Constitutional Law

2026–27

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VI. THE POWER TO DEFINE AND ENFORCE RIGHTS

This final set of materials concerns institutional authority for defining and enforcing constitutional rights, and especially the contrast between courts and Congress as wielders of that authority. In section VI.A, we'll focus mainly on *Dobbs v. Jackson Women's Health Organization* (2022). In addition to being the Supreme Court's latest major statement on some of the individual rights issues that we've considered over the latter half of the semester, *Dobbs* is also now a leading case about the role of *stare decisis* in the judicial elaboration of constitutional doctrine. So the idea here is two-fold: first, to resume some story lines from sections IV and V and bring them up to date, which gives us a substantive picture of what rights enforcement via courts looks like today; and second, to step back and think about some court-specific issues that we've sidelined so far, especially the doctrine of precedent.

In section VI.B, by contrast, we'll conclude by looking at *Congress's* power to define and enforce the individual rights protections of the Reconstruction Amendments. This connects the first part of the course (about Congress's powers) to the last one (about individual rights), because the question is how to interpret Congress's enumerated *power* to enforce certain individual *rights*.

A. Contemporary Rights Enforcement Through Courts (50 PAGES)

Before turning to *Dobbs*, you'll first read shorter excerpts from *Ramos v. Louisiana* (2020), in which the Court debated *stare decisis* in a more "ordinary" rights context. In *Ramos*, the Court held that the Sixth Amendment right to jury trial, as incorporated against the states by the Fourteenth Amendment, requires a unanimous jury verdict. In so holding, the Court overruled an earlier, fractured decision, *Apodaca v. Oregon* (1972); there, four Justices had concluded that the Sixth Amendment did not require unanimity at all, and a fifth (Justice Powell) had concluded that the unanimity requirement was not incorporated by the Fourteenth Amendment against the states.[*] Justice Gorsuch wrote the lead opinion in *Ramos*, in which Justices Ginsburg, Breyer, Sotomayor, and Kavanaugh joined to varying degrees. Justice Thomas concurred in the judgment. Justice Alito authored a dissenting opinion, joined by Chief Justice Roberts and Justice Kagan, that argued for retaining *Apodaca* based on *stare decisis*. Our focus is on Justice Kavanaugh's concurrence and Justice Alito's dissent.

[*] We briefly encountered the question of whether the contours of "incorporated" rights should perfectly match their original contours in section IV.B.1 [*supra*, p. IV-64].

Ramos v. Louisiana

140 S. Ct. 1390 (2020)

▪ JUSTICE KAVANAUGH, concurring in part.

In *Apodaca v. Oregon* (1972), this Court held that state juries need not be unanimous in order to convict a criminal defendant. Two States, Louisiana and Oregon, have continued to use non-unanimous juries in criminal cases. Today, the Court overrules *Apodaca* and holds that state juries must be unanimous in order to convict a criminal defendant.

I agree with the Court that the time has come to overrule *Apodaca*. I therefore join [much] of the Court's persuasive and important opinion. I write separately to explain my view of how *stare decisis* applies to this case.

The legal doctrine of *stare decisis* derives from the Latin maxim "*stare decisis et non quieta movere*," which means to stand by the thing decided and not disturb the calm. The doctrine reflects respect for the accumulated wisdom of judges who have previously tried to solve the same problem. In 1765, Blackstone—"the preeminent authority on English law for the founding generation"—wrote that "it is an established rule to abide by former precedents," to "keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." The Framers of our Constitution understood that the doctrine of *stare decisis* is part of the "judicial Power" and rooted in Article III of the Constitution. Writing in Federalist 78, Alexander Hamilton emphasized the importance of *stare decisis*: To "avoid an arbitrary discretion in the courts, it is indispensable" that federal judges "should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."

This Court has repeatedly explained that *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." The doctrine "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact."

The doctrine of *stare decisis* does not mean, of course, that the Court should never overrule erroneous precedents. All Justices now on this Court agree that it is sometimes appropriate for the Court to overrule erroneous decisions. Indeed, in just the last few Terms, every current Member of this Court has voted to overrule multiple constitutional precedents. See, *e.g.*, *Janus v. State, County, and Municipal Employees* (2018); *Obergefell* v. *Hodges* (2015); [other examples omitted].

