshall's classic opinion in *McCulloch v. Maryland* (whose language about a "government of the people, ... by them, ... and for their benefit" would find its way into Lincoln's Gettysburg Address), the great chief justice had, in a famous passage, construed the necessary-and-proper clause to permit all congressional laws "which are appropriate."* *McCulloch* was read in the nineteenth century as providing a generous understanding of congressional power. In the antebellum period, no Court opinion—with the arguable exception of the malodorous Taney opinion in *Dred Scott*—had ever held that a congressional statute flunked *McCulloch*'s deferential test of congressional power. Reconstructors pointed in particular to one case, *Prigg v. Pennsylvania*, where the justices had shown notable deference to Congress in upholding federal power to legislate under the *McCulloch* test of "appropriateness." Republicans relished the irony that this language, which had long been used to support proslavery congressional laws (like the law at issue in *Prigg*) would henceforth authorize a wide assortment of antislavery congressional laws.

In particular, Reconstructors insisted that the Abolition Amendment's "appropriate" clause allowed Congress to legislate not merely against slavery itself, but against all the "badges" and relics of a slave system. In 1866, Congress passed an expansive Civil Rights Act protecting the civil rights of blacks in every state, North and South. The act prohibited race discrimination even in states that had never known slavery, on the theory that such forms of discrimination were vestiges of slavery. Critics objected that Congress lacked authority to intrude so deeply into traditionally state-law issues, and Andrew Johnson vetoed the bill.

On April 9, 1866, Congress overrode, in a dramatic vote that made headlines and indeed made history: Never before had any Congress ever surmounted a president's veto of a major bill. The two-thirds vote in each house on this bill foreshadowed the eventual two-thirds votes on the Fourteenth Amendment later that spring. In fact, as all at the time understood, the linkage between the enacted Civil Rights Act and the proposed Civil Rights Amendment was even tighter than this: One of the main purposes of the amendment was to provide an incontrovertible constitutional foundation for the act, which Johnson and his allies persisted in labeling unconstitutional even after its passage in April.

As most Reconstruction Republicans viewed the matter, since antebellum Congresses had been allowed to promote a slave system, postwar Congresses should have equal latitude to destroy all remnants of that system. Illinois Senator Lyman Trumbull argued that if a narrow view of the Abolition Amendment's "appropriate" clause were to prevail,

> the trumpet of freedom that we have been blowing throughout the land has given an "uncertain sound," and the promised freedom is a delusion ... . I have no doubt that under this provision ... we may destroy all these discriminations in civil rights against the black

* [*See supra* p. II-12. —BE]

> man ... . It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress ... [which may] adopt such appropriate legislation as it may think proper.

Whatever we might think of Trumbull's words and Congress's votes in isolation, we must understand that they did not stand alone. In emphatic response to critics who resisted broad congressional legislation under the "appropriate" clause of the Thirteenth Amendment, Congress, as noted, promptly proposed a *Fourteenth* Amendment with its own "appropriate" clause calling for sweeping congressional enforcement. In debates over this proposed Civil Rights Amendment, congressmen repeatedly quoted the language and the deferential approach of *McCulloch* and *Prigg* as exemplifying the spacious view of congressional power they were espousing. An early draft of the Fourteenth in fact copied Article I verbatim: "*The Congress shall have power to make all laws which shall be necessary and proper* to secure to the citizens of each State all privileges and immunities ... and to all persons in the several States equal protection in the rights of life, liberty, and property." Later, this draft language gave way to revised language of "appropriate" congressional enforcement legislation, plainly patterned on the phraseology used at the end of the sibling Thirteenth Amendment.

And—here is the key point—the American people ratified the Fourteenth Amendment, with evident understanding of the breadth of its, and also the Thirteenth's, language authorizing "appropriate" federal legislation. Knowing full well that Congress believed that this language authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality—and having seen with their own eyes that Congress had already acted on a similar belief in connection with the Thirteenth Amendment—Americans said yes[.]

"born ... citizens"

The Fourteenth Amendment's text began by repudiating the racialist vision of American identity that had animated Chief Justice Taney's infamous *Dred Scott* decision. Taney's 1857 opinion had proclaimed that a black man—even if born free in a state that treated him as a full and equal citizen—could never claim rights of citizenship under the *federal* Constitution. In 1862, Lincoln's attorney general opined that free blacks as a rule were federal citizens, despite Taney's words. The Civil Rights Act of 1866 took aim at *Dred Scott* even more directly by legislating the principle of birthright citizenship: "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." Two months later, Congress opened its proposed Fourteenth Amendment with similar anti-Taney language: "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."

The amendment aimed to provide an unimpeachable legal foundation for the earlier statute, making clear that everyone born under the American flag—black or white, rich or poor, male or female, Jew or Gentile—was a free and equal citizen. As with the statute, the amendment did not encompass persons born on American soil who owed allegiance to some other jurisdiction—for instance, children of foreign diplomats or of tribal Indians. The amendment also made clear that non-native, naturalized Americans were entitled to claim the privileges of citizenship. [Perhaps] most important, the amendment clarified that to be an American citizen meant having rights not just against the federal government but also against one's home state.

These words codified a profound nationalization of American identity. Lacking any explicit definition of American citizenship, the Founders' Constitution was widely read in the antebellum era as making national citizenship derivative of state citizenship, except in cases involving the naturalization of immigrants and the regulation of federal territories. The Fourteenth Amendment made clear that all Americans were in fact citizens of the nation first and foremost, with a status and set of birthrights explicitly affirmed in a national Constitution. Henceforth the nation would not only define national citizenship, but state citizenship as well. Even for persons born on its own soil, a state would no longer enjoy carte blanche to designate some (that is, whites) as "citizens" and to treat others (free blacks) as lesser "inhabitants." Likewise, no state could henceforth bar any American citizen from choosing to become a state citizen—a point only implicit (at best) in the Founders' text. Article IV had obliged South Carolina to treat a Massachusetts *visitor* with a certain respect but had not stated explicitly that a Massachusetts man had an absolute right to *become* a South Carolinian, whatever other South Carolinians might think.

Many first-year law students are told, and today's Supreme Court is fond of reiterating, that the Fourteenth Amendment's key words targeted only the actions of state government. Though this claim may be true of the amendment's second sentence ("No State shall ... "), it is plainly false as an account of the amendment's first sentence, which entitled citizens to rights against both state and federal officials. In tandem with the amendment's final sentence, these opening words also empowered Congress to dismantle various nongovernmental structures of inequality that threatened the amendment's vision of equal citizenship.

Though the word "equal" did not explicitly appear in the Fourteenth Amendment's first sentence, the concept was strongly implicit. All persons born under the flag were citizens, and thus *equal* citizens. The companion Civil Rights Act had spoken of the right of all citizens to enjoy "full and equal" civil rights, and a later Supreme Court case glossed the citizenship clause as follows: "All citizens are equal before the law."[*] Read alongside Article I's prohibitions on both state and federal titles of nobility, the citizenship clause thus proclaimed an ideal of republican equality binding on state and federal governments alike. Congress, if it chose, could go even further by enforcing the vision of equal citizenship against a host of unequal social structures and institutions. Taney's backdrop *Dred Scott* opinion had located citizenship in a broad context of social meaning and practice above and beyond state action. Blacks, said Taney in notorious language, could not be citizens because they were regarded by the white race—and not merely by white governments—as "beings of an inferior order, and altogether unfit to associate with the white race," with "no rights which the white man is bound to respect."

Thus, when the Fourteenth Amendment overturned Taney, it did so with words suggesting that Congress could use its sweeping *McCulloch*-like enforcement power to enact statutes affirming that blacks were in fact and in law equal citizens worthy of respect and dignity. Such statutes could not compel whites to invite blacks to their dinner parties; such truly private consensual relations lay outside the ambit of equal citizenship. Suffrage rights also lay outside the domain of mere citizenship. For example, white women and children had long been viewed as equal citizens, but this fact did not thereby entitle them to vote. Black citizenship, as conceptualized by the Civil Rights Act and the Civil Rights Amendment, meant full and equal "civil" rights as distinct from "political" rights. But in enforcing the letter and spirit of the citizenship clause, Congress could indeed properly end widespread nongovernmental systems of exclusion in places such as hotels, theaters, trains, and steamships. Congress could also seek to protect blacks from racially motivated violence and thereby make plain that blacks did have rights that white men were bound to respect.

During the Reconstruction era, Congress enacted several statutes to this effect, some of which were struck down by a Supreme Court ill disposed to construe expansively the constitutional sentence that had been introduced to chastise the Court itself. The first Justice John Marshall Harlan (not to be confused with his Eisenhower-era grandson) dissented in the most important set of these stingy Reconstruction decisions, the 1883 *Civil Rights Cases*, as he would later dissent in *Plessy v. Ferguson*. In 1883, Harlan stressed the "distinctly affirmative character" of the citizenship clause and argued that postwar Congresses should have at least as much authority to protect blacks as prewar Congresses had enjoyed to harm them[.]

"No State shall"

Nowadays, the Fourteenth Amendment's second sentence ("No State shall ... ") is the handiest constitutional tool in the judicial kit bag, a constitutional provision deployed in court more often than any other—more

[*] *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896).

often, perhaps, than all others combined. As a formal matter, this single sentence has come into play in most of the major constitutional cases decided by the modern Supreme Court. In its entirety, the sentence reads as follows: "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."

Today's Court construes these words to safeguard a vast array of rights against states—both substantive rights (like freedom of religion and expression) and procedural rights (such as a criminal defendant's entitlements to appointed counsel and trial by jury); both rights enumerated elsewhere in the Constitution (especially in the Bill of Rights) and unenumerated rights (most important, rights of privacy and sexual freedom); both political rights (paradigmatically the rights to vote, hold office, and serve on juries) and nonpolitical civil rights (including rights of minors, aliens, and other nonvoters). All of which should lead us to ask whether this sentence's text and enactment history in fact support this extraordinary judicial outpouring.

Let's begin with what lawyers call the "incorporation" doctrine: the firmly settled judicial principle that the Fourteenth Amendment should be construed to "incorporate"—to apply—almost all of the provisions of the Bill of Rights against states. [In] ordinary nineteenth-century language, the various civil rights and freedoms mentioned in the Bill of Rights were indeed quintessential "privileges" and "immunities" of Americans. [Moreover, the advocates of the amendment repeatedly asserted, in widely publicized speeches and pamphlets, that it would give Congress authority to enforce the Bill of Rights.]

In 1866, the prevalence in the South of marauding bands of white thugs, terrorizing black families whom state governments were failing to safeguard via genuinely "equal protection" of criminal laws, made an individual right to keep a gun in his—or her—home a core civil right deserving federal affirmation. This transformation of a Founding-era political right into a Reconstruction-era civil right was exemplified by a key congressional enactment in 1866, which declared that "laws ... concerning personal liberty [and] personal security, ... *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens."

The words "privileges or immunities of citizens" not only enabled Reconstructionists to [generally] apply[] [the Bill of Rights] against states, but also made clear to the American public that the opening section of the Fourteenth Amendment applied only to civil rights and not to political rights such as voting, jury service, militia service, and officeholding. By conferring birthright citizenship on females as well as males—"all persons born" under the flag—the amendment's first sentence had strongly implied a focus only on civil rights. Citizenship itself did not imply voting or other political rights—a point that Justice Benjamin R. Curtis had famously stressed in his emphatic dissent in *Dred Scott*.

[The] amendment's civil-rights focus sharpened in its second sentence, whose language borrowed from Article IV, which had likewise spoken of "Privileges" and "Immunities" of "Citizens." Article IV, it will be recalled, had affirmed an idea of *interstate equality of citizenship*: A Massachusetts citizen traveling in South Carolina would as a rule be entitled to be treated as a South Carolinian. The Fourteenth Amendment promised much more, namely, *full and equal in-state citizenship*: Every Massachusetts and South Carolina citizen would be entitled to claim a host of fundamental rights and freedoms (including the right to equality) against his or her own *home* state. But under both Article IV and the Fourteenth Amendment, the basic "privileges" and "immunities" of "citizens" would extend only to civil rights, not political rights. Under Article IV, a Massachusetts visitor would have no right to vote in a South Carolina election, serve on a South Carolina jury, et cetera. So, too, the Fourteenth Amendment guaranteed civil rights but not political rights against each citizen's home state. In explaining the amendment's first two sentences to the American public and state legislatures being asked to support and ratify the amendment, Republican leaders repeatedly stressed these sentences' utter inapplicability to suffrage issues. Northerners were not yet ready for a federal amendment mandating black (or woman) suffrage in every state.*

As Amar suggests above, the heart of the Fourteenth Amendment was its declaration of birthright citizenship and its novel undertaking to protect individual rights, as a matter of federal law, against state governments. Eric Foner, a leading historian of the period, characterizes this transformation as follows:

> Before Reconstruction the federal government played almost no role in defining or protecting Americans' rights. Most of the matters addressed by the second founding had traditionally been dealt with by the states and municipalities. No "political idea," wrote Frederick Douglass, the escaped slave who rose to become perhaps the most prominent abolitionist orator, was "more deeply rooted in the minds of men in all sections of the country [than] the right of each state to control its own affairs." But many Republicans, like Douglass, identified the idea of states' rights as second only to slavery itself as a cause of the war and an obstacle to any "general assertion of human rights," and wanted it sharply curtailed. Reconstruction was a key moment in the process by which a hierarchical, locally based legal culture was transformed into one committed, at least ostensibly, to the equality of all Americans, protected by the national government. "In the revolution we have gone through," the staunchly Democratic *New York World* observed in 1872, "the

* [The discussion of the Fifteenth Amendment is omitted. —BE]

political equality of man has been substituted for the equality of the sovereign states."[*]

Textually, the most prominent rights guarantee in the Fourteenth Amendment was the Privileges or Immunities Clause. That was the basis on which the Amendment's framers and ratifiers likely expected the incorporation of the Bill of Rights against the states (see *supra* p. IV-29), and perhaps other fundamental rights, to rest. But it has not worked out that way, thanks largely to the interpretation of that clause announced in *The Slaughter-House Cases*, which you'll read next.

The Slaughter-House Cases

83 U.S. 36 (1872)

[A Louisiana law chartered a corporation (the "Slaughter-House Company") and granted it a monopoly on maintaining slaughter-houses within New Orleans. Independent butchers could use the corporation's facilities for fixed fees. Some of those butchers challenged the state law under the new Thirteenth and Fourteenth Amendments, alleging that it "deprives a large and meritorious class of citizens—the whole of the butchers of the city—of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families."]

■ JUSTICE MILLER delivered the opinion of the Court.

[This] court is thus called upon for the first time to give construction to [the Thirteenth and Fourteenth Amendments].

We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members.

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[*] FONER, *supra*.

[Within] the last eight years three [new] articles of amendment of vast importance have been added by the voice of the people to [the Constitution.] The most cursory glance at these articles 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, and the contests [over it] pervading the public mind for many years, [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, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient [i.e., precipitating] cause was African slavery.

In that struggle, slavery, as a legalized social relation, perished. [But] notwithstanding the formal recognition of those States [that had seceded] of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States [were] laws* which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

[These] circumstances [forced] upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.

[A] few years' experience satisfied the thoughtful men who had been authors of [these] two amendments that [they] were inadequate for the protection of life, liberty, and property, without which freedom to the slave was

* [These post-emancipation laws are generally known as "Black Codes." —BE]

no boon. They were in all those States denied the right of suffrage. [Hence] the fifteenth amendment[.]

[In light of all this,] no one can fail to be impressed with the one pervading purpose found in [the Reconstruction Amendments], 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 freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

We do not say that no one else but the negro can share in this protection. [But] what we do say [is] that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy[.]

The first section of the fourteenth article [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. [It] 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. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

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 first clause of the first section was framed.

[The first sentence also makes] quite clear [that] there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other[.] [T]his distinction [has] great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs[], 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 argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

* ["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. . . . " —BE]

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. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose. Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

[The] Constitution, [Article IV, § 2, states]: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."* Fortunately we are not without judicial construction of this clause[.] The first and the leading case on the subject is that of *Corfield v. Coryell*, decided by Mr. Justice Washington in the Circuit Court [in] 1823.

"The inquiry," he says, "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 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 the 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, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been

* [The Court misquoted the Privileges and Immunities Clause here; the final "of" should be "in." —BE]

held to be the class of rights which the State governments were created to establish and secure.

[Article IV] did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.

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.

[U]p to the adoption of the recent amendments, no claim or pretense was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the [States]. [The] entire domain of the privileges and immunities of citizens of the States [lay] within the constitutional and legislative power of the States, and without that of the Federal government. 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 the article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

[That would empower Congress to] pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction [would] constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. [When,] as in the case before us, [the] consequences [of an interpretation] are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument [based on those consequences] has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

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.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government, we 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.

One of these is well described in the case of *Crandall v. Nevada* [(1868)]. It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States."

[Another] privilege of a citizen of the United States is 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. [The] right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State.

[The] rights claimed by [the plaintiffs], if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration.

[The Court also rejected the plaintiffs' arguments under the Fourteenth Amendment's Due Process Clause and the Equal Protection Clause.]

[Affirmed.]

▪ JUSTICE FIELD, joined by CHIEF JUSTICE CHASE and JUSTICES SWAYNE and BRADLEY, dissenting:

[The] question presented [is] one of the gravest [importance]. It 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 first clause of the fourteenth amendment changes [the] whole subject [of citizenship under the Constitution], and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State.

[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 has no reference to privileges and immunities of this character, but only refers, as held by [the majority], to such privileges and immunities as were before its adoption specifically 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. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character. But if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence.

What then are the privileges and immunities which are secured against abridgement by State legislation? In the [Civil Rights Act of 1866], Congress has given its interpretation to these terms, or at least has stated some of the rights which, in its judgment, these terms include: [the] right "to make and enforce contracts, to sue, to be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property."[*] That act, it is true, was passed before the fourteenth amendment, but the amendment was adopted [to] obviate objections to the act, or [to]

[*] [More specifically, the statute provided that persons born in the United States "are hereby declared to be citizens of the United States" and that they "shall have the same right, in every State and Territory in the United States, to make and enforce contracts, [etc.] as is enjoyed by white citizens." This was the first federal civil rights law, enacted over President Andrew Johnson's veto, and it remains in force as 42 U.S.C. § 1981. —BE]

legislation of a similar character[.] Accordingly, after its ratification, Congress re-enacted the act under the belief that whatever doubts may have previously existed of its validity, they were removed by the amendment.

[The] terms, privileges and immunities, are not new in the amendment; they were in the Constitution before the amendment was adopted. [And] they have been the subject of frequent consideration in judicial decisions. [Justice Washington's description in *Corfield*] appears to me to be a sound construction of the clause in question. 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. [What Article IV, § 2] did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States.

[The Fourteenth Amendment] was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes. [To] citizens of the United States[,] all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition. The State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name. The fourteenth amendment, in my judgment, makes it essential to the validity of the legislation of every State that this equality of right should be respected.[*]

Although the *Slaughter-House Cases* do not have the "anticanonical" status of *Dred Scott*, and indeed remain binding precedent, "[v]irtually no serious modern scholar—left, right, and center—thinks that [Justice Miller's] is a plausible reading of the Amendment."[†] Moreover, Justice Field's prediction that the majority's interpretation would render the Privileges or Immunities Clause "a vain and idle enactment" has proved largely correct. With some narrow exceptions relating to rights of interstate travel, there is

[*] [A separate dissent by JUSTICE BRADLEY is omitted. —BE]

[†] Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPPERDINE L. REV. 601, 631, n. 178 (2001). As Justice Thomas has observed, however, "[l]egal scholars agree on little beyond the conclusion that the [Privileges or Immunities] Clause does not mean what the Court said it meant in 1873." *Saenz v. Roe*, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting).

hardly any federal constitutional right today that is grounded in the Privileges or Immunities Clause. Justice Thomas has argued that the Court should overrule the *Slaughter-House Cases* in whole or in part, but the Court has so far declined to revisit the issue.*

Even though the Privileges or Immunities Clause thus is not doctrinally significant today, it remains a centerpiece of the Fourteenth Amendment as originally enacted and understood. And as you'll see in the next set of readings, the Court's early wrong turn in the *Slaughter-House Cases* helps to make sense of the path-dependent evolution of the Court's case-law in the area of individual rights. When, in the following decades, the Court *did* begin to enforce individual rights that were not textually explicit—upholding claims much like the ones the butchers had made against Louisiana—it had to locate these in the less obvious home of the Due Process Clause instead.

* See *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

2. Economic Liberty and Rational Basis Review (19 PAGES)

Although Justice Miller's opinion in the *Slaughter-House Cases* had expressed reluctance about any reading of the Fourteenth Amendment that would "constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens" (*supra*, p. IV-35), the Court soon found its way to occupying essentially that role. It did so under the auspices of a doctrine known as "substantive due process."

In this section, you'll first read a bit about the origins of that idea. You'll then read *Lochner v. New York* (1905), one of the seminal cases deploying it. Finally, you'll read the series of cases in which the Court retreated from the robust conception of its role that had defined the so-called "*Lochner* era"—much as it retreated from the most aggressive of its Commerce Clause holdings in the same period—and see how the Court settled on the default, deferential mode of review that has remained its baseline approach to rights claims ever since.

INTRODUCTION TO "SUBSTANTIVE DUE PROCESS"

1. The Early History and Main Idea

The Due Process Clause of the Fourteenth Amendment provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law." The most obvious way of depriving someone of liberty "without due process of law" is to incarcerate them without affording them some procedural safeguard (say, a trial). But the Due Process Clause has long been understood to have a second, "substantive" component: it protects against deprivations of liberty that are arbitrary, in the sense of lacking adequate justification, even if there is no strictly procedural defect in a statute's application to an individual.

Understanding that doctrine requires a bit of historical context. The phrase "due process of the law" traces to a 14th-century English statute. According to the conventional wisdom, it was synonymous with the phrase "by the Law of the Land" (*per legem terrae*) as used in the Magna Carta, the famous charter of rights extracted from King John in 1215. American colonists then incorporated "law of the land" clauses into state constitutions, which provided a template for the Fifth Amendment's Due Process Clause, which was clearly the model for the Fourteenth Amendment's Due Process Clause.

There is no question that the focus of all of these enactments was procedure, especially conformity with the enacted positive laws. But there were also traditions broader than that, linked to notions of natural law or inherent limits on the powers of government, that came to be associated with the same language—especially by the time of the Fourteenth Amendment's ratification. Here is how Justice Souter summarized some of this history in a separate opinion in *Washington v. Glucksberg* [*infra*, p. IV-94]:

Before the ratification of the Fourteenth Amendment, substantive constitutional review resting on a theory of unenumerated rights occurred largely in the state courts applying state constitutions that commonly contained either due process clauses like that of the Fifth Amendment (and later the Fourteenth) or the textual antecedents of such clauses, repeating Magna Carta's guarantee of "the law of the land." On the basis of such clauses, or of general principles untethered to specific constitutional language, state courts evaluated the constitutionality of a wide range of statutes.

Thus, a Connecticut court approved a statute legitimating a class of previous illegitimate marriages, as falling within the terms of the "social compact," while making clear its power to review constitutionality in those terms. *Goshen* v. *Stonington* (Conn. 1822). In the same period, a specialized court of equity, created under a Tennessee statute solely to hear cases brought by the state bank against its debtors, found its own authorization unconstitutional as "partial" legislation violating the State Constitution's "law of the land" clause. *Bank of the State* v. *Cooper* (Tenn. 1831). And the middle of the 19th century brought the famous *Wynehamer* case, invalidating a statute purporting to render possession of liquor immediately illegal except when kept for narrow, specified purposes, the state court finding the statute inconsistent with the State's due process clause. *Wynehamer* v. *People* (N.Y. 1856). The statute was deemed an excessive threat to the "fundamental rights of the citizen" to property.

Even in this early period, however, this Court anticipated the developments that would presage both the Civil War and the ratification of the Fourteenth Amendment, by making it clear on several occasions that it too had no doubt of the judiciary's power to strike down legislation that conflicted with important but unenumerated principles of American government. In most such instances, after declaring its power to invalidate what it might find inconsistent with rights of liberty and property, the Court nevertheless went on to uphold the legislative Acts under review. See, *e.g., Wilkinson* v. *Leland* (1829); *Calder* v. *Bull* (1798) (opinion of Chase, J.); see also *Corfield* v. *Coryell* (CC ED Pa. 1823). But in *Fletcher* v. *Peck* (1810), the Court went further. It struck down an Act of the Georgia Legislature that purported to rescind a sale of public land [and] reclaim title for the State, and so deprive subsequent, good-faith purchasers of property conveyed by the original grantees. The Court rested the invalidation on alternative sources of authority: the specific prohibitions against bills of attainder, *ex post facto* laws, laws impairing contracts in Article I, §10, of the Constitution; and "general principles which are common to our free institutions," by which

> CHIEF JUSTICE MARSHALL meant that a simple deprivation of property by the State could not be an authentically "legislative" Act.

It is easier to grasp the intuition that animated these early cases if you place less emphasis on the "process" part of "due process of law" and more emphasis on the "*law*" part, with the vague ring that we might associate today with "the rule of law." Consider, for instance, this passage from Justice Chase's opinion in *Calder v. Bull* (1798):

> 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. [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] *general principles of law and reason* forbid them.

Or, in the same spirit as *Fletcher* and *Calder*, recall *Dred Scott*'s holding that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory[,] could hardly be *dignified with the name of due process of law*" (emphasis added).

We'll discuss the idea here more in class, but the notion seems to have been that for a deprivation to comport with "due process *of law*," there needs to have been not only a fair process at the point of application, but also the kind of substantive justification that distinguishes legitimate lawmaking from arbitrary acts of power in the first place. Indeed, in a larger sense of "process," depriving someone of an important liberty *without good enough reason* can itself be understood as depriving them of that liberty *through a deficient process*, i.e., in an impermissible way or without checking a necessary box.

2. The Road to *Lochner*

Despite the precursors discussed above, the Court did not use this due process theory to invalidate state laws under the Fourteenth Amendment until the end of the 19th century. One significant step toward embracing that role came in **Mugler v. Kansas** (1887), where the Court upheld a Kansas anti-alcohol law but, along the way, asserted a *Marbury*-like authority to hold states to the limits of their legitimate police powers:

> It belongs to [legislatures] to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

> It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. [“To] what purpose,” it was said in *Marbury* v. *Madison*, “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[.]” The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

The Court took a further step in the same direction in **Allgeyer v. Louisiana** (1897). The petitioner had been convicted under a Louisiana statute that forbade him from dealing with an out-of-state insurance company that was not licensed in Louisiana. The Court held that his conviction violated the Due Process Clause: “The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union.”[*] And the Court articulated a broad conception of the “liberty” protected by the Fourteenth Amendment that would form the backdrop for its later decisions:

> The “liberty” mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace 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

[*] This formulation offers an interesting window into how the Court might have been conceptualizing “substantive due process” at this time. In order to be constitutional, the deprivation of Allgeyer’s liberty had to be pursuant to “due process of law”—which seems here to have been understood to mean something like, “pursuant to a law, rather than as a bare exercise of power” (a criterion that would be supported by even the narrowest interpretations of the original “by the law of the land” idea). But the state statute—being unconstitutional—could not be how the state checked that box, and so the exercise of power was left unsupported by any law. Note that under this understanding of what the Court is doing, the statute’s unconstitutionality is not so much a consequence of the Due Process Clause as it is a presupposition of the argument for invoking the Due Process Clause.

may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

These developments set the stage for the most notorious of the Court's substantive due process cases, *Lochner v. New York*.

Lochner v. New York

198 U.S. 45 (1905)

[The New York Bakeshop Act of 1895 imposed several sanitation standards for bakeries and further provided that "[n]o employee shall be required, permitted or suffered to work in a [bakery] more than sixty hours in any one week, or more than ten hours in any one day." Joseph Lochner, the owner of a small bakery in upstate New York, was convicted of employing a baker for more than 60 hours in one week.]

■ JUSTICE PECKHAM delivered the opinion of the Court.

[The] statute necessarily interferes with the right of contract between the employer and employés, concerning the number of hours 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 Fourteenth Amendment of the Federal Constitution. *Allgeyer v. Louisiana* (1897). Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment[.] 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[,] 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 Fourteenth 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 Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people;

such legislation would be valid no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, [the] question necessarily arises: Is this a fair, reasonable and appropriate exercise of the [police power], 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.

[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. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week.

[The] mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

[We] think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law[.] [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 employé. 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. [It] is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? [No] trade, no occupation, no mode of earning one's living, could escape this all-pervading power[.]

It is also urged [that] it is to the interest of the State that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. [Not] only the hours of employés, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the State be impaired. [Statutes limiting] the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, [unless] there be some fair ground [to] say that there is material danger [if] the hours of labor are not curtailed. [All] that [the State] could properly do has been done by it with regard to the conduct of bakeries, as provided for in the other sections of the act, [which] provide for the inspection of the premises where the bakery is carried on, with regard to furnishing proper wash-rooms and water-closets, [and] with regard to providing proper drainage, plumbing and painting [and the like].

It was further urged [that] restricting the hours of labor in the case of bakers was valid because it tended to cleanliness on the part of the workers, as a man was more apt to be cleanly when not overworked, and if cleanly then his "output" was also more likely to be so. [In] our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten hours a day it is all right, but if ten and a half or eleven his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary. When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a "health law," it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare.

[Interference] on the part of the legislatures [with] the ordinary trades and occupations of the people seems to be on the increase. [A survey of state-court decisions is omitted. —BE] [It] is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution [must] be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.

[It] is manifest to us that the limitation of hours of labor [has] no such direct relation to and no such substantial effect upon the health of the employé 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 employés (all being men, *sui juris*),* in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employés. Under such circumstances the freedom of master and employé to contract with each other in relation to their employment [cannot] be prohibited or interfered with, without violating the Federal Constitution. [Reversed.]

▪ JUSTICE HARLAN, with whom JUSTICES WHITE and DAY concurred, dissenting.

[Granting that] there is a liberty of contract which cannot be violated [but] is subject to [reasonable police regulations], what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? [The] rule is universal that a [law] is never to be regarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. [If] the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional. *McCulloch*.

Let these principles be applied to the present case.

[It] is plain that this statute was enacted in order to protect the physical well-being of those who work in [bakeries]. It may be that the statute had its origin in part, in the belief that employers and employés 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

* ["*Sui juris*" is Latin for "in one's own right"; the point is that the workers are not minors or otherwise legally incompetent to make decisions for themselves. —BE]

wise legislation, it is not the province of the court to inquire. [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 ends sought to be accomplished by its legislation. [Still] less can I say that the statute is, beyond question, a plain, palpable invasion of rights secured by the fundamental law. It must be remembered that this statute does not apply to all kinds of business. It applies only to work in bakery and confectionery establishments, in which, as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors.

[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[.]" 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[.] [Nearly] all bakers are pale-faced and of more delicate health than the workers of other crafts[.] [The] average age of a baker is below that of other workmen; they seldom live over their fiftieth year[.]"

[There] are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health, and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the State, and to provide for those dependent upon them. If such reasons exist that ought to be the end of this case, for the State is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution[.]

Health laws of every description constitute, said Chief Justice Marshall, a part of that mass of legislation which "embraces everything within the territory of a State, not surrendered to the General Government; all which can be most advantageously exercised by the States themselves." *Gibbons v. Ogden*. A decision that the New York statute is void under the Fourteenth Amendment will, in my opinion, involve consequences of a far-reaching and mischievous character; for such a decision would seriously cripple the inherent power of the States to care for the lives, health and well-being of their citizens. Those are matters which can be best controlled by the States. The preservation of the just powers of the States is quite as vital as the preservation of the powers of the General Government.

▪ JUSTICE HOLMES, dissenting.

[This] case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that [state 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 liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. 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[.]

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. 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.

THE "*LOCHNER* ERA"

1. Extensions of *Lochner*

In the wake of *Lochner*, the Court struck down various other state and federal laws for depriving people of economic liberty. There are various examples, but two are especially helpful for mapping the ideas underlying this line of cases. In the first, **Coppage v. Kansas** (1915), the Court struck down a Kansas statute banning "yellow dog" contracts—contracts that required

[*] [This was an 1851 book defending an extreme version of the economic and social theory of *laissez-faire*. —BE]

workers to agree, as a condition of employment, that they would not join a union. The Court's explanation helps to clarify the grounds of its opposition to what, in *Lochner*, it had called a "labor law, pure and simple":

> No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. [Wherever] the right of private property and the right of free contract coexist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the 14th Amendment, in declaring that a state shall not "deprive any person of life, liberty, or property without due process of law," gives to each of these an equal sanction; it recognizes "liberty" and "property" as coexistent human rights, and debars the states from any unwarranted interference with either. And since a state may not strike them down directly, it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty.

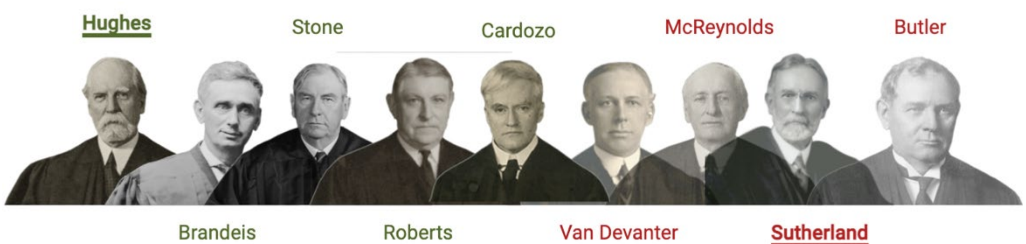
Another landmark was **Adkins v. Children's Hospital of the District of Columbia** (1923), where the Court struck down a minimum wage law for women. When it came to employment contracts, the Court explained, its decisions had established that, "generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining." Notwithstanding the government's contention "that great benefits have resulted from the operation of [similar] statutes," the Court rejected the law as an unacceptable incursion on this now-hardened rule. "A wrong decision does not end with itself; it is a precedent, and, with the swing of sentiment, its bad influence may run from one extremity of the arc to the other."

2. The Repudiation of *Lochner*

We saw in the Commerce Clause context how the Court's jurisprudence changed direction after President Roosevelt won re-election in 1936 and mounted a public campaign for Court reform. The interventionist approach of the *Lochner* era was abandoned at essentially the same time. The first pivotal case, *West Coast Hotel v. Parrish* (1937), was decided just weeks before *Jones & Laughlin*. In what came to be known as the "switch in time that saved nine," Justice Owen Roberts—who less than a year before had voted to strike down New York's minimum wage law—made a majority to uphold Washington's. Whether or not Justice Roberts really switched his vote to blunt Roosevelt's court-packing plan (a point that historians have debated), it seems clear that, one way or another, the majority—now including Roberts—came to appreciate that intense judicial scrutiny of economic legislation was no longer tenable.

West Coast Hotel v. Parrish

300 U.S. 379 (1937)



▪ CHIEF JUSTICE HUGHES wrote the opinion of the Court.

This case presents the question of the constitutional validity of the minimum wage law of the State of Washington. The Act, entitled "Minimum Wages for Women," authorizes the fixing of minimum wages for women and minors[.]

[The] importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the *Adkins* case was reached, and the economic conditions which have supervened[,] make it [imperative] that [the] subject should receive fresh consideration.

[T]he violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

The point [that] adult employees should be deemed competent to make their own contracts [is answered by] the inequality in the footing of the parties. [As the Court had recognized, before *Lochner*, in upholding a maximum-hours law for miners:]

> "[The] proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority."

[We thus] think that [*Adkins*] was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed. [What] can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that [a minimum wage] is not an admissible means to that end? The legislature [was] clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the "sweating system," the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent[.] [The] community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. [*Adkins* is] overruled.

▪ JUSTICE SUTHERLAND, joined by JUSTICES VAN DEVANTER, MCREYNOLDS, AND BUTLER, dissented.

[It] is urged that the question involved should now receive fresh consideration [because] of "the economic conditions which have supervened"; but the meaning of the Constitution does not change with the ebb and flow of economic events. If [what] is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written[,] is to rob that instrument of the essential element which continues it in force as the people have made it until they [decide] otherwise. [The] judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation.

[What] we said [in *Adkins*] is equally applicable here:

> The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. [The law] takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without means of livelihood. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.
>
> [A] statute requiring an employer to pay in money, to pay at prescribed and regular intervals, [even] to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things and solely with relation to circumstances apart from the contract of employment [is] so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States.

THE MODERN "RATIONAL BASIS" BASELINE

The approach that has taken *Lochner*'s place—or, at least, a central component of that approach—is known as "rational basis review." This mode of review began to crystallize in *United States v. Carolene Products Co.* (1938), one year after *West Coast Hotel*. Today, *Carolene Products* is known as a step on the road to the modern rational-basis test, but it is even more famous for its "Footnote 4." There, Justice Stone articulated in a few sentences—and in a footnote!—an overarching theory of the Court's role in adjudicating rights claims, now known as "political process theory," that has proved very influential. Read the footnote in the context of the case and consider what might be said for or against the differentiated scheme of judicial review that it outlines.

United States v. Carolene Products Co.

304 U.S. 144 (1938)

■ JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether the "Filled Milk Act" of [1923], which prohibits the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream, transcends the power of Congress to regulate interstate commerce or infringes the Fifth Amendment.

[The] prohibition of shipment of appellee's product in interstate commerce does not infringe the Fifth Amendment. [The] Filled Milk Act was adopted by Congress after committee hearings, in the course of which eminent scientists and health experts testified. [Two committees] concluded, as the statute itself declares, that the use of filled milk as a substitute for pure milk is generally injurious to health and facilitates fraud on the public. [Even] in the absence of [such express declarations in the statute,] the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed 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.[4]

[Where] the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry[.] But by their very nature such inquiries [must] be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for [the legislative judgment]. Here [it] is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, [no] finding of a court [can] be substituted for it.

[Reversed.][*]

While *Carolene Products* applied an unabashedly deferential standard of review—asking whether the facts "preclude the assumption that [the statute] rests upon some rational basis within the knowledge and experience of the legislators"—it did point to the substantial evidence before Congress about the ills of filled milk. A canonical articulation and starker illustration of the modern rational-basis standard is *Williamson v. Lee Optical Co.* (1955). As you will see, the form that rational basis review takes here is even more "hands off" than *Carolene Products* might have suggested.

[4] 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 under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. [Examples include] restrictions upon the right to vote, [restraints] upon the dissemination of information, [interferences] with political organizations, [and] prohibition of peaceable 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. Compare *McCulloch*[.]

[*] [A concurrence in the judgment by JUSTICE BUTLER, arguing that the company should be free to prove at trial that Congress's findings were wrong, is omitted. JUSTICE MCREYNOLDS dissented without an opinion, and JUSTICE BLACK joined all but the last part of the majority opinion (and thus did not join Footnote 4). —BE]

Williamson v. Lee Optical Co.

348 U.S. 483 (1955)

▪ JUSTICE DOUGLAS delivered the opinion of the Court.

[The District Court] held invalid [under] the Due Process Clause of the Fourteenth Amendment [an Oklahoma law that] make[s] 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[,] 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.

The effect of [the law] is to forbid the optician from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist. In practical effect, it 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] rebelled at the notion that a State could require a prescription [to] "take old lenses and place them in new frames and then fit the completed spectacles to the *face* of the eyeglass wearer." [The] court found that through mechanical devices and ordinary skills the optician could take a broken lens or a fragment thereof, measure its power, and reduce it to prescriptive terms. The court held that "Although [the legislature] was dealing with a matter of public interest, the particular means chosen are neither reasonably necessary nor reasonably related to the end sought to be achieved."

[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. *See* [*West Coast Hotel*]. "For protection against abuses by legislatures the people must resort to the polls, not to the courts."

[Reversed.]

Under *Lee Optical*, is it meaningfully possible for a law that regulates economic affairs to run afoul of substantive due process? Indeed, if the Court's review is going to look like it does here, why go through the exercise of requiring that there be *hypothetical* rational reasons for laws in this domain at all? (Won't *every* law be hypothetically justifiable as a rational means of serving some valid objective, if only the objective of doing exactly what the law does?)

Consider the criticism of rational basis review and *Lee Optical* voiced by Randy Barnett, a leading libertarian lawyer and academic:

> The modern rational basis approach adopted by the Warren Court in *Lee Optical* represents a judicial abdication of its function to police the Constitution's limits on legislative power. It accomplished this by combining its formalist irrebuttable presumption of constitutionality with a judicially-invented distinction between economic and personal liberties found nowhere in the Constitution—a distinction that runs afoul of one of the few rules of construction in the Constitution itself: "The enumeration in the

> Constitution of certain rights shall not be construed to deny or disparage others retained by the people."* The lesson of *Lee Optical* is that protection of these retained rights [requires] the recognition that the "due process of law" includes a judicial assessment of whether a restriction on either personal or economic liberty is genuinely rationally related to an end that is within the proper scope of federal or state legislative powers, or whether the restriction is instead irrational, arbitrary, or discriminatory. In short, the protection of these rights requires judicial engagement.†

B. Heightened Scrutiny: When, Why, and How

Lee Optical signaled the end of rigorous judicial review of most possible claims of "liberty" deprivations under the Fourteenth Amendment. But there are certain areas where the Court has applied what it terms "heightened" (or sometimes "strict") scrutiny—a form of review more like *Lochner* than *Lee Optical*. You saw an early suggestion that the Court might differentiate among contexts in this way in *Carolene Products*' Footnote 4, although, as you'll see, the scheme that has developed does not track that one exactly.

In this subsection, encompassing three classes' worth of material, you'll read about some of the most important (and most contested) areas where the Court has applied some form of heightened scrutiny under the Due Process Clause. We'll start by tracing two parallel lines of cases that developed in the twentieth century, up to roughly the 1970s: one "incorporating" the protections of the Bill of Rights into the Due Process Clause, and one recognizing so-called "unenumerated" rights, such as rights of privacy and reproductive freedom. We'll then turn to the debate in recent decades over the scope of the latter sorts of rights. And finally, we'll read some of the Court's recent Second Amendment cases, which, aside from being important in their own right, illustrate the enforcement of an "enumerated" right via substantive due process.

1. "Incorporation" and "Unenumerated Rights" (23 PAGES)

THE "INCORPORATION" OF THE BILL OF RIGHTS

Before the Reconstruction Amendments, it was clear and well-settled that the Bill of Rights limited only the Federal Government. The First Amendment, for instance, says expressly that "*Congress* shall make no law …" The point of these rights protections, after all, was to provide additional security against the new and imposing Federal Government; they were not supposed to protect people against their own state governments. But as we

* U.S. Const., amend. IX.

† Randy E. Barnett, *Judicial Engagement Through the Lens of* Lee Optical, 19 GEO. MASON. L. REV. 845, 860 (2012).

saw earlier, the Reconstruction Amendments worked a fundamental revision in this scheme—reflecting a very different experience of where the main threats to individual liberty and security lie—and the Fourteenth Amendment was thus designed precisely to interpose the Federal Government between citizens and their state governments as a guardian of certain individual rights.

There is wide agreement today that one way the Fourteenth Amendment was supposed to do this was by "incorporating" at least some of the protections of the original Bill of Rights and making them binding against the states as well. The leading view among historians of the period is that this work was supposed to be done principally by the Privileges or Immunities Clause.[*] But as we saw earlier, the *Slaughter-House Cases* construed the set of "privileges or immunities of citizens of the United States" very narrowly, and in a way that would be difficult to link to the Bill of Rights. As a result, incorporation has unfolded under the rubric of the Due Process Clause instead.

Under the prevailing doctrinal account of how this works, in fact, "incorporation" is a bit of a misnomer. As the Court put it in *Twining v. New Jersey* (1908):

> It is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it 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.

Under this line of thought, the question of whether the states must respect, say, freedom of speech is not fundamentally different from the question of whether they must respect freedom of contract (or, as we'll see later in this section, reproductive freedom). The question as to each is whether the intrusion on the liberty at issue runs afoul of the "substantive" aspect of the Due Process Clause, so whether the right is enumerated in the Bill of Rights—and therefore binds the *Federal* Government—is at most indirectly relevant. In fact, much the same goes for the squarely procedural rights in the Bill of Rights (like the protections against self-incrimination or double jeopardy) too. To be sure, it would be awkward to call the incorporation of these rights an application of "*substantive* due process"—but the point remains that whether the relevant procedures are required by the Due Process Clause turns on their sheer importance to "due process of law" rather than on the fact of their inclusion in the Bill of Rights.

[*] For a bit more on that understanding, see *supra*, p. IV-27.

The Court moved further in the direction suggested by *Twining* in **Palko v. Connecticut** (1937). The case involved a challenge to Connecticut's practice of granting appeals to the state in criminal trials, which Palko claimed would "place him twice in jeopardy for the same offense [in] violat[ion] of the Fourteenth Amendment." Justice Cardozo, writing for the 8–1 Court, rejected that claim, and with it the competing theory of "total" incorporation of the Bill of Rights. "There is no such general rule," the majority said, that "[w]hatever would be a violation of the original bill of rights [if] done by the federal government is now equally unlawful [under] the Fourteenth Amendment if done by a state." Reviewing recent precedent, Cardozo observed that, by that point, the Court had enforced some rights, such as freedom of speech and freedom of the press, against states, but had declined to enforce others, such as the right against self-incrimination. The distinction, he said, turned on whether the right was "of the very essence of a scheme of ordered liberty," such that eschewing it would "violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Illustrating the difference, the Court explained:

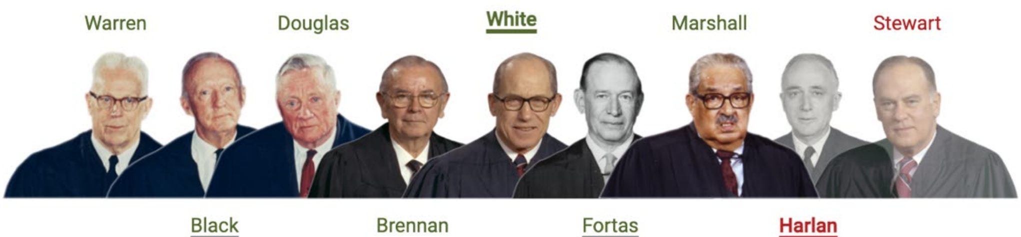
> The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. [But f]ew would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them.
>
> [We] reach a different plane of social and moral values when we pass to the privileges and immunities that have been [brought] within the Fourteenth Amendment by process of absorption. [If] the Fourteenth Amendment has absorbed them, the process of absorption has its source in the belief that neither liberty nor justice would exist if they were sacrificed. This is true, for illustration, of freedom of thought, and speech. Of that freedom, one may say that is it the matrix, the indispensable condition, of nearly every other form of freedom.
>
> [Is] that kind of double jeopardy to which the statute has subjected [Palko] a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? The answer surely must be "no." What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider.

As Cardozo's example of the jury trial right illustrates, this "implicit in the concept of ordered liberty" test has the potential to be quite stingy. Put another way, it would be expected to leave a sizable gap between what the state and federal governments can each get away with. That would have proved especially limiting as the Court embarked on a sustained project of criminal justice reform, especially in cases involving widespread racist abuses in the South, in the 1960s. At the same time, *Palko*'s "selective" approach to incorporation seemed to leave the Court with arbitrary discretion to judge just how important each particular provision of the Bill of Rights really is. Partly for that reason, Justice Black advocated an alternative theory of "total" incorporation, according to which the Fourteenth Amendment genuinely incorporated the Bill of Rights by reference and made it applicable against the states.*

Consider how the subsequent evolution of the Court's approach to incorporation, captured in *Duncan v. Louisiana*, might represent a response to these concerns about the selective model.

Duncan v. Louisiana

391 U.S. 145 (1968)



■ JUSTICE WHITE delivered the opinion of the Court.

[Duncan was convicted of battery in Louisiana. The state constitution recognized a right to jury trials, but only for offenses punishable by death or hard labor. He challenged his conviction in federal court based on the Due Process Clause of the Fourteenth Amendment.]

[In] resolving conflicting claims concerning the meaning of this spacious language [of due process], 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.

[The] test for determining whether a right extended by the [Bill of Rights] 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." Because we believe that

* See, e.g., *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting) ("I would follow what I believe was the original purpose of the Fourteenth Amendment — to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.").

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.

[The] deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

[Reversed and remanded.]

■ JUSTICE BLACK, with whom JUSTICE DOUGLAS joins, concurring.

[I] am very happy to support this selective process through which our Court has [held] most of the specific Bill of Rights' protections applicable to the States to the same extent they are applicable to the [Federal Government]. All of these holdings making Bill of Rights' provisions applicable as such to the States mark, of course, a departure from the *Twining* doctrine.

[Due] process, according to my BROTHER HARLAN, is to be a phrase with no permanent meaning, but one which is found to shift from time to time in accordance with judges' predilections and understandings of what is best for the country. [It] is impossible for me to believe that such unconfined power is given to judges in our Constitution that is a written one in order to limit governmental power. Another tenet of the *Twining* doctrine as restated by my BROTHER HARLAN is that "due process of law requires only fundamental fairness." But the "fundamental fairness" test is one on a par with that of shocking the conscience of the Court. Each of such tests depends entirely on the particular judge's idea of ethics and morals instead of requiring him to depend on the boundaries fixed by the written words of the Constitution.

■ JUSTICE HARLAN, with whom JUSTICE STEWART joins, dissenting.

[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. [Neither] history, nor sense, supports using the [Fourteenth] Amendment to put the States in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law. Although [I] fundamentally disagree with the total incorporation view of the [Fourteenth] Amendment, it seems to me that such a position does at least have the virtue, lacking in the Court's selective incorporation approach, of internal consistency: we look to the Bill of Rights, word for word, clause for clause, precedent for precedent because, it is said, the men who wrote the Amendment wanted it that way. [Apart] from the approach taken by the absolute incorporationists, I can see only one method of analysis that has any internal logic. That is to start with the words "liberty" and "due process of law" and attempt to define them in a way that accords with American traditions and our system of government.

[The] argument that jury trial is not a requisite of due process is quite simple. [If] due process of law requires only fundamental fairness, then the inquiry in each case must be whether a state trial process was a fair one. The Court has held, properly I think, that in an adversary process it is a requisite of fairness, for which there is no adequate substitute, that a criminal defendant be afforded a right to counsel and to cross-examine opposing witnesses. But it simply has not been demonstrated, nor, I think, can it be demonstrated, that trial by jury is the only fair means of resolving issues of fact. The jury is of course not without virtues. [The] jury system can also be said to have some inherent defects. [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. [The] Court has chosen to impose upon every State one means of trying criminal cases; it is a good means, but it is not the only fair means, and it is not demonstrably better than the alternatives States might devise.

PUZZLES ABOUT SELECTIVE INCORPORATION

Today, thanks largely to the reasoning of cases like *Duncan*, nearly all of the Bill of Rights applies to states as well as the federal government; there are only a few limited and scattered exceptions.* Is it clear why or how "selective" incorporation—an approach *not* premised on the view that the Bill of Rights provisions were actually incorporated, as such, in the Fourteenth Amendment, but rather on incrementally discerning the bounds of "due process of law"—would or should reach this result?

Moreover, supposing that some overall "right" (like the right to jury trial) that figures in the Bill of Rights *is* encompassed by the Due Process Clause, does it make sense that states would be bound by all of the particular holdings that the Supreme Court reaches in construing the corresponding provision of the Bill of Rights? Consider, for instance, *Wolf v. Colorado* (1949), where the Court held that the Fourth Amendment's basic protection against unreasonable searches was "implicit in the concept of ordered liberty"—and so was enforceable against the states as well—but that "the ways of enforcing such a basic right raise questions of a different order." Whereas the Court had held that evidence obtained in violation of the Fourth Amendment could not be introduced at trial, therefore, *Wolf* held that the Due Process Clause imposed no parallel "exclusionary rule" on the states: "How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range

* These include the right to grand jury indictment, the right to have one's trial in the locality where the crime occurred, and the right to jury trial in certain civil cases.

of judgment on issues not susceptible of quantitative solution."* The Court overruled that aspect of *Wolf* in *Mapp v. Ohio* (1961), aligning the state and federal rules. But if the logic of the selective incorporation doctrine is taken seriously, doesn't the discrepancy make sense? (Notice how *Palko* concluded its analysis: the right against retrial after a state appeal, at least, was not a fundamental requirement of justice, so the Court "ha[d] no occasion to consider" anything more. *Supra*, p. IV-60.)

We'll return briefly to this issue when we consider the Second Amendment in detail in section IV.B.3. In the meantime, one benefit of understanding how incorporation relied on the Court's due process standards is that this helps to make sense of the second line of cases—which were not so clearly separated at the time—that appealed to similar standards in recognizing other liberty interests that did not figure in the Bill of Rights at all.

THE ORIGINS OF RIGHTS OF PRIVACY, FAMILY, AND OTHER "UNENUMERATED" RIGHTS

Although freedom of contract was the focus of the Court's substantive due process decisions in the *Lochner* era, the same basic conception of the Due Process Clause also empowered the Court to invalidate state laws that, it thought, unreasonably intruded on "liberty" in other ways. And whereas post-*Lochner* cases such as *Lee Optical* leave no doubt that the economic freedom holdings of this era are no longer good law, some of the others took root and spawned a large body of doctrine—focused on claims of privacy and autonomy, especially in the domains of reproductive freedom and child-rearing or family life—that remains substantially intact today. Understanding that modern body of law (and the Court's recent decision cutting back on it in *Dobbs v. Jackson Women's Health Organization* (2022)) requires understanding its origins.

The substantive due process cases that set this line in motion are **Meyer v. Nebraska** (1923) and **Pierce v. Society of Sisters** (1925). In *Meyer*, the Supreme Court, by 7–2, reversed a teacher's conviction for teaching German in violation of a state law prohibiting foreign language instruction to young children. Justice McReynolds, one of the "four horsemen" who had led the effort to rein in government power, took a capacious view of the Fourteenth Amendment's protections:

> "Without a doubt, [liberty] denotes [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

* The structure of the issue here—involving a distinction between a substantive judgment about constitutional meaning and an implementing rule, which gives rise to a question about institutional authority as to each—might remind you of *Dickerson v. United States* (*supra*, p. I-19).

> common law as essential to the orderly pursuit of happiness by free men."

The statute, he wrote, "materially [interfered] 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." The decision thus blended core economic-liberty thinking (the teacher had a right to pursue his vocation free of unreasonable regulation) with a distinct concern about improper, totalitarian interference with a parent's freedom to raise a child differently than the state might prefer.

Justice McReynolds wrote for the Court again in *Pierce* two years later. The Court unanimously struck down a law that required every child to attend public schools. Drawing on *Pierce*, the Court explained that there was no "general power of the State to standardize its children by forcing them to accept instruction from public teachers only." "The child is not the mere creature of the State," the Court said, "and those who nurture him and direct his destiny" were entitled to choose private education.

Twenty years later—now shortly after *West Coast Hotel* and *Carolene Products*—the Court invalidated a sterilization law in **Skinner v. Oklahoma** (1942). An Oklahoma statute authorized the sterilization of "habitual criminals," defined as persons convicted of two or more felonies involving moral turpitude. Yet it expressly excluded certain crimes, such as embezzlement, from serving as predicate offenses. Based on that disparate treatment, the Court held that the law denied the challenger "equal protection of the laws." In so doing, it avoided resolving whether the law also violated the Due Process Clause.[*] Yet the substance of the Court's equal protection analysis was driven by the fact that, as Justice Douglas wrote for the majority, "[t]his case touches a sensitive and important area of human rights."

"[I]f we had here only a question as to a State's classification of crimes, such as embezzlement or larceny," the Court explained, "no substantial federal question would be raised." "[I]n the exercise of [their] police power," States are normally "not constrained" in "mark[ing] a [family] of offenses for special treatment." However:

> 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

[*] One reason for avoiding that question might have been that the Court had previously held, with its now-notorious ruling in *Buck v. Bell* (1927), that compulsory sterilization was permissible, at least in certain circumstances. Another reason might have been that reviving substantive due process so soon after *Carolene Products* would have appeared hypocritical (or, at least, could have sent mixed messages about the Court's commitment to its new policy of restraint).

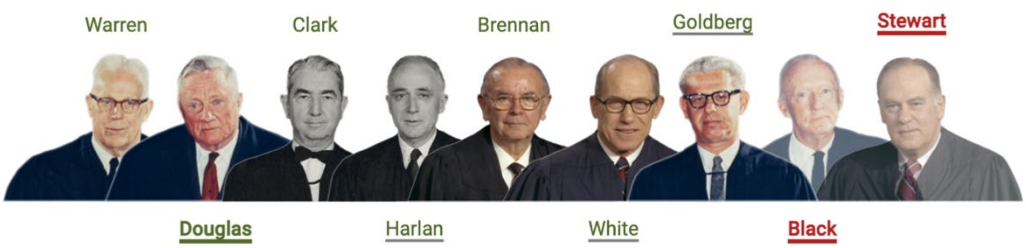
> to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. [S]trict scrutiny of the classification which a State makes in a sterilization law is essential[.]

Justice Jackson, concurring, gestured at the possibility that the right to procreate was beyond government intrusion: "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."

These cases formed the backdrop for the Court's decision, another twenty years later, in *Griswold v. Connecticut* (1965).

Griswold v. Connecticut

381 U.S. 479 (1965)



■ Justice Douglas delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. [He] gave information, instruction, and medical advice to *married persons* as to the means of preventing conception. [The] statutes whose constitutionality is involved [provide]:

> "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

> "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment.

[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* [*supra*, p. IV-44] should be our guide. But we decline that invitation as we did in *West Coast Hotel Co. v. Parrish* [*supra*, p. IV-51]; *Williamson v. Lee Optical Co.* [*supra*, p. IV-56]; [and other cases]. 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 *Meyer* v. *Nebraska*, the same dignity is given the right to study the German language in a private school. [Likewise, t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

[We have also recognized] freedom of association [as] a peripheral First Amendment right. [Membership in political groups] is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

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."

The Fourth and Fifth Amendments [have been] described [as] protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred [to] the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people."

[The] present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama* (1964).* 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. [Reversed.]

■ JUSTICE GOLDBERG, whom CHIEF JUSTICE WARREN and JUSTICE BRENNAN join, concurring.

I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy[.] 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. [I] add these words to emphasize the relevance of [the Ninth] Amendment to the Court's holding.

[This] Court, in a series of decisions, has held that 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 rights specifically mentioned in the first eight constitutional amendments.

The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." [The amendment] was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad

* [The Court held in *NAACP v. Alabama* that, even assuming that supporting a bus boycott violated some valid state law, Alabama could not permanently ban the NAACP from the state on the basis of that conduct, because doing so would too severely impair the constitutionally protected freedom of association. —BE]

to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.

[While] this Court has had little occasion to interpret the Ninth Amendment, "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury*. 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 is relevant [even] in a case dealing with a *State's* infringement of a fundamental right. While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon *federal* power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement.

■ JUSTICE HARLAN, concurring in the judgment.

I fully agree with the judgment of reversal, but find myself unable to join the Court's opinion. [That approach] seems to me to evince an approach [that] 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] my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty." *Palko v. Connecticut* (1937). For reasons stated at length in my dissenting opinion in *Poe v. Ullman* [quoted immediately below], 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 stands, in my opinion, on its own bottom.

A further observation seems in order[.] Judicial self-restraint [will] be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise application of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause.

[As you just saw, Justice Harlan essentially incorporated by reference his dissent in a prior case, *Poe v. Ullman* (1961), where the same issue had arisen but the majority had not reached the merits. Here is an excerpt of that very influential opinion:]

[I] believe that a statute making it a criminal offense for *married couples* to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life.

[Only] to the extent that the Constitution so requires may this Court interfere with the exercise of [the] plenary power of [state] government[s]. But precisely because it is the Constitution alone which warrants judicial interference in sovereign operations of the State, the basis of judgment as to the Constitutionality of state action must be a rational one, approaching the text which is the only commission for our power not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government. *McCulloch*. But as inescapable as is the rational process in Constitutional adjudication in general, nowhere is it more so than in giving meaning to the prohibitions of the Fourteenth Amendment and, where the Federal Government is involved, the Fifth Amendment, against the deprivation of life, liberty or property without due process of law.

It is but a truism to say that this provision of both Amendments is not self-explanatory. [It] is important to note, however, that two views of the Amendment have not been accepted by this Court as delineating its scope. One view, which was ably and insistently argued in response to what were felt to be abuses by this Court of its reviewing power, sought to limit the provision to a guarantee of procedural fairness. The other view which has been rejected would have it that the Fourteenth Amendment, whether by way of the Privileges and Immunities Clause or the Due Process Clause, applied against the States only and precisely those restraints which had prior to the Amendment been applicable merely to federal action. However, "due process" in the consistent view of this Court has ever been a broader concept than the first view and more flexible than the second.

Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. Thus the guaranties of due process, though having their roots in Magna Carta's *"per legem terrae"* ["by the law of the land"] and considered as procedural safeguards "against executive usurpation and tyranny," have in this country "become bulwarks also against arbitrary legislation."

However it is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights "which are . . . *fundamental;* which belong . . . to the citizens of all free governments," *Corfield* v. *Coryell*, for "the purposes [of securing] which men enter into society." Again and again this Court has resisted the notion that the Fourteenth Amendment is no more than a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights.

[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.

[The] full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, see *Allgeyer* v. *Louisiana*[,] and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. Cf. *Skinner* v. *Oklahoma* (1942) [*supra*, p. IV-65]; *Bolling* v. *Sharpe* [*infra*, p. V-45]. [It] is the purposes of [guarantees such as freedom of speech] and not their text, the reasons for their statement by the Framers and not the statement itself, which have led to their present status in the compendious notion of "liberty" embraced in the Fourteenth Amendment.

[On] these premises I turn to the particular Constitutional claim in this case. Appellants contend that the Connecticut statute deprives them, as it unquestionably does, of a substantial measure of liberty in carrying on the most intimate of all personal relationships, and that it does so arbitrarily and without any rational, justifying purpose. The State, on the other hand, asserts that it is acting to protect the moral welfare of its citizenry, both directly, in that it considers the practice of contraception immoral in itself, and instrumentally, in that the availability of contraceptive materials tends to minimize "the disastrous consequence of dissolute action," that is fornication and adultery.

[If] we had a case before us which required us to decide simply, and in abstraction, whether the moral judgment implicit in the application of the present statute to married couples was a sound one, the very controversial nature of these questions would, I think, require us to hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has among these various views. [But], as might be expected, we are not presented simply with this moral judgment to be passed on as an abstract proposition.

Precisely what is involved here is this: the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law. Potentially, this could allow the deployment of all the incidental machinery of the criminal law, arrests, searches and seizures; inevitably, it must mean at the very least the lodging of criminal charges, a public trial, and testimony as to the *corpus delicti.* Nor could any imaginable elaboration of presumptions, testimonial privileges, or other safeguards, alleviate the necessity for testimony as to the mode and manner of the married couples' sexual relations, or at least the opportunity for the accused to make denial of the charges. In sum, the statute allows the State to enquire into, prove and punish married people for the private use of their marital intimacy.

This, then, is the precise character of the enactment whose Constitutional measure we must take. The statute must pass a more rigorous Constitutional test than that going merely to the plausibility of its underlying rationale. This enactment involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of "liberty," the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to "strict scrutiny." *Skinner*.

[Although] the form of intrusion here—the enactment of a substantive offense—does not, in my opinion, preclude the making of a claim based on the right of privacy embraced in the "liberty" of the Due Process Clause, it must be acknowledged that there is another sense in which it could be argued that this intrusion on privacy differs from what the Fourth Amendment, and the similar concept of the Fourteenth, were intended to protect: here we have not an intrusion into the home so much as on the life which characteristically has its place in the home. But to my mind such a distinction is so insubstantial as to be captious: if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within.

[The] right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. [I acknowledge] the State's rightful concern for its people's moral welfare. But not to discriminate between what is involved in this case and either the traditional offenses against good morals or crimes which, though they may be committed anywhere, happen to have been committed or concealed in the home, would entirely misconceive the argument that is being made. [The] intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

[Since], as it appears to me, the statute marks an abridgment of important fundamental liberties protected by the Fourteenth Amendment, it will not do to urge in justification of that abridgment simply that the statute is rationally related to the effectuation of a proper state purpose. A closer scrutiny and stronger justification than that are required. [Though] the State has argued the Constitutional permissibility of the moral judgment underlying this statute, [it offers nothing that] remotely suggests a justification for the obnoxiously intrusive means it has chosen to effectuate that policy.

[But] conclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the *use* of contraceptives a crime. Indeed, a diligent search has revealed that no nation, including several which quite evidently share Connecticut's moral policy, has seen fit to effectuate that policy by the means presented here.

Though undoubtedly the States are and should be left free to reflect a wide variety of policies, and should be allowed broad scope in experimenting with various means of promoting those policies, I must agree with Mr. Justice Jackson that "There are limits to the extent to which a legislatively represented majority may conduct. . . experiments at the expense of the dignity and personality" of the individual. *Skinner* v. *Oklahoma, supra.* In this instance these limits are in my view reached and passed.

■ JUSTICE WHITE, concurring in the judgment.

[It] would be unduly repetitious, and belaboring the obvious, to expound on the impact of this statute on the liberty guaranteed by the Fourteenth Amendment[.] [An] examination of the justification offered, however, cannot be avoided by saying that the Connecticut anti-use statute invades a protected area of privacy and association or that it demeans the marriage relationship. [For] 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 this case,] the State claims but one justification for its anti-use statute. There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself, or that the anti-use statute is founded upon any policy of promoting population expansion. Rather, the statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal.

[But] I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State's ban on illicit sexual relationships. [Perhaps] the theory is that the flat ban on use prevents married people from possessing contraceptives and without the ready availability of such devices for use in the marital relationship, there will be [less] temptation to use them in extramarital ones. This reasoning rests on the premises that married people will comply with the anti-use ban in regard to their marital relationship, notwithstanding total nonenforcement in this context and apparent nonenforcibility, but will not comply with criminal statutes prohibiting extramarital affairs and the anti-use statute in respect to illicit sexual relationships, a premise whose validity has not been demonstrated and whose intrinsic validity is not very evident. At most the broad ban is of marginal utility to the declared objective. A statute limiting its prohibition on use to persons engaging in the prohibited relationship would serve the end posited by Connecticut in the same way, and with the same effectiveness, or ineffectiveness, as the broad anti-use statute under attack in this case. I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons[.]

■ JUSTICE BLACK, with whom JUSTICE STEWART joins, dissenting.

[The] law is every bit as offensive to me as it is to my Brethren of the majority and my Brothers Harlan, White, and Goldberg. [But I do not agree] that the evil qualities they see in the law make it unconstitutional.

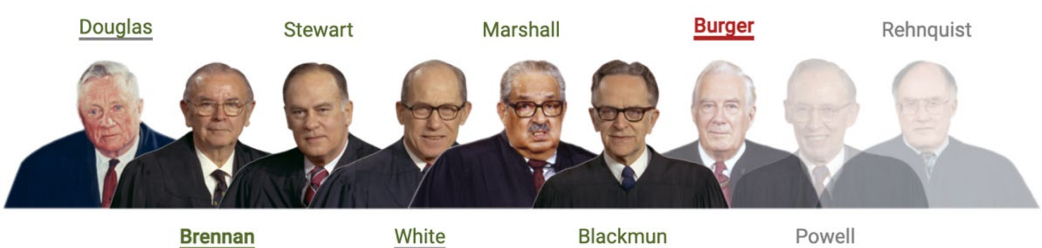
[The] Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions 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[.] But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." [One] of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. ["Privacy"] is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. [I] get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from one or more constitutional provisions. 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.

[This] brings me to the arguments made by my Brothers Harlan, White and Goldberg. [I] discuss the due process and Ninth Amendment arguments together because on analysis they turn out to be the same thing—merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive[.] [The] power to make such decisions is of course that of a legislative body. [I] do not believe that we are granted [this] power by the Due Process Clause or any other constitutional provision or provisions[.] [The cases that might suggest otherwise] elaborated the same natural law due process philosophy found in *Lochner v. New York*[.]

[Nor] does anything in the history of the [Ninth] Amendment offer any support for such a shocking doctrine. [That] Amendment was passed, not to broaden the powers of this Court or any other [part of government], but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. [This] fact is perhaps responsible for the peculiar phenomenon that for a period of a century and a half no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs.*

Eisenstadt v. Baird

405 U.S. 438 (1972)



[A Massachusetts law made it a felony offense to distribute contraceptives unless prescribed by a physician to a married person. The plaintiff, a physician, was convicted of giving a contraceptive to an adult woman. He challenged his conviction on the ground that the statute was unconstitutional.]

■ JUSTICE BRENNAN delivered the opinion of the Court.

* [A separate dissent by JUSTICE STEWART, joined by JUSTICE BLACK, is omitted. —BE]

[We] hold that the statute, viewed as a prohibition on contraception *per se*, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment. [That clause denies] "to the States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." [The] question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under [the Massachusetts law]. [We] conclude that no such ground exists.

[The Court of Appeals held that the statute violated "fundamental human rights."] We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access contraceptives may be, the rights must be the same for the unmarried and the married alike.

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. 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.

On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious. [To explain why the underinclusion would be unacceptable, the Court relied on Justice Jackson's concurrence in *Railway Express Agency* v. *New York* (1949), which we will read in Section V. —BE][*]

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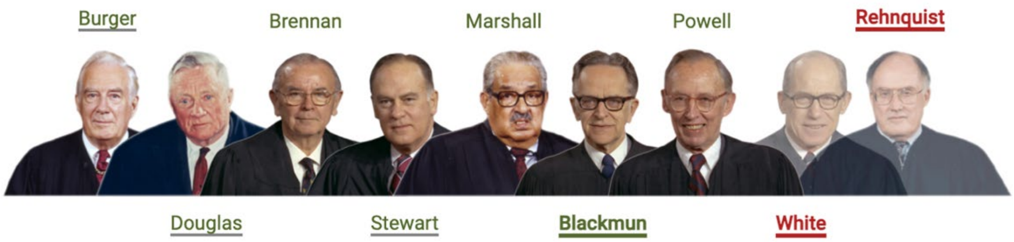
[*] [JUSTICE DOUGLAS concurred on First Amendment grounds. JUSTICE WHITE (joined by JUSTICE BLACKMUN) concurred on narrow grounds relating to the scope of the statute and the prosecution's legal theory. CHIEF JUSTICE BURGER dissented, arguing the state had shown the law served a legitimate interest in public health. —BE]

Roe v. Wade

410 U.S. 113 (1973)



[Jane Roe, a pregnant woman proceeding under a pseudonym, challenged the constitutionality of a Texas law that made it a crime to “procure an abortion” except “by medical advice for the purpose of saving the life of the mother.”]

■ JUSTICE BLACKMUN delivered the opinion of the Court.

[The] Constitution does not explicitly mention any right of privacy. [But] the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights, see *Griswold* [*supra*, p. IV-66]; in the Ninth Amendment, *id.* (Goldberg, J., concurring); or in the concept of liberty guaranteed [by] the Fourteenth Amendment. These decisions make it clear that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty” are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, procreation, contraception, *Eisenstadt* [*supra*, p. IV-75], family relationships, and child rearing and education.

This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty[,] as we feel it is, or, as the District Court determined, in the [Ninth Amendment], is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellants and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. [The] Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. [A] state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision.

[Texas] argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest.

[First, Texas argues] that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. [If] this suggestion of personhood is established, [Roe's] case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment. [The] Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." [The] word also appears in both the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution. [But] in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application.[54]

All this, together with our observation that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.

[Texas] urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained [in] medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

[The] State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman [and] it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality

[54] When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. [But] if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

as the woman approaches term and, at a point during pregnancy, each becomes "compelling." [With] respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Measured against these standards, [the Texas law] sweeps too broadly[.] [It therefore] cannot survive the constitutional attack made upon it here.

[This] decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.

■ JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

[I] find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus on the one hand against a spectrum of possible impacts on the mother on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.

■ JUSTICE REHNQUIST, dissenting.

[I] have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. [Texas] bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" which the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment[.]

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. [I agree] that "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, but only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. *See Williamson v. Lee Optical* [*supra*, p. IV-56].

[If] the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson*. But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard. [As] in *Lochner* [*supra*, p. IV-44] and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break pregnancy into [distinct periods] and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.*

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2. Autonomy and Tradition (25 PAGES)

In this section, we will pick up from where we left the Court's substantive due process doctrine—just after the recognition, in *Roe*, of a right to terminate a pregnancy—and trace its development through a series of cases, over the following decades, that grapple with how to conceptualize the heightened interests at stake in certain "liberty" claims. At the end of the section, you'll also read an excerpt from an article raising questions about how the Court has tended to approach the "state interests" side of the balance when it does apply heightened scrutiny.

* [JUSTICE STEWART concurred on the ground that *Roe*'s claim was sound under the test articulated by JUSTICE HARLAN in his *Poe v. Ullman* opinion and the Court's earlier substantive due process cases. Additional concurrences by CHIEF JUSTICE BURGER and JUSTICE DOUGLAS are omitted. —BE]

Moore v. East Cleveland
431 U.S. 494 (1977)

■ JUSTICE POWELL announced the judgment of the Court, and delivered an opinion in which JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN joined.

East Cleveland's housing ordinance [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. [The appellant,] Mrs. Inez Moore, lives in her East Cleveland home 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[, which puts the family unit in violation of the ordinance.]

In early 1973, Mrs. Moore received a notice of violation from the city[.] When she failed to remove [one of the grandchildren] from her home, the city filed a criminal charge. [She was convicted and ultimately appealed to the Supreme Court.]

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. [East] Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. [On] its face [the ordinance] selects certain categories of relatives who may live together and declares that others may not.

[When] a city undertakes such intrusive regulation of the family, [the] usual judicial deference to the legislature is inappropriate. A host of cases, tracing their lineage to *Meyer* and *Pierce*, have consistently acknowledged a "private realm of family life which the state cannot enter." *See, e.g.*, *Roe v. Wade*; *Griswold v. Connecticut; Poe v. Ullman* (Harlan, J., dissenting) [*supra*, p. IV-70]. [W]hen 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. See *Poe v. Ullman* (Harlan, J., dissenting).

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 prior substantive due process cases]. 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 here. They were immediately concerned with the freedom of choice with respect to childbearing, *e.g.*, *Griswold*, or with the rights of parents to the custody and companionship of their children, or with traditional parental authority in matters of child rearing and education. *Pierce*; *Meyer*. 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:

[The Court quoted at length from Justice Harlan's *Poe v. Ullman* dissent, including his discussion of "the supplying of content to [due process]" as "a rational process" and his description of the protected "liberty" as "a rational continuum" rather than "a series of isolated points pricked out in terms of [enumerated rights]."]

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[.]

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* (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.

[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.[14] [Especially] in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life. This is apparently what happened here.

[T]he Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.

■ JUSTICE STEVENS, concurring in the judgment.

[T]he critical question presented [is] whether East Cleveland's housing ordinance is a permissible restriction on appellant's right to use her own property as she sees fit. [Since] this ordinance has not been shown to have any "substantial relation to the public health, safety, morals, or general welfare" of the city of East Cleveland, and since it cuts so deeply into a fundamental right normally associated with the ownership of residential property—that of an owner to decide who may reside on his or her property—it must fall [even] under the limited standard of review of zoning decisions which this Court preserved in *Euclid*[.][*]

■ JUSTICE STEWART, with whom JUSTICE REHNQUIST joins, dissenting.

[Although] the appellant's desire to share a single-dwelling unit also involves "private family life" in a sense, that desire can hardly be equated with any of the interests protected in [*Griswold*, *Eisenstadt*, *Pierce* and *Meyer*.] 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

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[14] Recent census reports bear out the importance of family patterns other than the prototypical nuclear family. In 1970, 26.5% of all families contained one or more members over 18 years of age, other than the head of household and spouse. Earlier data are not available.

[*] [*Euclid v. Ambler Realty Co.* (1923) held that land-use regulations violate the Due Process Clause if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."]

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.

■ JUSTICE WHITE, dissenting.

[W]e must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments. [But t]hat the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, [the] Court should be extremely reluctant to breathe still further substantive content into the Due Process clause[.]

MR. JUSTICE POWELL would apparently construe the Due Process Clause to protect from all but quite important state regulatory interests any right or privilege that in his estimate is deeply rooted in the country's traditions. For me, this suggests a far too expansive charter for this Court and a far less meaningful and less confining guiding principle than MR. JUSTICE STEWART would use for serious substantive due process review. What the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable. The suggested view would broaden enormously the horizons of the Clause; and, if the interest involved here is any measure of what the States would be forbidden to regulate, the courts would be substantively weighing and very likely invalidating a wide range of measures that Congress and state legislatures think appropriate to respond to a changing economic and social order.

[Here,] Mrs. Moore's interest in having the offspring of more than one dependent son live with her qualifies as a liberty protected by the Due Process Clause; but, because of the nature of that particular interest, the demands of the Clause are satisfied once the Court is assured that the challenged proscription is the product of a duly enacted or promulgated statute, ordinance, or regulation and that it is not wholly lacking in purpose or utility.*

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* [JUSTICE BRENNAN's concurrence, emphasizing that the Constitution did not "tolerate the imposition by government [of] white suburbia's preference in patterns of family living," and JUSTICE REHNQUIST's dissent (on procedural grounds) are omitted. —BE]

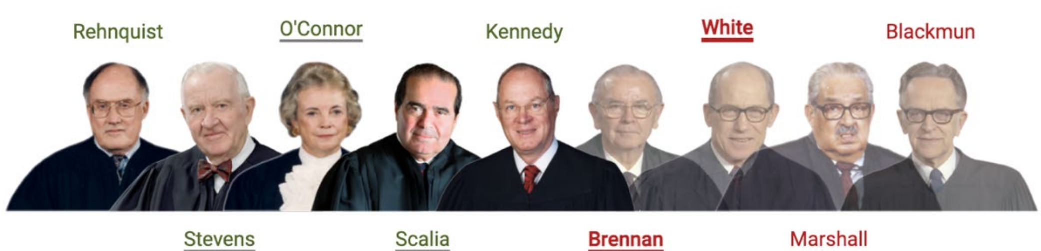
REASONS, TRADITIONS, AND LINE-DRAWING

Part of the enduring appeal of Justice Harlan's articulation of substantive due process seems to be the notion that decisionmaking in this area is a "rational" endeavor—that the Court should think less in terms of random bits of protected conduct, and more in terms of the *reasons* why conduct is, at least by the lights of our traditions, worthy of special protection. But an important challenge for this approach is that reasons tend to fade out gradually, over a space of possible practices, rather than toggling on and off in a clear, crisp way.

Consider, for instance, **Village of Belle Terre v. Boraas** (1974)—the case that the *Moore* plurality distinguished—where a similar ordinance barred living with *unrelated* people. *Moore* faulted East Cleveland for proposing to arbitrarily limit any substantive due process protection to the nuclear family. But does the line that the *Moore* plurality faulted East Cleveland for drawing differ in kind from the one the plurality itself drew between *Moore* and *Belle Terre*? (Consider that Justice Marshall had dissented in *Belle Terre* on the ground that "[t]he choice of household companions [involves] deeply personal considerations as to the kind and quality of intimate relationships in the home.")

Maybe the cases are distinguishable in that there is more of a "deeply rooted tradition" with respect to *living with family* than there is with respect to *choice of household companions in general*. But if the point is to focus on reasons—rather than contingent, arbitrary facts—shouldn't we think about *why* we've traditionally valued the former and whether, at least for some people, those same reasons equally extend to the latter? Is Justice Harlan's emphasis on reasons inherently at odds with his emphasis on traditions?

Michael H. v. Gerald D.
491 U.S. 110 (1989)



■ JUSTICE SCALIA announced the judgment of the Court and delivered an opinion, in which CHIEF JUSTICE REHNQUIST 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. 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[.]

[Carole D. and Gerald D. were married in 1976. In 1978, Carole began an affair with Michael H. She became pregnant in 1980 and gave birth to a daughter, Victoria, in 1981. Gerald was listed as the father on the birth certificate, but Carole told Michael she believed he was the father. Blood tests established a 98% probability that Michael was the child's father. Between 1982–1984, Carole and Victoria lived with Michael for intermittent periods and Michael held himself out as Victoria's father. After he and Carole broke up, he sought the right to visitation. An appointed representative of Victoria's interests and a court-appointed psychologist both concluded that visitation would be in her interest. But the court disallowed visitation on the ground that, under California law, recognizing Michael's relationship to Victoria would impermissibly "impugn[] the integrity of the family unit."]

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. See, *e.g.*, *Pierce*; *Meyer*. [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" (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Our cases reflect "continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society." *Griswold* v. *Connecticut* (Harlan, J., concurring in judgment).

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 related 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. In *Stanley,* for example, we forbade the destruction of such a family when, upon the death of the mother, the State had sought to remove children from the custody of a father who had lived with and supported them and their mother for 18 years. As Justice Powell stated for the plurality in *Moore* v. *East Cleveland*: "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. In fact, quite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts.[4]

The presumption of legitimacy was a fundamental principle of the common law. Traditionally, that presumption could be rebutted only by proof that a husband was incapable of procreation or had had no access to his wife during the relevant period. [We] have found nothing in the older sources, nor in the older cases, addressing specifically the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man. Since it is Michael's burden to establish that such a power (at least where the natural father has established a relationship with the child) is so deeply embedded within our traditions as to be a fundamental right, the lack of evidence alone might defeat his case. But the evidence shows that even in modern times — when, as we have noted, the rigid protection of the marital family has in other respects been relaxed — the ability of a person in Michael's position to claim paternity has not been generally acknowledged.

[Moreover,] [w]hat Michael asserts here is a right to have himself declared the natural father *and thereby to obtain parental prerogatives*. [Thus,] 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

[4] JUSTICE BRENNAN insists that in determining whether a liberty interest exists we must look at Michael's relationship with Victoria in isolation, without reference to the circumstance that Victoria's mother was married to someone else when the child was conceived, and that that woman and her husband wish to raise the child as their own. We cannot imagine what compels this strange procedure of looking at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people — rather like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body. The logic of JUSTICE BRENNAN's position leads to the conclusion that if Michael had begotten Victoria by rape, that fact would in no way affect his possession of a liberty interest in his relationship with her.

case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made.[6]

[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[.] 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. Justice Brennan's approach chooses one of them as the constitutional imperative, on no apparent basis except that the unconventional is to be preferred.

■ 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*; *Eisenstadt*. On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be "the most specific level" available. I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.

■ JUSTICE STEVENS, concurring in the judgment.

[JUSTICE SCALIA] seems to reject the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at

[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." There seems to us no basis for the contention that this methodology is "novel." [Discussion of *Roe v. Wade* and *Bowers v. Hardwick* (1986) omitted. —BE]

[Moreover, 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. [Although] assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.

the time of the child's conception and birth. I think cases like *Stanley* v. *Illinois* (1972) [demonstrate] that enduring "family" relationships may develop in unconventional settings. I therefore would not foreclose the possibility that a constitutionally protected relationship between a natural father and his child might exist in a case like this. Indeed, I am willing to assume for the purpose of deciding this case that Michael's relationship with Victoria is strong enough to give him a constitutional right to try to convince a trial judge that Victoria's best interest would be served by granting him visitation rights. I am satisfied, however, that the California statute, as applied in this case, gave him that opportunity[, because, as I read the statute, the court had authority to award visitation rights even if Michael could not establish paternity].

■ JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

Once we recognized that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment encompasses more than freedom from bodily restraint, today's plurality opinion emphasizes, the concept was cut loose from one natural limitation on its meaning. This innovation paved the way, so the plurality hints, for judges to substitute their own preferences for those of elected officials. Dissatisfied with this supposedly unbridled and uncertain state of affairs, the plurality casts about for another limitation on the concept of liberty.

It finds this limitation 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." Indeed, wherever I would begin to look for an interest "deeply rooted in the country's traditions," one thing is certain: I would not stop (as does the plurality) at Bracton, or Blackstone, or Kent, or even the American Law Reports in conducting my search. Because reasonable people can disagree about the content of particular traditions, and because they can disagree even about which traditions are relevant to the definition of "liberty," the plurality has not found the objective boundary that it seeks. [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.

[It] is not that tradition has been irrelevant to our prior decisions. 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 historical and traditional importance of these interests in our society.

[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*, or even by married couples, *Griswold*; the freedom from corporal punishment in schools, *Ingraham* v. *Wright* (1977); the freedom from an arbitrary transfer from a prison to a psychiatric institution, *Vitek* v. *Jones* (1980); 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 *Eisenstadt, Griswold, Ingraham, Vitek,* or *Stanley* itself 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.

The plurality's interpretive method is more than novel; it is misguided. It ignores the good reasons for limiting the role of "tradition" in interpreting the Constitution's deliberately capacious language. 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 [ask] whether the basis for [a] rule—which is the true reflection of the values undergirding it—has changed too often or too recently to call the rule embodying that rationale a "tradition."

[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. We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies. [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] document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.*

RIGHTS CLAIMS AND LEVELS OF GENERALITY

Michael H. was too fractured to really settle much about parental rights. (In fact, although Justice Scalia wrote the plurality opinion, five Justices—Brennan, Marshall, Blackmun, White, and Stevens—either concluded or assumed that Michael *did* have a significant liberty interest at stake.) So the enduring significance of the case has less to do with what it held than with the debate over methodology for which it came to be well-known.

One side of that debate is captured well in Justice Scalia's footnote 6 (*supra*, p. IV-88). Although Justice Rehnquist joined that footnote, the other members of the plurality—Justice O'Connor and Justice Kennedy—pointedly declined to do so. And Justice Brennan denounced Scalia's approach, in unusually sharp terms, as inconsistent with precedent and misguided in principle.

Suppose that you do want to apply Justice Scalia's approach: that is, you want to resolve the dispute in *Michael H.* by looking to the "most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." Is it clear what that level is?†

The basic issue that divided the Justices here—the "level of generality" at which to frame and assess claimed rights or traditions—recurs throughout the Court's individual-rights cases and remains fiercely contested. For example, although we will defer the Court's gay rights cases until Section V—so that we can consider their liberty and equality dimensions together—you'll see then that the "level of generality" issue is central to them, too. In *Bowers v. Hardwick* (1986) [*infra*, p. V-162], one of the cases on which Scalia relied in footnote 6, the Court upheld a Georgia sodomy law on the ground that the claimed liberty—which it cast as a right to engage in same-sex sexual activity—was not deeply rooted in American traditions. But in *Lawrence v. Texas* (2003) [*infra*, p. V-167V-162], the Court overruled *Bowers* and faulted it, in part, for misunderstanding the liberty interest being asserted.

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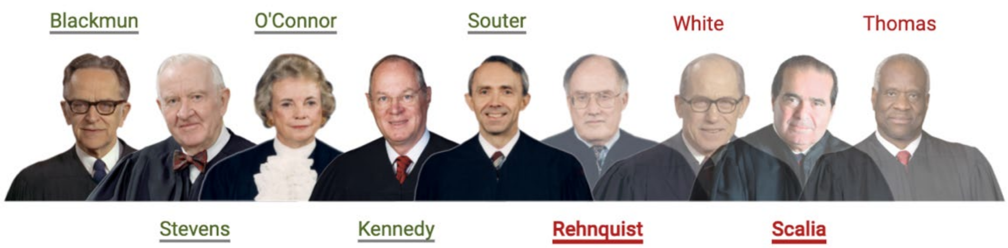
* [JUSTICE WHITE's dissent, joined by Justice BRENNAN, is omitted. —BE]

† For an influential argument that the answer to Scalia's question is indeterminate, see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

Another central area in which this issue arises involves claims of bodily autonomy. In the balance of this section, you'll read two such cases: one involving abortion (*Casey*), the other involving assisted suicide (*Glucksberg*). As you read, consider how the two cases' conceptions of the substantive due process inquiry differ and where the two of them together left the law.[*]

Planned Parenthood of Southeastern Pa. v. Casey

505 U.S. 833 (1992)



[A Pennsylvania law restricted abortion in several ways. Planned Parenthood challenged those restrictions, and the State countered that *Roe* should be overruled.]

■ Justice O'Connor, Justice Kennedy, and Justice Souter announced the judgment of the Court and delivered the opinion of the Court [in relevant part].

Liberty finds no refuge in a jurisprudence of doubt. [The] essential holding of [Roe] should be retained and once again reaffirmed.

[Constitutional] protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. [For more than a century,] [t]he Clause has been understood to contain a substantive component as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them."

[As] a means of curbing the discretion of federal judges[,] [it] is [tempting] to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. See *Michael H.*, n. 6 (opinion of Scalia, J.). But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. [Neither] the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.

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[*] We will also see a form of the "level of generality problem" at work in the Court's recent Second Amendment cases. See *infra* p. IV-111.

[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. As Justice Harlan observed:

[The Court again quotes at length from Justice Harlan's opinion in *Poe v. Ullman* (*supra*, p. IV-70). —BE]

[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.

[When States restrict abortion,] the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. 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.

[Moreover, in] some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold* [and] *Eisenstadt* [afford] constitutional protection. We have no doubt as to the correctness of those decisions. They support the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it.

[While] we appreciate the weight of the arguments made on behalf of the State in the cases before us[,] 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*. We turn now to that doctrine. [Discussion omitted —BE]

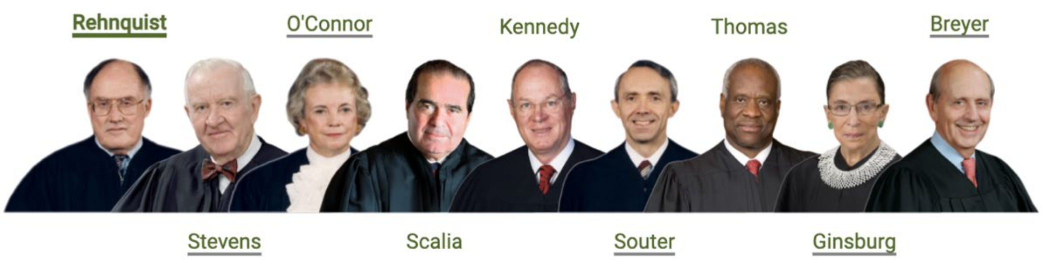
■ JUSTICE SCALIA, with whom CHIEF JUSTICE REHNQUIST, JUSTICE WHITE, and JUSTICE THOMAS join, concurring in the judgment in part and dissenting in part.

[The] issue is whether [abortion] is a liberty protected by the Constitution[.] I am sure it is not. [I] reach [that conclusion] 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.*

The Court's next major substantive due process case came five years after *Casey*, in *Washington v. Glucksberg*. Several physicians and their terminally ill patients claimed a constitutional right to provide and receive treatment intended to end the patients' lives, in violation of Washington's law making it a crime to aid a suicide. The district court and the Court of Appeals sided with the plaintiffs, relying heavily on *Casey*'s autonomy-centric characterization of the substantive due process inquiry.

Washington v. Glucksberg

521 U.S. 702 (1997)



■ CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented [is] whether Washington's prohibition against "caus[ing]" or "aid[ing]" a suicide offends the Fourteenth Amendment[.] We hold that it does not.

We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices. *See, e.g.*, *Casey*; *Moore v. East Cleveland* (plurality opinion). In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States' assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life. Indeed, opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages. [F]or over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide. In the 13th century, Henry de Bracton, one of the first legal-treatise writers, observed that "[j]ust as a man may commit felony by

* [A concurrence by JUSTICE BLACKMUN and a dissent by CHIEF JUSTICE REHNQUIST are omitted. —BE]

slaying another so may he do so by slaying himself." [Centuries] later, Sir William Blackstone, whose Commentaries on the Laws of England not only provided a definitive summary of the common law but was also a primary legal authority for 18th- and 19th-century American lawyers, [emphasized] that "the law has . . . ranked [suicide] among the highest crimes[."]

For the most part, the early American colonies adopted the common-law approach. [And] the prohibitions against assisting suicide never contained exceptions for those who were near death. The earliest American statute explicitly to outlaw assisting suicide was enacted in New York in 1828, and many of the new States and Territories followed New York's example. [By] the time the Fourteenth Amendment was ratified, it was a crime in most States to assist a suicide. [In] this century, the Model Penal Code also prohibited "aiding" suicide, prompting many States to enact or revise their assisted-suicide bans.

[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, for example, now 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. [Against] this backdrop of history, tradition, and practice, we now turn to [the] constitutional claim.

The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. [We] have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan v. Director, Missouri Department of Health* (1990).* But we "ha[ve] 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. *Moore v. East Cleveland* (plurality opinion).

* [In *Cruzan*, the Court upheld Missouri's requirement of "clear and convincing" evidence of a patient's wishes before they could *refuse* lifesaving hydration and nutrition. The Court suggested that there was a protected liberty interest in refusing such treatment, but it ultimately only "assumed" as much for purposes of the case and held that the state law was permissible in any event. —BE]

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," *Moore v. East Cleveland* (plurality opinion), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decisionmaking that direct and restrain our exposition of the Due Process Clause.

[JUSTICE] SOUTER, relying on Justice Harlan's dissenting opinion in *Poe v. Ullman* (1961), would largely abandon this restrained methodology, and instead ask "whether [Washington's] statute sets up one of those 'arbitrary impositions' or 'purposeless restraints' at odds with the Due Process Clause of the Fourteenth Amendment." In our view, however, 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.

[T]he 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 [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, however, that the liberty interest they assert *is* consistent with this Court's substantive-due-process line of cases, if not with this Nation's history and practice. Pointing to *Casey* and *Cruzan*, [they] read our jurisprudence in this area as reflecting a general tradition of "self-sovereignty" and as teaching that the "liberty" protected by the Due Process Clause includes "basic and intimate exercises of personal autonomy." See *Casey*.

[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. Respondents also rely on *Casey*. [But] *Casey* described, in a general way and in light of our prior cases, those personal activities [that] this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of ordered liberty, that they are protected by the Fourteenth Amendment.[19] [That] many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* did not suggest otherwise.

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. [Washington] has an "unqualified interest in the preservation of human life." *Cruzan*. The State's prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest. [Its] ban on assisted suicide is at least reasonably related to [the] promotion and protection [of this interest].

■ JUSTICE O'CONNOR, concurring[, joined in part by JUSTICE GINSBURG and JUSTICE BREYER].

The Court frames the issue [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

[19] See *Moore v. East Cleveland* ("[T]he Constitution protects the sanctity of the family *precisely because* the institution of the family is deeply rooted in this Nation's history and tradition" (emphasis added)); *Griswold v. Connecticut* (intrusions into the "sacred precincts of marital bedrooms" offend rights "older than the Bill of Rights"); *Roe v. Wade* (stating that at the founding and throughout the 19th century, "a woman enjoyed a substantially broader right to terminate a pregnancy"); *Skinner v. Oklahoma ex rel. Williamson* ("Marriage and procreation are fundamental"); *Meyer v. Nebraska* (liberty includes "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men").

has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death. I see no need to reach that question [here]. The parties [agree] that [a] patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining 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 to justify a prohibition against physician-assisted suicide.

Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure.

■ JUSTICE SOUTER, concurring in the judgment.

[Justice Souter offered an extended history of the evolution of substantive due process, putting particular emphasis on Justice Harlan's *Poe* dissent—"the conclusion of which was adopted in *Griswold* and the authority of which was acknowledged in *Planned Parenthood v. Casey*"—and then undertook at length to apply that methodology to the claim here.]

[In] my judgment, the importance of the individual interest here, as within that class of "certain interests" demanding careful scrutiny of the State's contrary claim, see *Poe*, cannot be gainsaid. Whether that interest might in some circumstances, or at some time, be seen as "fundamental" to the degree entitled to prevail is not, however, a conclusion that I need draw here, for I am satisfied that the State's interests described in the following section are sufficiently serious to defeat the present claim that its law is arbitrary or purposeless.

[The] State claims interests in protecting patients from mistakenly and involuntarily deciding to end their lives, and in guarding against both voluntary and involuntary euthanasia. The argument is that a progression would occur, obscuring the line between the ill and the dying, and between the responsible and the unduly influenced, until ultimately doctors and perhaps others would abuse a limited freedom to aid suicides by yielding to the impulse to end another's suffering under conditions going beyond the narrow limits the respondents propose. [In light of extensive factual uncertainties in this novel area,] I do not decide for all time that respondents' claim should not be recognized, [but] I acknowledge the legislative institutional competence as the better one to deal with that claim at this time.[*]

Glucksberg articulated a narrow test for substantive due process claims, one particularly focused on "history and tradition." But note that, while the Court was unanimous on the bottom-line result in the case, only Justices Scalia, Kennedy, and Thomas joined Chief Justice Rehnquist's opinion without writing separately. Although Justice O'Connor did provide a fifth vote to make Rehnquist's a majority opinion, her separate writing suggests a different understanding of the substantive due process inquiry than the one that the majority opinion, taken at face value, appears to endorse. (Could the question she purports to leave open really remain open under the most straightforward reading of Rehnquist's test?) And, of course, she was a coauthor of the joint opinion in *Casey* a few years before.[†]

So, after *Glucksberg*, the question of where the Court had landed on substantive due process remained unsettled. As we'll see later, that uncertainty or incoherence was compounded in *Lawrence v. Texas* (2003), which struck down a Texas sodomy law and relied on *Casey*, not *Glucksberg*, to do so. The latest chapter in this story, which we'll read toward the end of the semester, is *Dobbs v. Jackson Women's Health Organization* (2022), where the Court treated *Glucksberg* as the controlling rule—reaffirming that "any [substantive due process] right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' *Washington v. Glucksberg* (1997)"—and overruled *Roe* and *Casey* on that basis.

The final reading in this section—an excerpt from a recent book by the legal theorist Seana Shiffrin—raises questions about how the Court approaches the exercise of balancing protected liberties against "state interests." Shiffrin uses *Glucksberg* and *Casey* as central examples but focuses on a different aspect of their reasoning than we have considered thus far.

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[*] [Separate concurrences in the judgment by JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE STEVENS are omitted. —BE]

[†] In addition, we now know (from Justice Stevens' case files, which were opened to researchers in 2023) that Justice O'Connor specifically asked Chief Justice Rehnquist to "omit [a] citation to *Michael H. v. Gerald D.* (plurality opinion), an opinion with which [she] did not fully agree," from his draft opinion. As you might have noticed, the published *Glucksberg* opinion makes no reference to *Michael H.*

Constitutional Balancing and State Interests

Seana Valentine Shiffrin*

The predominant method of resolving constitutional challenges putatively "balances" constitutional interests against asserted "state interests." [Roughly] speaking, the product of this balance produces the content and limitations of the right. [Despite] the ubiquitous invocation of state interests in constitutional law, we have dedicated insufficient attention to what it means to say, in a constitutional controversy, that a [state actor] *has* an interest [to] be weighed against the constitutional interests at stake. [It] often seems implicitly assumed that the question of what interests a state has may be resolved entirely through armchair, a priori reasoning. But a priori reasoning could not settle which assertions of state interests should be taken as actual and sincere as opposed to hypothetical, aspirational, fledgling, or ambivalent.

[Apart] from a small handful of religious freedom cases, investigations into pretextual rationalizations to disguise illegitimate motives, and some of Justice Brennan's opinions,[10] our jurisprudence does not typically dwell on whether the particular state agent is truly committed to an asserted interest in a way that would justify that interest's exerting weight in a balancing test. This nonchalance is difficult to understand[.] [If] we are truly balancing, then a compromise of sorts is being brokered. But compromises carry legitimacy only when real—as opposed to hypothetical, potential, or aspirational—interests are at stake[.] So why don't we regularly investigate whether the state has real interests that merit compromise?

The issue of whether the state has a substantial investment meriting compromise arises most pointedly with what I will call 'discretionary interests,' as opposed to 'mandatory interests.' [Discretionary] interests are those that would be permissible for a state actor to entertain or promote, but are not required[.] [Examples] include interests in protecting fetal life, in protecting life irrespective of its quality, or in maintaining the integrity of the legal profession. The range of potential discretionary interests may not be capable of being jointly affirmed by one state at once. Washington State's assertion, at one time, of an "unqualified" interest in preserving life, even against a patient's will, is incompatible with Oregon's interest in facilitating

* Excerpt from Seana Valentine Shiffrin, DEMOCRATIC LAW, pt. II, ch. 3 (2021).

[10] Justice Brennan's opinions showed sensitivity to the issues I explore here, although he was often in the minority; my argument may be understood as offering a philosophical argument for the more regular application of his approach. A few examples: in *Michael H.*, Justice Brennan criticizes the majority for an approach that does not consider whether the asserted state interest in presumptive determinations of paternity bolstering the state's paternity rule "has changed too often or too recently to call the rule embodying that rationale a 'tradition.' " His dissent in *Cruzan* [*supra*, p. IV-97] also noted that Missouri's own enactments did not support the conclusion that Missouri had an unqualified interest in life given its absence of a health insurance scheme and its legislative support for living wills. [Other examples omitted. —BE]

patients' choices regarding the timing of their deaths, betraying a more qualified interest in preserving life when disvalued by its bearer. Given their elective quality, the question arises whether the mere articulation and in-principle defense of a discretionary interest could establish that a state *has* that interest for constitutional balancing purposes[.]

Individual Interests

I will illustrate the importance of actual investment by starting with individual, discretionary interests. By 'interest,' I mean something more than desire or preference; rather, something whose pursuit or success significantly contributes to the objective well-being of the agent who has it. A 'discretionary' interest is one that the agent chooses to develop, where neither prudence nor morality dictate that choice. For instance, an individual may reasonably and morally take an interest in musical theater, dance, community beautification, tutoring students in need, or learning a foreign language. Some such projects are predominantly self-regarding, while others have wider moral value. Should she dedicate substantial time and energy to it, the success of her endeavor or at least her access to participation would come, over time, to constitute an interest of *hers* in a robust sense, perhaps looming large enough to play a role in her characterological identity. Her freedom, welfare, and even her life's meaning may suffer should her success or access be thwarted—especially if by sources outside herself.

As fellow community members, we would have moral reasons to adjust our plans to avoid thwarting her interests, where possible. If the most convenient time for a weekly neighborhood watch meeting conflicted with her regular dance class and if the other times, while less convenient or even costly, did not thwart any of our interests in this particular sense, we should adjust our meeting time to accommodate her interest. If adjusting the time affects others' interests, we would have reason to ask how great the imposition was on others, whether that imposition could be mitigated, and to search for some fair way to distribute the burden. Whichever form of accommodation is apt, the justification for our absorption of some costs on her behalf depends on her actually *having* that interest. That possession depends on a certain level of dedication and involvement. If she were merely considering or had only just begun attending class, the opportunity to continue would matter but would not be of a different caliber than the reasons why the time is more convenient for us; same if she is an occasional drop-in but often foregoes the class for dinner with friends, a good book, or to save money. Her assertion of her "interest" in attending despite her only episodic participation might be sincere in the sense that she subjectively wants to dance more and dancing figures among the activities that matter to her. Such assertions matter and may represent an aspiration to make dancing her interest. Still, the moral significance of such aspirational, fledgling, or ambivalent discretionary interests differs from the case where she actually has substantially incorporated a commitment to dance into her life. The sincerity of the occasional dancer's assertion that dancing is an important interest of hers is partially compromised not by subjective ambivalence but by her failure to act consistently to realize these intentions in a morally significant way.

[The] sustained pursuit involved in the substantial incorporation of a discretionary interest into a life demonstrates that the interest is actual as opposed to aspirational, that it has duration as opposed to its being impulsive or impetuous, and that the agent has considered what its execution involves in terms of appropriate means and opportunity costs. Substantial incorporation [also] provides stronger deliberative credentials about the worthiness of the choice in light of its actual and not merely its imagined features and costs. These credentials matter morally. Partly, this is for reasons of reciprocity. Other things equal, it may be appropriate to ask others to bear costs on one's behalf only for those things one is willing to bear costs for oneself. Partly, these credentials matter morally because shouldering those costs and forsaking other possibilities lends deliberative credibility to one's assertion of the interest's worthiness. Tellingly, shouldering them often heralds revisions in the articulation of one's exact interest.

State Interests

When an individual asserts theoretically legitimate discretionary interests that are predominantly only aspirational, fledgling, or ambivalent, their precarious status may diminish their moral force. Shouldn't these same considerations hold true when the state cites a discretionary interest as a reason for citizens to be afforded a narrower range of opportunities to pursue their constitutional interests? States also may assert legitimate interests that are only discretionary and that, for those actors, are predominantly aspirational, fledgling, or ambivalent.

Consider the state interest asserted in the right-to-die litigation in [*Glucksberg*.] Chief Justice Rehnquist's majority opinion emphasized that "Washington has an '*unqualified* interest in the preservation of human life.'" Even assuming the theoretical legitimacy of such an interest, its assertion by Washington might startle those familiar with the death-penalty map. Washington was not then and is not now an abolitionist state.* [Strangely,] no effort was made to reconcile its asserted "unqualified" interest in life with its willingness to declare some lives ineligible for preservation. Indeed, no evidence whatsoever was assembled showing that *Washington* embraced this unqualified interest. There was no survey of Washington's historical efforts in workplace and traffic safety, no descriptions of unstinting support for medical funding of the severely disabled and the elderly, and no description of a state educational curriculum dedicated to instilling equal respect for the lives of all of its citizens. The Court did not explicitly glean a commitment, beyond the assertions in briefs, from the preambulatory language of

* [Washington has since abolished the death penalty. —BE]

the statute, commitments voiced in prior cases, or the amicus practice of the state of Washington in other cases involving end-of-life issues, expressions that might have supported a distinction, however specious, between "innocent" lives and the lives of criminals.

Bizarrely, to support the assertion of Washington's alleged interest, Justice Rehnquist instead cited his own prior opinion in *Cruzan*, a case affirming that *Missouri* could require "clear and convincing evidence" that a patient in a permanent vegetative state had wished to refuse treatment. Right topic, wrong state. The *Cruzan* opinion had a similar *ipse dixit* quality, [gliding] from the claim that Missouri was *permitted* to *assert* an unqualified interest in life to concluding Missouri *had* that interest.

[We] should be puzzled by a constitutional approach that affords much weight to Washington's asserted interest given its exhibited ambivalence about the unqualified value of life, troubled by the Court's failure to demand substantiating evidence of its commitment, and perplexed by its substitution of one state's purported commitment to testify to the commitment of another's. It is not as though the states are univocal on this matter. Not long before *Glucksberg* upheld the constitutionality of Washington's prohibition on assisted suicide, its neighbor, Oregon, passed a law acknowledging a right to die[.] [Oregon's] divergent path reveals a defect in *Gluckberg*'s methodology; citing one state's interest as evidence of another's seemed a rather thin veneer for assuming that there was only one acceptable commitment a state could have. When there is an actual diversity of possible interests, establishing one particular state's interest requires more than a priori reasoning; it demands a more searching inquiry into the depth and breadth of the state's commitment.

[There] are other cases in which a state has asserted a non-pretextual, legitimate, but not obligatory interest, but, nonetheless, the state's level of commitment to that interest is questionable—either predominantly aspirational (apart from the state action in question), fledgling, or ambivalent. For example, since *Roe*, the Court has taken the stance that the state may take an interest in the health of the embryo or fetus, but there is no suggestion that it must. [When] a state asserts a discretionary interest in fetal life *as a reason* to restrict the scope of exercise of women's right to abort, it seems fair to ask whether the state's assertion goes beyond the aspirational, the ambivalent, or the fledgling.

There are often reasons to doubt the robustness of the state's asserted interests in fetal life. Take, for example, the regulations considered in *Planned Parenthood v. Casey*. Pennsylvania compelled women to attend an education session followed by a 24-hour waiting period before they could abort, justifying these restrictions by appeal to the state's interest in the life and health of the embryo or fetus. Yet, for embryos fabricated through in vitro fertilization (IVF) procedures, Pennsylvania required only reporting on the preservation, protection, and disposal of embryos. It permitted their destruction at the election of either genetic parent without any waiting period or compulsory education. The failure consistently to pursue measures reflecting an interest in the embryo may well substantiate charges that the cited interest is pretextual, meant to disguise the intent to bully or otherwise to impose an undue burden on women.

Alternatively, it may simply show that the state's commitment to the interest was not well-considered and fully fledged, thereby depriving the state of the normative standing to burden the exercise of a recognized constitutional interest. Skepticism about the depth of the state's commitment and of its deliberation should not seem out of place here; after all, these regulations are predicated on skepticism that women seeking abortion have adequately deliberated, thus forcing deliberative measures on women to ensure the depth of their commitment to the procedure. It seems only fitting to make an analogous demand of the state.

[My] argument has been that to make normative sense of the balancing tests that dominate our constitutional jurisprudence, we must inquire about the strength of a state's commitment to a discretionary interest just as we undertake a similar inquiry in the interpersonal case. If a major function of democratic law is to express our joint moral commitments, our constitutional jurisprudence should do more to unearth what actual, rather than hypothetical or aspirational, commitments our laws express and should demand that a sufficiently developed and sincere expression of those interests be identified before acknowledging a permissible limitation on the scope of constitutional interests[.]

[These] questions should not occur only to a court. In deliberating about whether and how to defend state action, the state's legal representatives may initiate inquiries of their own, attempting to ascertain whether, in good faith, they are in the position to represent a potential state interest as actual and to explain any apparent inconsistencies or hesitancies in the pursuit of the interest. Those inquiries, like those made by a court, need not conclude in a binary determination that the state either has or lacks the interest. Having to advance a justification might itself be salutary for a state office, forcing questions to be faced that have been avoided and generating greater levels of accountability via justification.

3. **The Second Amendment** (45 PAGES)

District of Columbia v. Heller

554 U.S. 570 (2008)

■ JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.

[The] Second Amendment 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." In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

[The] Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

[Logic] demands that there be a link between the stated purpose and the command. [But] apart from [its] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. [Therefore,] while we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.[4]

[4] JUSTICE STEVENS criticizes us for discussing the prologue last. But if a prologue can be used only to clarify an ambiguous operative provision, surely the first step must be to determine whether the operative provision is ambiguous[.]

1. Operative Clause

a. "Right of the People." The first salient feature of the operative clause is that it codifies a "right of the people." The unamended Constitution and the Bill of Rights use the phrase "right of the people" two other times, in the First Amendment's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"). All three of these instances unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body.[5] Three provisions of the Constitution refer to "the people" in a context other than "rights"—the famous preamble ("We the people"), §2 of Article I (providing that "the people" will choose members of the House), and the Tenth Amendment (providing that those powers not given the Federal Government remain with "the States" or "the people"). Those provisions arguably refer to "the people" acting collectively—but they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a "right" attributed to "the people" refer to anything other than an individual right.

What is more, in all six other provisions of the Constitution that mention "the people," the term unambiguously refers to all members of the political community, not an unspecified subset. [This] contrasts markedly with the phrase "the militia" in the prefatory clause. As we will describe below, the "militia" in colonial America consisted of a subset of "the people"—those who were male, able bodied, and within a certain age range. Reading the Second Amendment as protecting only the right to "keep and bear Arms" in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as "the people." We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.

b. "Keep and bear Arms." [The] 18th-century meaning [of "Arms"] is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined "arms" as "weapons of offence, or armour of defence." [Some] have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

We turn to the phrases "keep arms" and "bear arms." [T]he most natural reading of "keep Arms" in the Second Amendment is to "have weapons." [D.C.] point[s] to militia laws of the founding period that required militia

[5] [T]he right to assembly cannot be exercised alone, but it is still an individual right, and not one conditioned upon membership in some defined "assembly[.]"

members to "keep" arms in connection with militia service, and they conclude from this that the phrase "keep Arms" has a militia-related connotation. This is rather like saying that, since there are many statutes that authorize aggrieved employees to "file complaints" with federal agencies, the phrase "file complaints" has an employment-related connotation. "Keep arms" was simply a common way of referring to possessing arms, for militiamen *and everyone else.*

At the time of the founding, as now, to "bear" meant to "carry." When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose—confrontation. [Although] the phrase implies that the carrying of the weapon is for the purpose of "offensive or defensive action," it in no way connotes participation in a structured military organization.

From our review of founding-era sources, we conclude that this natural meaning was also the meaning that "bear arms" had in the 18th century. In numerous instances, "bear arms" was unambiguously used to refer to the carrying of weapons outside of an organized militia. The most prominent examples are those most relevant to the Second Amendment: nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to "bear arms in defense of themselves and the state" or "bear arms in defense of himself and the state." It is clear from those formulations that "bear arms" did not refer only to carrying a weapon in an organized military unit.

[Petitioners] justify their limitation of "bear arms" to the military context by pointing out the unremarkable fact that it was often used in that context—the same mistake they made with respect to "keep arms." It is especially unremarkable that the phrase was often used in a military context in the federal legal sources (such as records of congressional debate) that have been the focus of petitioners' inquiry. Those sources would have had little occasion to use it *except* in discussions about the standing army and the militia.

[**c.**] **Meaning of the Operative Clause**. Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed."

[The English Bill of Rights provided:] "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law." This right has long been understood to be the predecessor to our Second Amendment. It was clearly an individual right, having nothing whatever to do with service in a militia. [And by] the time of the founding, the right to have arms had become fundamental for English subjects. Blackstone, whose works, we have said, "constituted the preeminent authority on English law for the founding generation," cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen. His description of it cannot possibly be thought to tie it to militia or military service. It was, he said, "the natural right of resistance and self-preservation," and "the right of having and using arms for self-preservation and defence." [Thus,] the right secured in 1689 [against the Crown, as part of the English Bill of Rights,] was by the time of the founding understood to be an individual right protecting against both public and private violence. [And when, in the 1760s and 1770s,] the Crown began to disarm the inhabitants of the most rebellious areas [in the colonies,] [this] provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms.

[There] seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not[.]Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause.

2. Prefatory Clause

The prefatory clause reads: "A well regulated Militia, being necessary to the security of a free State…." [At the Founding,] "the Militia comprised all males physically capable of acting in concert for the common defense." [T]he adjective "well-regulated" implies nothing more than the imposition of proper discipline and training. [And] the phrase "security of a free state" meant "security of a free polity," not security of each of the several States[.]

There are many reasons why the militia was thought to be "necessary to the security of a free state." First, of course, it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary[.] Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.

3. Relationship Between Prefatory Clause and Operative Clause.

We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above. [The] debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. [It] was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.

It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution. Justice Breyer's assertion that individual self-defense is merely a "subsidiary interest" of the right to keep and bear arms is profoundly mistaken. He bases that assertion solely upon the prologue—but that can only show that self-defense had little to do with the right's *codification*; it was the *central component* of the right itself.

Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment. Four States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights. Two of them—Pennsylvania and Vermont—clearly adopted individual rights unconnected to militia service. Pennsylvania's Declaration of Rights of 1776 said: "That the people have a right to bear arms *for the defence of themselves*, and the state . . . . " In 1777, Vermont adopted the identical provision, except for inconsequential differences in punctuation and capitalization.

[Additional historical discussion omitted. —BE]

III

Like most rights, the right secured by the Second Amendment is not unlimited. [Although] we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[26]

We also recognize another important limitation on the right to keep and carry arms. [In *United States v. Miller* (1939), the Court upheld federal restrictions on short-barreled shotguns.] *Miller* said [that] the sorts of weapons protected were those "in common use at the time." We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons." It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia

[26] We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.

at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. [But] the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

IV

We turn finally to the law at issue here. As we have said, the law totally bans handgun possession in the home. [T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family" would fail constitutional muster.

[Justice Breyer] says that, even assuming the Second Amendment is a personal guarantee of the right to bear arms, the District's prohibition is valid. He first tries to establish this by founding-era historical precedent, pointing to various restrictive laws in the colonial period. [But these laws, such as gunpowder-storage restrictions, did not] remotely burden the right of self-defense as much as an absolute ban on handguns.

[Ultimately,] Justice Breyer [proposes] a judge-empowering "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." After an exhaustive discussion of the arguments for and against gun control, Justice Breyer arrives at his interest-balanced answer: because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

[Undoubtedly] some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

■ JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The question presented by this case is not whether the Second Amendment protects a "collective right" or an "individual right." Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right. Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it does encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history, and our decision in *United States v. Miller* (1939) provide a clear answer to that question.

The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

[T]he preamble to the Second Amendment ["A well regulated Militia, being necessary to the security of a free State"] makes three important points. It identifies the preservation of the militia as the Amendment's purpose; it explains that the militia is necessary to the security of a free State; and it recognizes that the militia must be "well regulated." In all three respects it is comparable to provisions in several State Declarations of Rights that were adopted roughly contemporaneously with the Declaration of Independence.

The parallels between the Second Amendment and these state declarations, and the Second Amendment's omission of any statement of purpose related to the right to use firearms for hunting or personal self-defense, is especially striking in light of the fact that the Declarations of Rights of Pennsylvania and Vermont *did* expressly protect such civilian uses at the time. Article XIII of Pennsylvania's 1776 Declaration of Rights announced that "the people have a right to bear arms for the defence *of themselves* and the state[.] And Article XV of the 1777 Vermont Declaration of Rights guaranteed "[t]hat the people have a right to bear arms for the defence *of themselves* and the State." The contrast between those two declarations and the Second Amendment [confirms] that the Framers' single-minded focus in crafting the constitutional guarantee "to keep and bear arms" was on military uses of firearms, which they viewed in the context of service in state militias.

The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text. Such text should not be treated as mere surplusage, for "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison.* [W]hile the Court makes the novel suggestion that it need only find some "logical connection" between the preamble and the operative provision, it does acknowledge that a prefatory clause may resolve an ambiguity in the text. Without identifying any language in the text that even mentions civilian uses of firearms, the Court proceeds to "find" its preferred reading in what is at best an ambiguous text, and then concludes that its reading is not foreclosed by the preamble. Perhaps the Court's approach to the text is acceptable advocacy, but it is surely an unusual approach for judges to follow.

[The] centerpiece of the Court's textual argument is its insistence that the words "the people" as used in the Second Amendment must have the same meaning, and protect the same class of individuals, as when they are used in the First and Fourth Amendments. According to the Court, in all three provisions—as well as the Constitution's preamble, section 2 of Article I, and the Tenth Amendment—the term unambiguously refers to all members of the political community, not an unspecified subset. But the Court itself reads the Second Amendment to protect a "subset" significantly narrower than the class of persons protected by the First and Fourth Amendments; when it finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to "law-abiding, responsible citizens." But the class of persons protected by the First and Fourth Amendments is not so limited[.] The Court offers no way to harmonize its conflicting pronouncements.

The Court also overlooks the significance of the way the Framers used the phrase "the people" in these constitutional provisions. In the First Amendment, no words define the class of individuals entitled to speak, to publish, or to worship; in that Amendment it is only the right peaceably to assemble, and to petition the Government for a redress of grievances, that is described as a right of "the people." These rights contemplate collective action. While the right peaceably to assemble protects the individual rights of those persons participating in the assembly, its concern is with action engaged in by members of a group, rather than any single individual. Likewise, although the act of petitioning the Government is a right that can be exercised by individuals, it is primarily collective in nature. For if they are to be effective, petitions must involve groups of individuals acting in concert. Similarly, the words "the people" in the Second Amendment refer back to the object announced in the Amendment's preamble. They remind us that it is the collective action of individuals having a duty to serve in the militia that the text directly protects and, perhaps more importantly, that the ultimate purpose of the Amendment was to protect the States' share of the divided sovereignty created by the Constitution.

As used in the Fourth Amendment, "the people" describes the class of persons protected from unreasonable searches and seizures by Government officials. It is true that the Fourth Amendment describes a right that need not be exercised in any collective sense. But that observation does not settle the meaning of the phrase "the people" when used in the Second Amendment. For, as we have seen, the phrase means something quite different in the Petition and Assembly Clauses of the First Amendment. Although the abstract definition of the phrase "the people" could carry the same meaning in the Second Amendment as in the Fourth Amendment, the preamble of the Second Amendment suggests that the uses of the phrase in the First and Second Amendments are the same in referring to a collective activity. By way of contrast, the Fourth Amendment describes a right against governmental interference rather than an affirmative right to engage in protected conduct, and so refers to a right to protect a purely individual interest. As used in the Second Amendment, the words "the people" do not enlarge the right to keep and bear arms to encompass use or ownership of weapons outside the context of service in a well-regulated militia.

[The words "To keep and bear Arms"] describe a unitary right: to possess arms if needed for military purposes and to use them in conjunction with military activities. [The] term "bear arms" is a familiar idiom; when used unadorned by any additional words, its meaning is "to serve as a soldier, do military service, fight." [Had] the Framers wished to expand the meaning of the phrase "bear arms" to encompass civilian possession and use, they could have done so by the addition of phrases such as "for the defense of themselves," as was done in the Pennsylvania and Vermont Declarations of Rights. The *unmodified* use of "bear arms," by contrast, refers most naturally to a military purpose, as evidenced by its use in literally dozens of contemporary texts. The absence of any reference to civilian uses of weapons tailors the text of the Amendment to the purpose identified in its preamble. But when discussing these words, the Court simply ignores the preamble. [Even] if the meaning of the text were genuinely susceptible to more than one interpretation, the burden would remain on those advocating a departure from the purpose identified in the preamble and from settled law to come forward with persuasive new arguments or evidence.

[The] Court concludes its opinion by declaring that it is not the proper role of this Court to change the meaning of rights "enshrine[d]" in the Constitution. But the right the Court announces was not "enshrined" in the Second Amendment by the Framers; it is the product of today's law-changing decision. Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court's announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations. The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun control policy. Absent compelling evidence that is nowhere to be found in the Court's opinion, I could not possibly conclude that the Framers made such a choice.

For these reasons, I respectfully dissent.

■ JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

I agree with JUSTICE STEVENS [that the Second Amendment protects militia-related, not self-defense-related, interests], and I join his opinion. [But] the District's law is consistent with the Second Amendment even if that Amendment is interpreted as protecting a wholly separate interest in individual self-defense. That is so because the District's regulation, which focuses upon the presence of handguns in high-crime urban areas, represents a permissible legislative response to a serious, indeed life-threatening, problem.

[T]he District law is tailored to the life-threatening problems it attempts to address. The law concerns one class of weapons, handguns, leaving residents free to possess shotguns and rifles, along with ammunition. The area that falls within its scope is totally urban. That urban area suffers from a serious handgun-fatality problem. The District's law directly aims at that compelling problem. And there is no less restrictive way to achieve the problem-related benefits that it seeks.

[The] majority derides my approach as "judge-empowering." I take this criticism seriously, but I do not think it accurate. [T]he very nature of the approach—requiring careful identification of the relevant interests and evaluating the law's effect upon them—limits the judge's choices; and the method's necessary transparency lays bare the judge's reasoning for all to see and to criticize. The majority's methodology is, in my view, substantially less transparent than mine.

[At] the same time the majority ignores a more important question: Given the purposes for which the Framers enacted the Second Amendment, how should it be applied to modern-day circumstances that they could not have anticipated? Assume, for argument's sake, that the Framers did intend the Amendment to offer a degree of self-defense protection. Does that mean that the Framers also intended to guarantee a right to possess a loaded gun near swimming pools, parks, and playgrounds? That they would not have cared about the children who might pick up a loaded gun on their parents' bedside table? [Unless] we believe that they intended future generations to ignore such matters, answering questions such as the questions in this case requires judgment—judicial judgment exercised within a framework for constitutional analysis that guides that judgment and which makes its exercise transparent. One cannot answer those questions by combining inconclusive historical research with judicial *ipse dixit* [“say-so”].

The Court has decided only three gun rights cases in the years since *Heller*, which was itself the Court’s first case invalidating any statute on Second Amendment grounds. The first of those was **McDonald v. City of Chicago**, 561 U.S. 742 (2010), where the same majority held that the right recognized in *Heller* also applied against the states. According to Justice Alito’s plurality opinion, “it [was] clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”[*] In dissent, Justice Stevens pointed out that *McDonald* was actually “a substantive due process case,” and argued that, for various reasons, a broad right to have a handgun for self-defense did not meet the standards of the Court’s substantive due process cases. But the plurality read the Court’s earlier cases as having “decisively held” that incorporated rights “are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment,” effectively killing a “two-track approach to incorporation.”

You’ll read the other two cases—*New York State Rifle & Pistol Association, Inc. v. Bruen* (2022), and *United States v. Rahimi* (2024)—below. As you read, consider how the opinions fill out the contours of the Second Amendment right and especially the methodological choices that they make.

New York State Rifle & Pistol Association, Inc. v. Bruen

142 S. Ct. 2111 (2022)

■ JUSTICE THOMAS delivered the opinion of the Court.

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[*] Whereas Justice Alito applied the Court’s incorporation precedents, which ground incorporation in the Due Process Clause (see *supra*, p. IV-59), Justice Thomas concurred on the ground that “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.”

[Many states] require[] a permit to carry a handgun in public. But the vast majority of States—43 by our count—are "shall issue" jurisdictions, where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability. Meanwhile, only six States and the District of Columbia have "may issue" licensing laws, under which authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria.

[Since *Heller* and *McDonald*, lower courts have assessed Second Amendment claims by considering the importance of the government interest asserted, the fit between that end and the government's chosen means, and the degree of intrusion on individual interests protected by the Second Amendment.] [But w]hether it came to defining the character of the right (individual or militia dependent), suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation, *Heller* relied on text and history. It did not invoke any means-end test such as strict or intermediate scrutiny.

[We] reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

[To] be sure, "[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it." *McDonald* (Scalia, J. concurring). But reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable, than asking judges to "make difficult empirical judgments" about "the costs and benefits of firearms restrictions," especially given their "lack [of] expertise" in the field.[6]

If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations [often] defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference

[6] The dissent claims that *Heller*'s text-and-history test will prove unworkable [because] judges are relatively ill equipped to "resolv[e] difficult historical questions[."] [But t]he job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies. That "legal inquiry is a refined subset" of a broader "historical inquiry" and it relies on "various evidentiary principles and default rules" to resolve uncertainties. W. Baude & S. Sachs, Originalism and the Law of the Past, 37 L. & Hist. Rev. 809, 810-811 (2019). For example, "[i]n the adversarial system, [we] follow the principle of party presentation." Courts are thus entitled to decide a case based on the historical record compiled by the parties.

that the Constitution demands here. The Second Amendment "is the very *product* of an interest balancing by the people" and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense. *Heller*. It is this balance—struck by the traditions of the American people—that demands our unqualified deference.

The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding. In some cases, that inquiry will be fairly straightforward. For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.

Heller itself exemplifies this kind of straightforward historical inquiry. One of the District's regulations challenged in *Heller* "totally ban[ned] handgun possession in the home." The District in *Heller* addressed a perceived societal problem—firearm violence in densely populated communities—and it employed a regulation—a flat ban on the possession of handguns in the home—that the Founders themselves could have adopted to confront that problem. Accordingly, after considering "founding-era historical precedent," including "various restrictive laws in the colonial period," and finding that none was analogous to the District's ban, *Heller* concluded that the handgun ban was unconstitutional.

New York's proper-cause requirement concerns the same alleged societal problem addressed in *Heller*: "handgun violence," primarily in "urban area[s]." Following the course charted by *Heller*, we will consider whether "historical precedent" from before, during, and even after the founding evinces a comparable tradition of regulation. And, as we explain below, we find no such tradition in the historical materials that respondents and their *amici* have brought to bear on that question.

While the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. Fortunately, the Founders created a Constitution—and a Second Amendment—"intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch.* Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.

We have already recognized in *Heller* at least one way in which the Second Amendment's historically fixed meaning applies to new circumstances: Its reference to "arms" does not apply "only [to] those arms in existence in the 18th century." *Heller.* "Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." Thus, even though the Second Amendment's definition of "arms" is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense.

Much like we use history to determine which modern "arms" are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding. When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are "relevantly similar." C. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 773 (1993). And because "[e]verything is similar in infinite ways to everything else," one needs "some metric enabling the analogizer to assess which similarities are important and which are not." F. Schauer & B. Spellman, *Analogy, Expertise, and Experience*, 84 U. Chi. L. Rev. 249, 254 (2017). For instance, a green truck and a green hat are relevantly similar if one's metric is "things that are green." They are not relevantly similar if the applicable metric is "things you can wear."

While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense. As we stated in *Heller* and repeated in *McDonald*, "individual self-defense is 'the *central component*' of the Second Amendment right." Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are "'*central*'" considerations when engaging in an analogical inquiry.[7]

[7] This does not mean that courts may engage in independent means-end scrutiny under the guise of an analogical inquiry. Again, the Second Amendment is the "product of an interest balancing by the people," not the evolving product of federal judges. Analogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances, and contrary to the dissent's assertion, there is nothing "[i]ronic" about that undertaking. It is not an invitation to revise that balance through means-end scrutiny.

To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not uphold every modern law that remotely resembles a historical analogue, because doing so risks endorsing outliers that our ancestors would never have accepted. On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.

Consider, for example, *Heller*'s discussion of "longstanding" "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." Although the historical record yields relatively few 18th-and 19th-century "sensitive places" where weapons were altogether prohibited—*e.g.,* legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions. We therefore can assume it settled that these locations were "sensitive places" where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of "sensitive places" to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible.

Although we have no occasion to comprehensively define "sensitive places" in this case, we do think respondents err in their attempt to characterize New York's proper-cause requirement as a "sensitive-place" law. In their view, "sensitive places" where the government may lawfully disarm law-abiding citizens include all "places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available." It is true that people sometimes congregate in "sensitive places," and it is likewise true that law enforcement professionals are usually presumptively available in those locations. But expanding the category of "sensitive places" simply to all places of public congregation that are not isolated from law enforcement defines the category of "sensitive places" far too broadly. Respondents' argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense that we discuss in detail below. Put simply, there is no historical basis for New York to effectively declare the island of Manhattan a "sensitive place" simply because it is crowded and protected generally by the New York City Police Department.

Like *Heller*, we "do not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." And we acknowledge that "applying constitutional principles to novel modern conditions can be difficult and leave close questions at the margins." "But that is hardly unique to the Second Amendment. It is an essential component of judicial decisionmaking under our enduring Constitution." We see no reason why judges frequently tasked with answering these kinds of historical, analogical questions cannot do the same for Second Amendment claims.

Having made the constitutional standard endorsed in *Heller* more explicit, we now apply that standard to New York's proper-cause requirement. It is undisputed that petitioners Koch and Nash—two ordinary, law-abiding, adult citizens—are part of "the people" whom the Second Amendment protects. Nor does any party dispute that handguns are weapons "in common use" today for self-defense. *Heller*. We therefore turn to whether the plain text of the Second Amendment protects Koch's and Nash's proposed course of conduct—carrying handguns publicly for self-defense.

We have little difficulty concluding that it does. [Although] individuals often "keep" firearms in their home, at the ready for self-defense, most do not "bear" (*i.e.*, carry) them in the home beyond moments of actual confrontation. To confine the right to "bear" arms to the home would nullify half of the Second Amendment's operative protections.

[T]he burden [then] falls on respondents to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation. [Respondents] appeal to a variety of historical sources from the late 1200s to the early 1900s. We categorize these periods as follows: (1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries.

We categorize these historical sources because, when it comes to interpreting the Constitution, not all history is created equal. "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Heller*. The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years.

[Similarly,] we must also guard against giving post-enactment history more weight than it can rightly bear. It is true that in *Heller* we [examined] "a variety of legal and other sources to determine *the public understanding* of [the Second Amendment] after its . . . ratification." And, in other contexts, we have [recognized] that "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision." *NLRB v. Noel Canning* (2014) (Scalia, J., concurring in judgment) [(citing, among other things, *Youngstown Sheet & Tube Co. v. Sawyer* (1952) (Frankfurter, J., concurring))]. But to the extent later history contradicts what the text says, the text controls.

[A] final word on historical method: Strictly speaking, New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second. Nonetheless, we have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government. And we have generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791.

We also acknowledge that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government). See, *e.g.,* A. Amar, The Bill of Rights: Creation and Reconstruction (1998); K. Lash, Re-Speaking the Bill of Rights: A New Doctrine of Incorporation (2021). We need not address this issue today because, as we explain below, the public understanding in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry.

With these principles in mind, we turn to respondents' historical evidence. Throughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms. But apart from a handful of late-19th-century jurisdictions, the historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense.[9] We conclude that respondents have failed to meet their burden to identify an American tradition justifying New York's proper-cause requirement. Under *Heller*'s text-and-history standard, the proper-cause requirement is therefore unconstitutional.

Respondents' substantial reliance on English history and custom before the founding makes some sense given our statement in *Heller* that the Second Amendment "codified a right 'inherited from our English ancestors.'" But this Court has long cautioned that the English common law "is not to be taken in all respects to be that of America." [We find] the English history that respondents and the United States muster [ambiguous] at best and see little reason to think that the Framers would have thought it applicable in the New World. It is not sufficiently probative to defend New York's proper-cause requirement.

To begin, respondents and their *amici* point to several medieval English regulations from as early as 1285 that they say indicate a longstanding tradition of restricting the public carry of firearms. The most prominent is the 1328 Statute of Northampton (or Statute), passed shortly after Edward II was deposed by force [and when] "tendency to turmoil and rebellion was

[9] [To] be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' "shall-issue" licensing regimes. [It] appears that these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, "law-abiding, responsible citizens." And they likewise appear to contain only "narrow, objective, and definite standards" guiding licensing officials[.]

everywhere apparent throughout the realm." [The] Statute of Northampton was, in part, "a product of . . . the acute disorder that still plagued England." It provided that, with some exceptions, Englishmen could not "come before the King's Justices, or other of the King's Ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere[.]"

Respondents argue that the prohibition on "rid[ing]" or "go[ing] . . . armed" was a sweeping restriction on public carry of self-defense weapons that would ultimately be adopted in Colonial America and justify onerous public-carry regulations. [But] the Statute of Northampton—at least as it was understood during the Middle Ages—has little bearing on the Second Amendment adopted in 1791. [The] Statute's prohibition on going or riding "armed" obviously did not contemplate handguns, given they did not appear in Europe until about the mid-1500s. [And respondents] point to no evidence suggesting the Statute applied to the smaller medieval weapons [such as daggers carried on the person] that strike us as most analogous to modern handguns.

[T]he Statute of Northampton [was] no obstacle to public carry for self-defense in the decades leading to the founding. Serjeant William Hawkins, in his widely read 1716 treatise, confirmed that "no wearing of Arms is within the meaning of [the Statute], unless it be accompanied with such Circumstances as are apt to terrify the People." [Respondents] do not offer any evidence showing that, in the early 18th century or after, the mere public carrying of a handgun would terrify people. In fact, the opposite seems to have been true. As time went on, "domestic gun culture [in England] softened" any "terror" that firearms might once have conveyed. Thus, whatever place handguns had in English society during the Tudor and Stuart reigns, by the time we reach the 18th century—and near the founding—they had gained a fairly secure footing in English culture.

At the very least, we cannot conclude from this historical record that, by the time of the founding, English law would have justified restricting the right to publicly bear arms suited for self-defense only to those who demonstrate some special need for self-protection.

Respondents next point us to the history of the Colonies and early Republic, but there is little evidence of an early American practice of regulating public carry by the general public. [In] the colonial era, respondents point to only three restrictions on public carry. For starters, we doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation. In any event, [far] from banning the carrying of any class of firearms, [these laws] merely codified the existing common-law offense of bearing arms to terrorize the people, as had the Statute of Northampton itself. [And] even if respondents' reading of these colonial statutes were correct, it would still do little to support restrictions on the public carry of handguns *today*. At most, respondents can show that colonial legislatures sometimes prohibited the carrying of "dangerous and unusual weapons"—a fact we already acknowledged in *Heller*. Drawing from this historical tradition, we explained there that the Second Amendment protects only the carrying of weapons that are those "in common use at the time," as opposed to those that "are highly unusual in society at large." Whatever the likelihood that handguns were considered "dangerous and unusual" during the colonial period, they are indisputably in "common use" for self-defense today. [Thus,] even if these colonial laws prohibited the carrying of handguns because they were considered "dangerous and unusual weapons" in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.

[Only] after the ratification of the Second Amendment in 1791 did public-carry restrictions proliferate. Respondents rely heavily on these restrictions, which generally fell into three categories: common-law offenses, statutory prohibitions, and "surety" statutes. [Discussion of the first two categories is omitted. —BE]

In the mid-19th century, many jurisdictions began adopting surety statutes that required certain individuals to post bond before carrying weapons in public. Although respondents seize on these laws to justify the proper-cause restriction, their reliance on them is misplaced. These laws were not *bans* on public carry, and they typically targeted only those threatening to do harm.

[While] New York presumes that individuals have no public carry right without a showing of heightened need, the surety statutes presumed that individuals had a right to public carry that could be burdened only if another could make out a specific showing of "reasonable cause to fear an injury, or breach of the peace." [Then,] even on such a showing, the surety laws did not *prohibit* public carry in locations frequented by the general community. Rather, an accused arms-bearer "could go on carrying without criminal penalty" so long as he "post[ed] money that would be forfeited if he breached the peace or injured others[.]" [We] have little reason to think that the hypothetical possibility of posting a bond would have prevented anyone from carrying a firearm for self-defense in the 19th century. [Besides,] respondents offer little evidence that authorities ever enforced surety laws. The only recorded case that we know of involved a justice of the peace *declining* to require a surety, even when the complainant alleged that the arms-bearer "'did threaten to beat, wou[n]d, mai[m], and kill'" him.

[To] summarize: The historical evidence from antebellum America does demonstrate that *the manner* of public carry was subject to reasonable regulation. Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others. Similarly, although surety statutes did not directly restrict public carry, they did provide financial incentives for responsible arms carrying. Finally, States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly.

None of these historical limitations on the right to bear arms approach New York's proper-cause requirement because none operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose.

Evidence from around the adoption of the Fourteenth Amendment also fails to support respondents' position. [Respondents point] primarily to two late-19th-century cases in Texas [that approved a statutory "reasonable grounds" standard for public carry analogous to New York's proper-cause requirement]. But the Texas statute, and the rationales set forth in [those two cases], are outliers. In fact, only one other State, West Virginia, adopted a similar public-carry statute before 1900. [The] Texas decisions therefore provide little insight into how postbellum courts viewed the right to carry protected arms in public. In the end, while we recognize the support that postbellum Texas provides for respondents' view, we will not give disproportionate weight to a single state statute and a pair of state-court decisions.

[Finally,] respondents point to the slight uptick in gun regulation during the late-19th century[.] The vast majority of the statutes that respondents invoke come from the Western Territories. [W]e will not stake our interpretation on a handful of temporary territorial laws that were enacted nearly a century after the Second Amendment's adoption, governed less than 1% of the American population, and also "contradic[t] the overwhelming weight" of other, more contemporaneous historical evidence.

[At] the end of this long journey through the Anglo-American history of public carry, we conclude that respondents have not met their burden to identify an American tradition justifying the State's proper-cause requirement. The Second Amendment guaranteed to "all Americans" the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions. Those restrictions, for example, limited the intent for which one could carry arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms, such as before justices of the peace and other government officials. Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense. Nor, subject to a few late-in-time outliers, have American governments required law-abiding, responsible citizens to "demonstrate a special need for self-protection distinguishable from that of the general community" in order to carry arms in public.

The constitutional right to bear arms in public for self-defense is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*. We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. [And] it is not how the Second Amendment works when it comes to public carry for self-defense. New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.

■ JUSTICE BARRETT, concurring.

I join the Court's opinion in full. I write separately to highlight two methodological points that the Court does not resolve. First, the Court does not conclusively determine the manner and circumstances in which post-ratification practice may bear on the original meaning of the Constitution. [Second] and relatedly, the Court avoids another "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868" or when the Bill of Rights was ratified in 1791. [So] today's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights. On the contrary, the Court is careful to caution "against giving post-enactment history more weight than it can rightly bear."

■ JUSTICE BREYER, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

In 2020, 45,222 Americans were killed by firearms. Since the start of this year (2022), there have been 277 reported mass shootings—an average of more than one per day. Gun violence has now surpassed motor vehicle crashes as the leading cause of death among children and adolescents. Many States have tried to address some of the dangers of gun violence just described by passing laws that limit, in various ways, who may purchase, carry, or use firearms of different kinds. The Court today severely burdens States' efforts to do so. [In] my view, that decision rests upon several serious mistakes.

[T]he Court wrongly limits its analysis to focus nearly exclusively on history. It refuses to consider the government interests that justify a challenged gun regulation, regardless of how compelling those interests may be. The Constitution contains no such limitation, and neither do our precedents. [In addition,] the Court itself demonstrates the practical problems with its history-only approach. In applying that approach to New York's law, the Court fails to correctly identify and analyze the relevant historical facts.

[In] my view, when courts interpret the Second Amendment, it is constitutionally proper, indeed often necessary, for them to consider the serious dangers and consequences of gun violence that lead States to regulate firearms. [In] 2017, there were an estimated 393.3 million civilian-held firearms in the United States, or about 120 firearms per 100 people. That is more guns per capita than in any other country in the world. Unsurprisingly, the United States also suffers a disproportionately high rate of firearm-related deaths and injuries. [And] the consequences of gun violence are borne disproportionately by communities of color, and Black communities in particular. [M]ass shootings are just one part of the problem. Easy access to firearms can also make many other aspects of American life more dangerous. [Discussion of statistics regarding gun use in incidents of road rage, protests, domestic disputes, suicide, and interactions with police officers omitted. —BE]

[The] question presented in this case concerns the extent to which the Second Amendment restricts different States (and the Federal Government) from working out solutions to these problems through democratic processes. The primary difference between the Court's view and mine is that I believe the Amendment allows States to take account of the serious problems posed by gun violence that I have just described. I fear that the Court's interpretation ignores these significant dangers and leaves States without the ability to address them.

[Because] the Court counts 43 "shall issue" jurisdictions and only 7 "may issue" jurisdictions, it suggests that New York's law is an outlier. [By] the Court's count, the seven "may issue" jurisdictions are New York, California, Hawaii, Maryland, Massachusetts, New Jersey, and the District of Columbia. Together, these seven jurisdictions comprise about 84.4 million people and account for over a quarter of the country's population. Thus, "may issue" laws can hardly be described as a marginal or outdated regime.

And there are good reasons why these seven jurisdictions may have chosen not to follow other States in shifting toward "shall issue" regimes. The seven ["may issue"] jurisdictions are among the most densely populated in the United States [and] contain some of the country's densest and most populous urban areas[.] [D]ensely populated urban areas face different kinds and degrees of dangers from gun violence than rural areas. It is thus easy to see why the seven "may issue" jurisdictions might choose to regulate firearm carriage more strictly than other States.

[The] Court's near-exclusive reliance on history is not only unnecessary, it is deeply impractical. It imposes a task on the lower courts that judges cannot easily accomplish. Judges understand well how to weigh a law's objectives (its "ends") against the methods used to achieve those objectives (its "means"). Judges are far less accustomed to resolving difficult historical questions. Courts are, after all, staffed by lawyers, not historians. Legal experts typically have little experience answering contested historical questions or applying those answers to resolve contemporary problems.

[Do] lower courts have the research resources necessary to conduct exhaustive historical analyses in every Second Amendment case? What historical regulations and decisions qualify as representative analogues to modern laws? How will judges determine which historians have the better view of close historical questions? Will the meaning of the Second Amendment change if or when new historical evidence becomes available? And, most importantly, will the Court's approach permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history?

[Consider] *Heller* itself. [I] accept its holding as a matter of *stare decisis.* I refer to its historical analysis only to show the difficulties inherent in answering historical questions and to suggest that judges do not have the expertise needed to answer those questions accurately. For example, the *Heller* majority relied heavily on its interpretation of the English Bill of Rights. Citing Blackstone, the majority claimed that the English Bill of Rights protected a "'right of having and using arms for self-preservation and defence.'" *Heller* [*supra*, p. IV-108]. The majority interpreted that language to mean a private right to bear arms for self-defense, "having nothing whatever to do with service in a militia." Two years later, however, 21 English and early American historians (including experts at top universities) told us in *McDonald v. Chicago* that the *Heller* Court had gotten the history wrong: [the] English right [did] protect a right of "self-preservation and defence," as Blackstone said, but that right "was to be exercised not by individuals acting privately or independently, but as a militia organized by their elected representatives," *i.e.,* Parliament. The Court, not an expert in history, had misread Blackstone and other sources explaining the English Bill of Rights.

And that was not the *Heller* Court's only questionable judgment. The majority rejected Justice Stevens' argument that the Second Amendment's use of the words "bear Arms" drew on an idiomatic meaning that, at the time of the founding, commonly referred to military service. Linguistics experts now tell us that the majority was wrong to do so. Since *Heller* was decided, experts have searched over 120,000 founding-era texts from between 1760 and 1799, as well as 40,000 texts from sources dating as far back as 1475, for historical uses of the phrase "bear arms," and they concluded that the phrase was overwhelmingly used to refer to "'war, soldiering, or other forms of armed action by a group rather than an individual.'"

[The] Court's opinion today compounds these problems, for it gives the lower courts precious little guidance regarding how to resolve modern constitutional questions based almost solely on history. The Court declines to "provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment." [Ironically,] the only two "relevan[t]" metrics that the Court does identify are "how and why" a gun control regulation "burden[s the] right to armed self-defense." In other words, the Court believes that the most relevant metrics of comparison are a regulation's means (how) and ends (why)—even as it rejects the utility of means-end scrutiny.

What the Court offers instead is a laundry list of reasons to discount seemingly relevant historical evidence. The Court [dismisses some historical laws as] outliers. [But] the Court does not say how many cases or laws would suffice "to show a tradition of public-carry regulation." Other laws are irrelevant, the Court claims, because they are too dissimilar from New York's. But the Court does not say what "representative historical analogue," short of a "twin" or a "dead ringer," would suffice. Indeed, the Court offers many and varied reasons to reject potential representative analogues, but very few reasons to accept them.

[I] fear that history will be an especially inadequate tool when it comes to modern cases presenting modern problems. Consider the Court's apparent preference for founding-era regulation. Our country confronted profoundly different problems during that time period than it does today. Society at the founding was "predominantly rural." [Small] founding-era towns are unlikely to have faced the same degrees and types of risks from gun violence as major metropolitan areas do today, so the types of regulations they adopted are unlikely to address modern needs.

This problem is all the more acute when it comes to "modern-day circumstances that [the Framers] could not have anticipated." How can we expect laws and cases that are over a century old to dictate the legality of regulations targeting "ghost guns" constructed with the aid of a three-dimensional printer? Or modern laws requiring all gun shops to offer smart guns, which can only be fired by authorized users? Or laws imposing additional criminal penalties for the use of bullets capable of piercing body armor?

The Court's answer is that judges will simply have to employ "analogical reasoning." But, as I explained above, the Court does not provide clear guidance on how to apply such reasoning. Even seemingly straightforward historical restrictions on firearm use may prove surprisingly difficult to apply to modern circumstances. The Court affirms *Heller*'s recognition that States may forbid public carriage in "sensitive places." But what, in 21st-century New York City, may properly be considered a sensitive place? [W]here does that leave the many locations in a modern city with no obvious 18th-or 19th-century analogue? What about subways, nightclubs, movie theaters, and sports stadiums? The Court does not say.

[The] Court's application of its history-only test in this case demonstrates the very pitfalls described above. The historical evidence reveals a 700-year Anglo-American tradition of regulating the public carriage of firearms in general, and concealed or concealable firearms in particular. The Court spends more than half of its opinion trying to discredit this tradition. But, in my view, the robust evidence of such a tradition cannot be so easily explained away. [E]ven applying the Court's history-only analysis, New York's law must be upheld because "historical precedent from before, during, and . . . after the founding evinces a comparable tradition of regulation."

[Extensive historical discussion omitted. —BE]

The Court [believes] that, by the end of the 17th century, the Statute of Northampton was understood to contain an extratextual intent element: the intent to cause terror in others. [But] other sources suggest that carrying arms in public was prohibited *because* it naturally tended to terrify the people. According to these sources, terror was the natural consequence—not an additional element—of the crime. [Although] the Statute of Northampton is particularly significant because of its breadth, longevity, and impact on American law, it was far from the only English restriction on firearms or their carriage. Whatever right to bear arms we inherited from our English forebears, it was qualified by a robust tradition of public carriage regulations.

As I have made clear, I am not a historian. But if the foregoing facts, which historians and other scholars have presented to us, are even roughly correct, it is difficult to see how the Court can believe that English history fails to support legal restrictions on the public carriage of firearms.

[The] tradition of regulations restricting public carriage of firearms, inherited from England and adopted by the Colonies, continued into the founding era. [The] Court discounts these laws primarily because they were modeled on the Statute of Northampton, which it believes prohibited only public carriage with the intent to terrify. [But] American regulations modeled on the Statute of Northampton appear to have been understood to set forth a broad prohibition on public carriage of firearms without any intent-to-terrify requirement. [O]ne of the cases the Court cites, *State* v. *Huntly*, wrote that the Statute of Northampton codified a pre-existing common-law offense, which provided that "riding or going armed with dangerous or unusual weapons, is a crime against the public peace, *by* terrifying the good people of the land." *Huntly* added that "[a] gun is an 'unusual weapon'" and that "[n]o man amongst us carries it about with him, as one of his every-day accoutrements—as a part of his dress—and never, we trust, will the day come when any deadly weapon will be worn or wielded in our peace-loving and law-abiding State, as an appendage of manly equipment." [The] founding-era regulations—like the colonial and English laws on which they were modeled—thus demonstrate a longstanding tradition of broad restrictions on public carriage of firearms.

[After] the Civil War, public carriage of firearms remained subject to extensive regulation. [Most] notably, many States and Western Territories enacted stringent regulations that prohibited *any* public carriage of firearms, with only limited exceptions. [The] Court's principal answer to these broad prohibitions on public carriage is to discount gun control laws passed in the American West. It notes that laws enacted in the Western Territories were "rarely subject to judicial scrutiny." But, of course, that may well mean that "[w]e . . . can assume it settled that these" regulations were "consistent with the Second Amendment." The Court also reasons that laws enacted in the Western Territories applied to a relatively small portion of the population and were comparatively short lived. But even assuming that is true, it does not mean that these laws were historical aberrations. To the contrary, [they fit with] the centuries-old tradition [described] above.

[Finally,] the Court disregards "20th-century historical evidence." But it is worth noting that the law the Court strikes down today is well over 100 years old, having been enacted in 1911 and amended to substantially its present form in 1913. That alone gives it a longer historical pedigree than at least three of the four types of firearms regulations that *Heller* identified as "presumptively lawful." See C. Larson, Four Exceptions in Search of a Theory: *District of Columbia v. Heller* and Judicial *Ipse Dixit*, 60 Hastings L.J.

1371, 1374-1379 (2009) (concluding that "'prohibitions on the possession of firearms by felons and the mentally ill [and] laws imposing conditions and qualifications on the commercial sale of arms'" have their origins in the 20th century).

[The] historical examples of regulations similar to New York's licensing regime are legion. [In] each instance, the Court finds a reason to discount the historical evidence's persuasive force. Some of the laws New York has identified are too old. But others are too recent. Still others did not last long enough. Some applied to too few people. Some were enacted for the wrong reasons. Some may have been based on a constitutional rationale that is now impossible to identify. Some arose in historically unique circumstances. And some are not sufficiently analogous to the licensing regime at issue here. But if the examples discussed above, taken together, do not show a tradition and history of regulation that supports the validity of New York's law, what could? Sadly, I do not know the answer to that question. What is worse, the Court appears to have no answer either.*

Bruen set off a flood of Second Amendment litigation. Within less than a year, "lower courts [had] reached divergent conclusions about the constitutionality of major state and federal laws," with many judges expressing confusion about how to assess a claimed historical analogue for a contemporary regulation.† These cases involved everything from "sensitive places" restrictions, to requirements that firearms bear a serial number, to restrictions on large-capacity magazines, to bans on firearm possession by convicted felons. After hearing no major Second Amendment cases for more than a decade before *Bruen*, the Court quickly granted certiorari in another case to clarify its implications.

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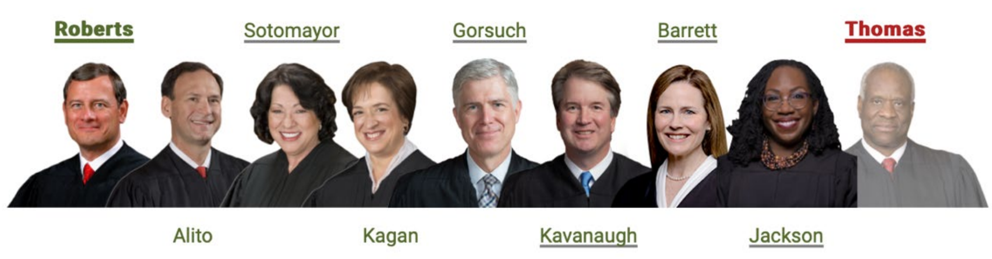

* [JUSTICE KAVANAUGH wrote a concurrence, joined by CHIEF JUSTICE ROBERTS, underscoring the limits of the Court's holding. JUSTICE ALITO wrote a separate concurrence responding to the dissent. —BE]

† Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen, *Gun Rights, and the Shackles of History*, 73 Duke L.J. 67, 145 (2023).

■ CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

A federal statute prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that he "represents a credible threat to the physical safety of [an] intimate partner," or a child of the partner or individual. 18 U.S.C. §922(g)(8). Respondent Zackey Rahimi is subject to such an order. The question is whether this provision may be enforced against him consistent with the Second Amendment.

I

A

In December 2019, Rahimi met his girlfriend, C. M., for lunch in a parking lot. C. M. is also the mother of Rahimi's young child, A. R. During the meal, Rahimi and C. M. began arguing, and Rahimi became enraged. C. M. attempted to leave, but Rahimi grabbed her by the wrist, dragged her back to his car, and shoved her in, causing her to strike her head against the dashboard. When he realized that a bystander was watching the altercation, Rahimi paused to retrieve a gun from under the passenger seat. C. M. took advantage of the opportunity to escape. Rahimi fired as she fled, although it is unclear whether he was aiming at C. M. or the witness. Rahimi later called C. M. and warned that he would shoot her if she reported the incident.

Undeterred by this threat, C. M. went to court to seek a restraining order. [A Texas court] issued a restraining order against him. The order, entered with the consent of both parties, included a finding that Rahimi had committed "family violence." It also found that this violence was "likely to occur again" and that Rahimi posed "a credible threat" to the "physical safety" of C. M. or A. R. Based on these findings, the order prohibited Rahimi from threatening C. M. or her family for two years or contacting C. M. during that period except to discuss A. R. It also suspended Rahimi's gun license for two years. If Rahimi was imprisoned or confined when the order was set to expire, the order would instead terminate either one or two years after his release date, depending on the length of his imprisonment.

In May, however, Rahimi violated the order by approaching C. M.'s home at night. He also began contacting her through several social media accounts.

In November, Rahimi threatened a different woman with a gun, resulting in a charge for aggravated assault with a deadly weapon. And while Rahimi was under arrest for that assault, the Texas police identified him as the suspect in a spate of at least five additional shootings. [In connection with one of these], [t]he police obtained a warrant to search Rahimi's residence. There they discovered a pistol, a rifle, ammunition—and a copy of the restraining order.

B

Rahimi was indicted on one count of possessing a firearm while subject to a domestic violence restraining order, in violation of 18 U.S.C. §922(g)(8). [As relevant here, such an order must] contain a finding that the defendant "represents a credible threat to the physical safety" of his intimate partner or his or his partner's child[.] Rahimi moved to dismiss the indictment, arguing that Section 922(g)(8) violated [the] Second Amendment right to keep and bear arms. [Applying *Bruen*, the Fifth Circuit ruled in Rahimi's favor on the ground] that Section 922(g)(8) does not fit within our tradition of firearm regulation[.]

II

When a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may—consistent with the Second Amendment—be banned from possessing firearms while the order is in effect. Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms. As applied to the facts of this case, Section 922(g)(8) fits comfortably within this tradition.

A

We have held that the right to keep and bear arms is among the "fundamental rights necessary to our system of ordered liberty." *McDonald*. Derived from English practice and codified in the Second Amendment, the right secures for Americans a means of self-defense. *Bruen*.

["Like] most rights," though, "the right secured by the Second Amendment is not unlimited." *Heller*. In *Heller*, this Court held that the right applied to ordinary citizens within the home. Even as we did so, however, we recognized that the right was never thought to sweep indiscriminately. [At] the founding, the bearing of arms was subject to regulations ranging from rules about firearm storage to restrictions on gun use by drunken New Year's Eve revelers. Some jurisdictions banned the carrying of "dangerous and unusual weapons." Others forbade carrying concealed firearms.

In *Heller,* our inquiry into the scope of the right began with "constitutional text and history." In *Bruen,* we directed courts to examine our "historical tradition of firearm regulation" to help delineate the contours of the right. We explained that if a challenged regulation fits within that tradition, it is lawful under the Second Amendment. We also clarified that when the Government regulates arms-bearing conduct, as when the Government regulates other constitutional rights, it bears the burden to "justify its regulation."

Nevertheless, some courts have misunderstood the methodology of our recent Second Amendment cases. These precedents were not meant to suggest a law trapped in amber. As we explained in *Heller,* for example, the reach of the Second Amendment is not limited only to those arms that were in existence at the founding. Rather, it "extends, prima facie, to all instruments that constitute bearable arms, even those that were not [yet] in existence." By that same logic, the Second Amendment permits more than just those regulations identical to ones that could be found in 1791. Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers.

As we explained in *Bruen,* the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. A court must ascertain whether the new law is "relevantly similar" to laws that our tradition is understood to permit, "apply[ing] faithfully the balance struck by the founding generation to modern circumstances." Discerning and developing the law in this way is "a commonplace task for any lawyer or judge."

Why and how the regulation burdens the right are central to this inquiry. For example, if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations. Even when a law regulates arms-bearing for a permissible reason, though, it may not be compatible with the right if it does so to an extent beyond what was done at the founding. And when a challenged regulation does not precisely match its historical precursors, "it still may be analogous enough to pass constitutional muster." The law must comport with the principles underlying the Second Amendment, but it need not be a "dead ringer" or a "historical twin."

B

Bearing these principles in mind, we conclude that Section 922(g)(8) survives Rahimi's challenge.

[2]

This Court reviewed the history of American gun laws extensively in *Heller* and *Bruen.* From the earliest days of the common law, firearm regulations have included provisions barring people from misusing weapons to harm or menace others. The act of "go[ing] armed to terrify the King's subjects" was recognized at common law as a "great offence." *Sir John Knight's Case* (K. B. 1686). Parliament began codifying prohibitions against such conduct as early as the 1200s and 1300s, most notably in the Statute of Northampton of 1328. *Bruen.* In the aftermath of the Reformation and the English Civil War, Parliament passed further restrictions. The Militia Act of 1662, for example, authorized the King's agents to "seize all Armes in the custody or possession of any person ... judge[d] dangerous to the Peace of the Kingdome."

[On] this side of the Atlantic[,] regulations targeting individuals who physically threatened others persisted [even as broad authority to disarm political opponents was blunted by the Second Amendment]. [By] the 1700s and early 1800s, [two] distinct legal regimes had developed that specifically addressed firearms violence[.]

The first were the surety laws. [Under these laws], a magistrate could "oblig[e] those persons, [of] whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance … that such offence … shall not happen[,] by finding pledges or securities." In other words, the law authorized magistrates to require individuals suspected of future misbehavior to post a bond. If an individual failed to post a bond, he would be jailed. If the individual did post a bond and then broke the peace, the bond would be forfeit.

Well entrenched in the common law, the surety laws could be invoked to prevent all forms of violence, including spousal abuse. As Blackstone explained, "[w]ives [could] demand [sureties] against their husbands; or husbands, if necessary, against their wives." These often took the form of a surety of the peace, meaning that the defendant pledged to "keep the peace." Wives also demanded sureties for good behavior, whereby a husband pledged to "demean and behave himself well."

Importantly for this case, the surety laws also targeted the misuse of firearms. In 1795, for example, Massachusetts enacted a law authorizing justices of the peace to "arrest" all who "go armed offensively [and] require of the offender to find sureties for his keeping the peace." Later, Massachusetts amended its surety laws to be even more specific, authorizing the imposition of bonds from individuals "[who went] armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon." At least nine other jurisdictions did the same.

[While] the surety laws provided a mechanism for preventing violence before it occurred, a second regime provided a mechanism for punishing those who had menaced others with firearms. These were the "going armed" laws, a particular subset of the ancient common-law prohibition on affrays.

Derived from the French word "affraier," meaning "to terrify," the affray laws traced their origin to the Statute of Northampton. Although the prototypical affray involved fighting in public, commentators understood affrays to encompass the offense of "arm[ing]" oneself "to the Terror of the People." [Whether] classified as an affray law or a distinct prohibition, the going armed laws prohibited "riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land." Such conduct disrupted the "public order" and "le[d] almost necessarily to actual violence." Therefore, the law punished these acts with "forfeiture of the arms … and imprisonment."

In some instances, prohibitions on going armed and affrays were incorporated into American jurisprudence through the common law. Moreover, at least four States—Massachusetts, New Hampshire, North Carolina, and Virginia—expressly codified prohibitions on going armed.

3

Taken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed. Section 922(g)(8) is by no means identical to these founding era regimes, but it does not need to be. See *Bruen*. Its prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition the surety and going armed laws represent.

Like the surety and going armed laws, Section 922(g)(8)(C)(i) applies to individuals found to threaten the physical safety of another. This provision is "relevantly similar" to those founding era regimes in both why and how it burdens the Second Amendment right. Section 922(g)(8) restricts gun use to mitigate demonstrated threats of physical violence, just as the surety and going armed laws do. Unlike the regulation struck down in *Bruen,* Section 922(g)(8) does not broadly restrict arms use by the public generally.

The burden Section 922(g)(8) imposes on the right to bear arms also fits within our regulatory tradition. While we do not suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse, see *Heller*, we note that Section 922(g)(8) applies only once a court has found that the defendant "represents a credible threat to the physical safety" of another. That matches the surety and going armed laws, which involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon.

Moreover, like surety bonds of limited duration, Section 922(g)(8)'s restriction was temporary as applied to Rahimi. Section 922(g)(8) only prohibits firearm possession so long as the defendant "is" subject to a restraining order. §922(g)(8). In Rahimi's case that is one to two years after his release from prison.

Finally, the penalty—another relevant aspect of the burden—also fits within the regulatory tradition. The going armed laws provided for imprisonment, and if imprisonment was permissible to respond to the use of guns to threaten the physical safety of others, then the lesser restriction of temporary disarmament that Section 922(g)(8) imposes is also permissible.

[Our] analysis of the surety laws in *Bruen* [does] not help Rahimi. In *Bruen,* we explained that the surety laws were not a proper historical analogue for New York's gun licensing regime. What distinguished the regimes, we observed, was that the surety laws "presumed that individuals had a right to . . . carry," whereas New York's law effectively presumed that no citizen had such a right, absent a special need. Section 922(g)(8)(C)(i) does not make the same faulty presumption. To the contrary, it presumes, like the surety laws before it, that the Second Amendment right may only be burdened once a defendant has been found to pose a credible threat to the physical safety of others.

While we also noted that the surety laws applied different penalties than New York's special-need regime, we did so only to emphasize just how severely the State treated the rights of its citizens. But as we have explained, our Nation's tradition of firearm regulation distinguishes citizens who have been found to pose a credible threat to the physical safety of others from those who have not. The conclusion that focused regulations like the surety laws are not a historical analogue for a broad prohibitory regime like New York's does not mean that they cannot be an appropriate analogue for a narrow one.

4

In short, we have no trouble concluding that Section 922(g)(8) survives Rahimi's facial challenge. Our tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others.

The dissent reaches a contrary conclusion, primarily on the ground that the historical analogues for Section 922(g)(8) are not sufficiently similar to place that provision in our historical tradition. The dissent does, however, acknowledge that Section 922(g)(8) is within that tradition when it comes to the "why" of the appropriate inquiry. The objection is to the "how." For the reasons we have set forth, however, we conclude that Section 922(g)(8) satisfies that part of the inquiry as well. As we said in *Bruen,* a "historical *twin*" is not required[.]

* * *

In *Heller, McDonald,* and *Bruen,* this Court did not "undertake an exhaustive historical analysis ... of the full scope of the Second Amendment." Nor do we do so today. Rather, we conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment.

[Reversed.]

■ JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN joins, concurring.

The Court today emphasizes that a challenged regulation "must comport with the principles underlying the Second Amendment," but need not have a precise historical match. I agree. I write separately to highlight why the Court's interpretation of *Bruen,* and not the dissent's, is the right one. In short, the Court's interpretation permits a historical inquiry calibrated to reveal something useful and transferable to the present day, while the dissent would make the historical inquiry so exacting as to be useless, a too-sensitive alarm that sounds whenever a regulation did not exist in an essentially identical form at the founding.

The Court's opinion [clarifies] an important methodological point that bears repeating: Rather than asking whether a present-day gun regulation has a precise historical analogue, courts applying *Bruen* should "conside[r] whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition." Here, for example, the Government has not identified a founding-era or Reconstruction-era law that specifically disarmed domestic abusers, see, *e.g.,* Tr. of Oral Arg. (conceding as much), but it did not need to do so. Although §922(g)(8) "is by no means identical" to the surety or going armed laws, it "restricts gun use to mitigate demonstrated threats of physical violence, just as the surety and going armed laws d[id]." That shared principle is sufficient.

[This] case lays bare the perils of the dissent's approach. Because the dissent concludes that "§922(g)(8) addresses a societal problem—the risk of interpersonal violence—'that has persisted since the 18th century,'" it insists that the means of addressing that problem cannot be "'materially different'" from the means that existed in the 18th century. [According] to the dissent, the solution cannot be "materially different" even when societal perception of the problem has changed, and even if it is now clear to everyone that the historical means of addressing the problem had been wholly inadequate. Given the fact that the law at the founding was more likely to protect husbands who abused their spouses than offer some measure of accountability, see, *e.g.,* R. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L. J. 2117, 2154-2170 (1996), it is no surprise that that generation did not have an equivalent to §922(g)(8). Under the dissent's approach, the legislatures of today would be limited not by a distant generation's determination that such a law was unconstitutional, but by a distant generation's failure to consider that such a law might be necessary. History has a role to play in Second Amendment analysis, but a rigid adherence to history (particularly history predating the inclusion of women and people of color as full members of the polity) impoverishes constitutional interpretation and hamstrings our democracy.

III

The Court today clarifies *Bruen*'s historical inquiry and rejects the dissent's exacting historical test. I welcome that development. That being said, I remain troubled by *Bruen*'s myopic focus on history and tradition, which fails to give full consideration to the real and present stakes of the problems facing our society today. In my view, the Second Amendment allows legislators "to take account of the serious problems posed by gun violence," *Bruen* (Breyer, J., dissenting), not merely by asking what their predecessors at the time of the founding or Reconstruction thought, but by listening to their constituents and crafting new and appropriately tailored solutions. Under the means-end scrutiny that this Court rejected in *Bruen* but "regularly use[s] ... in cases involving other constitutional provisions," *id.*, the constitutionality of §922(g)(8) is even more readily apparent.

■ JUSTICE GORSUCH, concurring.

To prevail, the government [must] establish that, in at least some of its applications, the challenged law "impose[s] a comparable burden on the right of armed self-defense" to that imposed by a historically recognized regulation. *Bruen*. And it must show that the burden imposed by the current law "is comparably justified."

Why do we require those showings? Through them, we seek to honor the fact that the Second Amendment "codified a pre-existing right" belonging to the American people, one that carries the same "scope" today that it was "understood to have when the people adopted" it. *Heller*. When the people ratified the Second Amendment, they surely understood an arms-bearing citizenry posed some risks. But just as surely they believed that the right protected by the Second Amendment was itself vital to the preservation of life and liberty.

We have no authority to question that judgment. As judges charged with respecting the people's directions in the Constitution—directions that are "trapped in amber" (quoting majority opinion)—our only lawful role is to apply them in the cases that come before us. Developments in the world may change, facts on the ground may evolve, and new laws may invite new challenges, but the Constitution the people adopted remains our enduring guide. *Bruen*. If changes are to be made to the Constitution's directions, they must be made by the American people. Nor is there anything remotely unusual about any of this.

[Consider] just one example. We have recognized that the Sixth Amendment enshrines another pre-existing right: the right of a defendant to confront his accusers at trial. *Crawford v. Washington* (2004). Just as here, we have recognized that, in placing this right in the Constitution, the people set its scope, "admitting only those exceptions established at the time of the founding." And, just as here, when a party asks us to sustain some modern exception to the confrontation right, we require them to point to a close historic analogue to justify it. Just as here, too, we have expressly rejected arguments that courts should proceed differently, such as by trying to glean from historic exceptions overarching "policies," "'purposes,'" or "values" to guide them in future cases. We have rejected those paths because the Constitution enshrines the people's choice to achieve certain policies, purposes, and values "through very specific means": the right of confrontation as originally understood at the time of the founding. [As] there, so too here: Courts must proceed with care in making comparisons to historic firearms regulations, or else they risk gaming away an individual right the people expressly preserved for themselves in the Constitution's text.

Proceeding with this well in mind today, the Court rightly holds that [in] at least some applications, the challenged law does not diminish any aspect of the right the Second Amendment was originally understood to protect.

[Among] all the opinions issued in this case, its central messages should not be lost. The Court reinforces the focus on text, history, and tradition, following exactly the path we described in *Bruen*. And after carefully consulting those materials, the Court "conclude[s] *only* this": "An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." With these observations, I am pleased to concur.

■ JUSTICE KAVANAUGH, concurring.

[II]

[Absent] precedent, there are really only two potential answers to the question of how to determine exceptions to broadly worded constitutional rights: history or policy. [Generally] speaking, the historical approach examines the laws, practices, and understandings from before and after ratification that may help the interpreter discern the meaning of the constitutional text and the principles embodied in that text. The policy approach rests on the philosophical or policy dispositions of the individual judge.

History, not policy, is the proper guide.

For more than 200 years, this Court has relied on history when construing vague constitutional text in all manner of constitutional disputes. For good reason. History can supply evidence of the original meaning of vague text. History is far less subjective than policy. And reliance on history is more consistent with the properly neutral judicial role than an approach where judges subtly (or not so subtly) impose their own policy views on the American people.

Judges are like umpires, as The Chief Justice has aptly explained. And in a constitutional system that counts on an independent Judiciary, judges must act like umpires. To be an umpire, the judge "must stick close to the text and the history, and their fair implications," because there "is no principled way" for a neutral judge "to prefer any claimed human value to any other." R. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1, 8 (1971). History establishes a "criterion that is conceptually quite separate from the preferences of the judge himself." A. Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 864 (1989). When properly applied, history helps ensure that judges do not simply create constitutional meaning "out of whole cloth." A. Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1183 (1989).

[Discussion of the relevance of "pre-ratification" history omitted. —BE]

Post-ratification history. As the Framers made clear, and as this Court has stated time and again for more than two centuries, post-ratification history—sometimes referred to as tradition—can also be important for interpreting vague constitutional text and determining exceptions to individual constitutional rights. When the text is vague and the pre-ratification history is elusive or inconclusive, post-ratification history becomes especially important. Indeed, absent precedent, there can be little else to guide a judge deciding a constitutional case in that situation, unless the judge simply defaults to his or her own policy preferences.

After ratification, the National Government and the state governments began interpreting and applying the Constitution's text. They have continued to do so ever since. As the national and state governments over time have enacted laws and implemented practices to promote the general welfare, those laws and practices have often reflected and reinforced common understandings of the Constitution's authorizations and limitations.

Post-ratification interpretations and applications by government actors—at least when reasonably consistent and longstanding—can be probative of the meaning of vague constitutional text. The collective understanding of Americans who, over time, have interpreted and applied the broadly worded constitutional text can provide good guidance for a judge who is trying to interpret that same text decades or centuries later.

Importantly, the Framers themselves intended that post-ratification history would shed light on the meaning of vague constitutional text. [James Madison] explained that the meaning of vague text would be "liquidated and ascertained by a series of particular discussions and adjudications." Federalist No. 37. In other words, Madison articulated the Framers' expectation and intent that post-ratification history would be a proper and important tool to help constitutional interpreters determine the meaning of vague constitutional text.

From early on, this Court followed Madison's lead. In 1819, in one of its most important decisions ever, the Court addressed the scope of Article I's Necessary and Proper Clause. *McCulloch v. Maryland*. Writing for the Court, Chief Justice Marshall invoked post-ratification history to conclude that Congress's authority to establish a national bank could "scarcely be considered as an open question." The constitutionality of the national bank had "been recognised by many successive legislatures," and an "exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded." Marshall added: The "respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice."

In relying on post-ratification history as a proper tool to discern constitutional meaning, Madison and Marshall make for a formidable duo. Moving from distant American history to more recent times, one can add Justice Scalia. Throughout his consequential 30-year tenure on this Court, Justice Scalia repeatedly emphasized that constitutional interpretation must take account of text, pre-ratification history, and post-ratification history—the last of which he often referred to as "tradition."

[For] more than two centuries—from the early 1800s to this case—this Court has done just that. [Reliance] on post-ratification history "has shaped scores of Court cases spanning all domains of constitutional law, every era of the nation's history, and Justices of every stripe." S. Girgis, Living Traditionalism, 98 N. Y. U. L. Rev. 1477, 1480 (2023). [Citation of thirty-two cases omitted. —BE]

III

Some say that courts should determine exceptions to broadly worded individual rights, including the Second Amendment, by looking to policy.

Uphold a law if it is a good idea; strike it down if it is not. True, the proponents of a policy-based approach to interpretation of broadly worded or vague constitutional text usually do not say so explicitly (although some do). Rather, they support a balancing approach variously known as means-end scrutiny, heightened scrutiny, tiers of scrutiny, [or the like]. Whatever the label of the day, that balancing approach is policy by another name. It requires judges to weigh the benefits against the burdens of a law and to uphold the law as constitutional if, in the judge's view, the law is sufficiently reasonable or important.

One major problem with using a balancing approach to determine exceptions to constitutional rights is that it requires highly subjective judicial evaluations of how important a law is[.] [That] is because the balancing approach requires judges to weigh the benefits of a law against its burdens—a value-laden and political task that is usually reserved for the political branches. And that power in essence vests judges with "a roving commission to second-guess" legislators and administrative officers "concerning what is best for the country." W. Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 698 (1976). Stated otherwise, when a court "does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncement appears uncomfortably like legislation." A. Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1185 (1989).

Moreover, the balancing approach is ill-defined. Some judges will apply heightened scrutiny with a presumption in favor of deference to the legislature. Other judges will apply heightened scrutiny with a presumption in favor of the individual right in question. Because it is unmoored, the balancing approach presents the real "danger" that "judges will mistake their own predilections for the law." A. Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 863 (1989).

[The] historical approach is not perfect. But "the question to be decided is not whether the historically focused method is a *perfect means* of restraining aristocratic judicial Constitution-writing; but whether it is the *best means available* in an imperfect world." *McDonald* (Scalia, J., concurring). And the historical approach is superior to judicial policymaking. The historical approach "depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor." Moreover, the historical approach "intrudes less upon the democratic process because the rights it acknowledges are those established by a constitutional history formed by democratic decisions; and the rights it fails to acknowledge are left to be democratically adopted or rejected by the people."

* * *

As exemplified by *Heller, McDonald, Bruen,* and the Court's opinion today, constitutional interpretation properly takes account of text, pre-ratification and post-ratification history, and precedent. Those are the tools of the trade for an American judge interpreting the American Constitution. Of course, difficult subsidiary questions can arise about how to apply those tools, both generally and in particular cases. And in some cases, text, history, and precedent may point in somewhat different directions. In law as in life, nothing is perfect. But in Second Amendment cases as in other constitutional cases, text, history, and precedent must remain paramount.

■ JUSTICE BARRETT, concurring.

[Because] the Court has taken an originalist approach to the Second Amendment, it is worth pausing to identify the basic premises of originalism. The theory is built on two core principles: that the meaning of constitutional text is fixed at the time of its ratification and that the "discoverable historical meaning ... has legal significance and is authoritative in most circumstances." K. Whittington, Originalism: A Critical Introduction, 82 Ford. L. Rev. 375, 378 (2013) . Ratification is a democratic act that renders constitutional text part of our fundamental law, and that text "remains law until lawfully altered," S. Sachs, Originalism: Standard and Procedure, 135 Harv. L. Rev. 777, 782 (2022). So for an originalist, the history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law. History (or tradition) that long postdates ratification does not serve that function. To be sure, postenactment history can be an important tool. [But] generally speaking, the use of postenactment history requires some justification other than originalism simpliciter.

In *Bruen,* the Court took history beyond the founding era, considering gun regulations that spanned the 19th century. I expressed reservations about the scope of that inquiry but concluded that the timing question did not matter to *Bruen*'s holding. It bears emphasis, however, that my questions were about the time period relevant to discerning the Second Amendment's original meaning—for instance, what is the post-1791 cutoff for discerning how the Second Amendment was originally understood? My doubts were *not* about whether "tradition," standing alone, is dispositive. [Evidence] of "tradition" unmoored from original meaning is not binding law. And scattered cases or regulations pulled from history may have little bearing on the meaning of the text.

"Original history"—*i.e.,* the generally dispositive kind—plays two roles in the Second Amendment context. It elucidates how contemporaries understood the text—for example, the meaning of the phrase "bear Arms." See *Heller*. It also plays the more complicated role of determining the scope of the pre-existing right that the people enshrined in our fundamental law.* In Rahimi's case, the Court uses history in this latter way. Call this "original contours" history: It looks at historical gun regulations to identify the contours of the right.

Courts have struggled with this use of history in the wake of *Bruen.* One difficulty is a level of generality problem: Must the government produce a founding-era relative of the challenged regulation—if not a twin, a cousin? Or do founding-era gun regulations yield concrete principles that mark the borders of the right?

Many courts, including the Fifth Circuit, have understood *Bruen* to require the former, narrower approach. But *Bruen* emphasized that "analogical reasoning" is not a "regulatory straightjacket." To be *consistent* with historical limits, a challenged regulation need not be an updated model of a historical counterpart. Besides, imposing a test that demands overly specific analogues has serious problems. To name two: It forces 21st-century regulations to follow late-18th-century policy choices, giving us "a law trapped in amber." And it assumes that founding-era legislatures maximally exercised their power to regulate, thereby adopting a "use it or lose it" view of legislative authority. Such assumptions are flawed, and originalism does not require them.

"Analogical reasoning" under *Bruen* demands a wider lens: Historical regulations reveal a principle, not a mold. To be sure, a court must be careful not to read a principle at such a high level of generality that it waters down the right. Pulling principle from precedent, whether case law or history, is a standard feature of legal reasoning, and reasonable minds sometimes disagree about how broad or narrow the controlling principle should be.

Here, though, the Court settles on just the right level of generality: "Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." Section 922(g)(8)(C)(i) fits well within that principle; therefore, Rahimi's [challenge] fails. Harder level-of-generality problems can await another day.

■ JUSTICE JACKSON, concurring.

[I] write separately because we now have two years' worth of post-*Bruen* cases under our belts, and the experiences of courts applying its history-and-tradition test should bear on our assessment of the workability of that

* To my mind, this use of history walks a fine line between original meaning (which controls) and expectations about how the text would apply (which do not). Contemporary government actors might have been "wrong about the consequences of their own constitutional rule," or they "might not have fully and faithfully implemented the adopted constitutional rule themselves." Whittington, *supra*. Thus, while early applications of a constitutional rule can help illuminate its original scope, an interpreter must exercise care in considering them. In the Second Amendment context, particular gun regulations— even if from the ratification era—do not themselves have the status of constitutional law.

legal standard. This case highlights the apparent difficulty faced by judges on the ground. Make no mistake: Today's effort to clear up "misunderst[andings]" is a tacit admission that lower courts are struggling. In my view, the blame may lie with us, not with them.

[When] this Court adopts a new legal standard, as we did in *Bruen,* we do not do so in a vacuum. The tests we establish bind lower court judges, who then apply those legal standards to the cases before them. [So] when courts signal they are having trouble with one of our standards, we should pay attention. Cf. *Garcia v. San Antonio Metropolitan Transit Authority* [*supra*, p. II-93].

The message that lower courts are sending now in Second Amendment cases could not be clearer. They say there is little method to *Bruen*'s madness. [Citations to lower court opinions omitted. —BE] It isn't just that *Bruen*'s history-and-tradition test is burdensome (though that is no small thing to courts with heavier caseloads and fewer resources than we have). The more worrisome concern is that lower courts appear to be diverging in both approach and outcome as they struggle to conduct the inquiry *Bruen* requires of them. Scholars report that lower courts applying *Bruen*'s approach ["have] come to conflicting conclusions on virtually every consequential Second Amendment issue to come before them[.]"

[Consistent] analyses and outcomes are likely to remain elusive because whether *Bruen*'s test is satisfied in a particular case seems to depend on the suitability of whatever historical sources the parties can manage to cobble together, as well as the level of generality at which a court evaluates those sources—neither of which we have as yet adequately clarified.

And the unresolved questions hardly end there. Who is protected by the Second Amendment, from a historical perspective? To what conduct does the Second Amendment's plain text apply? To what historical era (or eras) should courts look to divine a historical tradition of gun regulation? How many analogues add up to a tradition? Must there be evidence that those analogues were enforced or subject to judicial scrutiny? How much support can nonstatutory sources lend? I could go on—as others have. But I won't.

Maybe time will resolve these and other key questions. [Indeed,] "[m]any constitutional standards involve undoubted gray areas," and "it normally might be fair to venture the assumption that case-by-case development [will] lead to a workable standard." *Garcia*. By underscoring that gun regulations need only "comport with the *principles* underlying the Second Amendment," today's opinion inches that ball forward.

But it is becoming increasingly obvious that there are miles to go. Meanwhile, the Rule of Law suffers. That ideal—key to our democracy—thrives on legal standards that foster stability, facilitate consistency, and promote predictability. So far, *Bruen*'s history-focused test ticks none of those boxes[.]

■ JUSTICE THOMAS, dissenting.

[Despite] canvassing laws before, during, and after our Nation's founding, the Government does not identify even a single regulation with an analogous burden and justification. [The] Government's failure is unsurprising given that §922(g)(8) addresses a societal problem—the risk of interpersonal violence—"that has persisted since the 18th century," yet was addressed "through [the] materially different means" of surety laws. *Bruen.* Surety laws were, in a nutshell, a fine on certain behavior. If a person threatened someone in his community, he was given the choice to either keep the peace or forfeit a sum of money. Surety laws thus shared the same justification as §922(g)(8), but they imposed a far less onerous burden. The Government has not shown that §922(g)(8)'s more severe approach is consistent with our historical tradition of firearm regulation.

[Tracing] back to early English history, surety laws were a preventative mechanism for ensuring an individual's future peaceable conduct. If someone received a surety demand, he was required to go to a court or judicial officer with one or more members of the community—*i.e.,* sureties—and comply with certain conditions. Specifically, the person providing sureties was required to "keep the peace: either generally ... or ... with regard to the person who crave[d] the security" until a set date. If he kept the peace, the surety obligation dissolved on that predetermined date. If, however, he breached the peace before that date, he and his sureties would owe a set sum of money. Evidence suggests that sureties were readily available.

There is little question that surety laws applied to the threat of future interpersonal violence. [In particular,] [s]urety demands were [expressly] available to prevent domestic violence. Surety could be sought by "a wife against her husband who threatens to kill her or beat her outrageously, or, if she have notorious cause to fear he will do either." The right to demand sureties in cases of potential domestic violence was recognized not only by treatises, but also the founding-era courts.

Although surety laws shared a common justification with §922(g)(8), surety laws imposed a materially different burden. Critically, a surety demand did not alter an individual's right to keep and bear arms. After providing sureties, a person kept possession of all his firearms; could purchase additional firearms; and could carry firearms in public and private. Even if he breached the peace, the only penalty was that he and his sureties had to pay a sum of money. To disarm him, the Government would have to take some other action, such as imprisoning him for a crime.

By contrast, §922(g)(8) strips an individual of his Second Amendment right. The statute's breadth cannot be overstated. For one, §922(g) criminalizes nearly all conduct related to covered firearms and ammunition. Most fundamentally, possession is prohibited, except in the rarest of circumstances. [Moreover,] §922(g) captures virtually all commercially available firearms and ammunition. It prohibits possessing a firearm "in or affecting commerce" and "receiv[ing] any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." §922(g). As courts have interpreted that nexus, if a firearm or ammunition has at any point crossed interstate lines, it is regulated by §922(g).

These sweeping prohibitions are criminally enforced. To violate the statute is a felony, punishable by up to 15 years. That felony conviction, in turn, triggers a permanent, life-long prohibition on exercising the Second Amendment right.

The combination of the Government's sweeping view of the firearms and ammunition within its regulatory reach and the broad prohibition on any conduct regarding covered firearms and ammunition makes §922(g)(8)'s burden unmistakable: The statute revokes a citizen's Second Amendment right while the civil restraining order is in place. And, that revocation is absolute. It makes no difference if the covered individual agrees to a no-contact order, posts a bond, or even moves across the country from his former domestic partner—the bar on exercising the Second Amendment right remains.

That combination of burdens places §922(g)(8) in an entirely different stratum from surety laws. Surety laws preserve the Second Amendment right, whereas §922(g)(8) strips an individual of that right. While a breach of a surety demand was punishable by a fine, §922(g)(8) is punishable by a felony conviction, which in turn permanently revokes an individual's Second Amendment right. At base, it is difficult to imagine how surety laws can be considered relevantly similar to a complete ban on firearm ownership, possession, and use.

This observation is nothing new; the Court has already recognized that surety laws impose a lesser relative burden on the Second Amendment right. In *Bruen,* the Court explained that surety laws merely "provide financial incentives for responsible arms carrying." "[A]n accused arms-bearer 'could go on carrying without criminal penalty' so long as he 'post[ed] money that would be forfeited if he breached the peace or injured others.'" As a result, we held that surety laws were not analogous to New York's effective ban on public carry. That conclusion is damning for §922(g)(8), which burdens the Second Amendment right even more with respect to covered individuals.

Surety laws demonstrate that this case should have been a "straightforward" inquiry. The Government failed to produce a single historical regulation that is relevantly similar to §922(g)(8). Rather, §922(g)(8) addresses a societal problem—the risk of interpersonal violence—"that has persisted since the 18th century," yet was addressed "through [the] materially different means" of surety laws.

The Court [also points to] affray laws. [But] affray laws had a dissimilar burden *and* justification.

[First,] affray laws had a distinct justification from §922(g)(8) because they regulated only certain public conduct that injured the entire community. [Affrays] were defined by their public nature and effect. An affray could occur only in "some public place," and captured only conduct affecting the broader public. To that end, going armed laws did not prohibit carrying firearms at home or even public carry generally. Instead, they targeted only public carry that was "accompanied with such circumstances as are apt to terrify the people." Affrays thus did not cover the very conduct §922(g)(8) seeks to prevent—interpersonal violence in the home.

Second, affray laws did not impose a burden analogous to §922(g)(8). They regulated a niche subset of Second Amendment-protected activity. As explained, affray laws prohibited only carrying certain weapons ("dangerous and unusual") in a particular manner ("terrifying the good people of the land" without a need for self-defense) and in particular places (in public).

[The] Court counters that since affray laws "provided for imprisonment," they imposed a greater burden than §922(g)(8)'s disarmament. But, that argument serves only to highlight another fundamental difference: Affray laws were criminal statutes that penalized past behavior, whereas §922(g)(8) is triggered by a civil restraining order that seeks to prevent future behavior. Accordingly, an affray's burden was vastly harder to impose. To imprison a person, a State had to prove that he committed the crime of affray beyond a reasonable doubt.

Affray laws are wide of the mark. While the Second Amendment does not demand a historical twin, it requires something closer than affray laws, which expressly carve out the very conduct §922(g)(8) was designed to prevent (interpersonal violence in the home). Nor would I conclude that affray laws—criminal laws regulating a specific type of public carry—are analogous to §922(g)(8)'s use of a civil proceeding to bar all Second Amendment-protected activity.

[The] Court recognizes that surety and affray laws on their own are not enough. So it takes pieces from each to stitch together an analogue for §922(g)(8). Our precedents foreclose that approach. The question before us is whether a single historical law has both a comparable burden and justification as §922(g)(8), not whether several laws can be cobbled together to qualify.

[Mixing] and matching historical laws—relying on one law's burden and another law's justification —defeats the purpose of a historical inquiry altogether. Given that imprisonment (which involved disarmament) existed at the founding, the Government can always satisfy this newly minted comparable-burden requirement. That means the Government need only find a historical law with a comparable justification to validate modern disarmament regimes. As a result, historical laws fining certain behavior could justify completely disarming a person for the same behavior. That is the exact sort of "regulatory blank check" that *Bruen* warns against and the American people ratified the Second Amendment to preclude.

[The] Framers and ratifying public understood "that the right to keep and bear arms was essential to the preservation of liberty." *McDonald*

(Thomas, J., concurring in part). Yet, in the interest of ensuring the Government can regulate one subset of society, today's decision puts at risk the Second Amendment rights of many more. I respectfully dissent.

METHODOLOGICAL QUESTIONS ABOUT *BRUEN* AND *RAHIMI*

1. Is Balancing Inevitable? *Bruen* represented the fullest and most triumphant expression of judicial hostility to "interest balancing" in the domain of constitutional rights. That hostility is rooted in understandable concerns: If judges are tasked with weighing the state's interest against the infringement on a constitutionally protected liberty, won't they necessarily be making judgments of policy better left to legislatures?* And won't they be empowered to depart from the original public meaning of a provision when it doesn't accord with modern values? Justice Scalia sounded these themes in *Heller* when he rejected Justice Breyer's analysis (*supra*, at p. IV-110), but he left open the possibility that Second Amendment claims—like First Amendment claims, most substantive due process claims, and equal protection claims—would still be subject to some conventional form of means-ends scrutiny. *Bruen*'s denunciation of this mode of analysis and its embrace of "analogical reasoning" as an alternative marked a major shift.

But just two years later, in *Rahimi*, we find the same criticisms of balancing pressed mainly in Justice Gorsuch's concurrence, Justice Kavanaugh's concurrence, and Justice Thomas's dissent. To be sure, *Rahimi* doesn't openly embrace "interest balancing" of the sort that *Bruen* disavowed. But how different is its version of the tradition inquiry from that sort of reasoning in practice? And if *Rahimi* is indeed a retreat (as Justice Thomas, at least, clearly believes), what does it say that *Bruen*'s approach had to be walked back so quickly? Could it be that balancing values in the way that *Bruen* condemns is simply an unavoidable feature of any workable system of civil liberties? Sherif Girgis, an avowed originalist, has recently argued that the Court's "campaign against balancing" is doomed to fail for this reason:

> General liberties offer adaptive protection, guarding certain conduct against whatever threats it might face as regulatory needs change. [For] this, [the liberty] must be irreducible to any finite list of specific regulations excluded. [So] free speech is not just shorthand for discrete rights to burn flags, parade, and preach at street corners. Nor does it just forbid laws clearly serving illicit goals like the quashing of offensive speech. Its scope can only be defined in presumptive terms that invoke the values [underlying] it.
>
> The special need to balance arises from this *irreducible open-endedness* of general liberties: their being defined such that they could

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* Think, for instance, of *Roe*'s judgment that a state's interest in protecting fetal life becomes "compelling" at the point of viability.

> always adapt to block new laws, laws serving different aims to different degrees. Since *by design* the framers couldn't have foreseen which laws might be blocked, they couldn't have shrunk the liberty to allow for laws that would prove crucial. They could not have done the balancing and trimming up front even with endless time, precise words, and reams of text. That's why implementers will need to balance over time. It's why general liberties' creation—the shaping of their core based on political-moral reasoning—is always necessarily *unfinished*.[*]

Is Girgis right? If he is, but the balancing critics are also right that balancing is ill-suited for judges (as, in fact, Girgis also concludes), what then?

2. Traditionalism and Originalism. A striking and related feature of *Bruen* and *Rahimi* is their embrace of "tradition" as the central mode of argument. On the surface, at least, this focus contrasts with *Heller*, which presented itself as an exegesis of the original public meaning of the Second Amendment's text. Both Justice Kavanaugh and Justice Barrett are clearly mindful of this gap and evidently wanted to address it in *Rahimi*, but their responses are quite different. Justice Kavanaugh seems to argue that even post-ratification history that does *not* illuminate original public meaning should guide courts in fixing the bounds of gun rights—because the only alternative is unconstrained judicial policymaking, which would be worse.[†] Justice Barrett, by contrast, stresses that "'tradition' unmoored from original meaning is not binding law"; she seems to think that the presence or absence of old regulations matters only insofar as it reveals the contours that the ratifiers would have understood the right that they codified to have. (Barrett's concurrence is also notable for its careful attention to the body of originalist theory that we briefly encountered, through the work of Larry Solum, in section I.B.) Is one of these positions more convincing, or more faithful to originalists' professed commitments, than the other?

3. Levels of Generality. In her *Rahimi* concurrence, Justice Barrett notes that using (even genuinely relevant) history to map the contours of the Second Amendment right poses "a level of generality problem." The exercise requires "[p]ulling principle from precedent," here in the form of historical practice, "and reasonable minds sometimes disagree about how broad or narrow the controlling principle should be." Yet she concludes by applauding the Court for "settl[ing] on just the right level of generality" in *Rahimi* itself. What, if anything, makes that level of generality "right" and Justice Thomas's alternative wrong?

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[*] Sherif Girgis, *Unfinished Liberties: The Inevitability of Interest-Balancing*, 125 Colum. L. Rev. 531, 535-36 (2025).

[†] This argument may be *compatible* with originalism even if it is not itself originalist; perhaps it is best understood as an account of how judges should engage in construction once their interpretive resources are exhausted. See *supra*, p. I-33.