Historically, moreover, some of the Court's most notable and consequential decisions have entailed overruling precedent. See, *e.g.*, *Obergefell*; *Lawrence v. Texas* (2003); *Planned Parenthood of Southeastern Pa. v. Casey* (1992); *Batson v. Kentucky* (1986); *Garcia v. San Antonio Metropolitan Transit Authority* (1985); *Craig v. Boren* (1976); *Miranda v. Arizona* (1966); *Gideon v. Wainwright* (1963); *Baker v. Carr* (1962); *Brown v. Board of Education* (1954); *West Virginia Bd. of Ed. v. Barnette* (1943); *United States v. Darby* (1941); *Erie R. Co. v. Tompkins* (1938); *West Coast Hotel Co. v. Parrish* (1937); [some examples omitted]. The lengthy and extraordinary list of landmark cases that overruled precedent includes the single most important and greatest decision in this Court's history, *Brown v. Board of Education*, which repudiated the separate but equal doctrine of *Plessy v. Ferguson* (1896).

As those many examples demonstrate, the doctrine of *stare decisis* does not dictate, and no one seriously maintains, that the Court should *never* overrule erroneous precedent. As the Court has often stated and repeats today, *stare decisis* is not an "inexorable command."

On the other hand, as Justice Jackson explained, just "because one should avoid Scylla is no reason for crashing into Charybdis." So no one advocates that the Court should *always* overrule erroneous precedent.

Rather, applying the doctrine of *stare decisis*, this Court ordinarily adheres to precedent, but sometimes overrules precedent. The difficult question, then, is when to overrule an erroneous precedent.

To begin with, the Court's precedents on precedent distinguish statutory cases from constitutional cases. In statutory cases, *stare decisis* is comparatively strict, as history shows and the Court has often stated. That is because Congress and the President can alter a statutory precedent by enacting new legislation. [B]y contrast, the Court has repeatedly said—and says again today—that [*stare decisis*] is not as strict "when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." The Court therefore "must balance the importance of having constitutional questions *decided* against the importance of having them *decided right.*" It follows "that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent."

[I]n deciding whether to overrule an erroneous constitutional decision, how does the Court know when to overrule and when to stand pat?

As the Court has exercised the "judicial Power" over time, the Court has identified various *stare decisis* factors. In articulating and applying those factors, the Court has, to borrow James Madison's words, sought to liquidate and ascertain the meaning of the Article III "judicial Power" with respect to precedent. The Federalist No. 37. The *stare decisis* factors identified by the Court in its past cases include:

- the quality of the precedent's reasoning;
- the precedent's consistency and coherence with previous or subsequent decisions;
- changed law since the prior decision;
- changed facts since the prior decision;
- the workability of the precedent;
- the reliance interests of those who have relied on the precedent; and
- the age of the precedent.

But the Court has articulated and applied those various individual factors without establishing any consistent methodology or roadmap for how to analyze all of the factors taken together. And in my view, that muddle poses a problem for the rule of law and for this Court, as the Court attempts to apply *stare decisis* principles in a neutral and consistent manner.

As I read the Court's cases on precedent, those varied and somewhat elastic *stare decisis* factors fold into three broad considerations that, in my view, can help guide the inquiry and help determine what constitutes a "special justification" or "strong grounds" to overrule a prior constitutional decision.

First, is the prior decision not just wrong, but grievously or egregiously wrong? A garden-variety error or disagreement does not suffice to overrule. In the view of the Court that is considering whether to overrule, the precedent must be egregiously wrong as a matter of law in order for the Court to overrule it. In conducting that inquiry, the Court may examine the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability, among other factors. A case may be egregiously wrong when decided, see, *e.g.*, *Korematsu v. United States* (1944); *Plessy v. Ferguson* (1896), or may be unmasked as egregiously wrong based on later legal or factual understandings or developments, see, *e.g.*, *Nevada v. Hall* (1979) [(holding that states are not immune from private lawsuits brought against them in the courts of other states)], or both, *ibid*.

Second, has the prior decision caused significant negative jurisprudential or real-world consequences? In conducting that inquiry, the Court may consider jurisprudential consequences (some of which are also relevant to the first inquiry), such as workability, as well as consistency and coherence with other decisions, among other factors. Importantly, the Court may also scrutinize the precedent's real-world effects on the citizenry, not just its effects on the law and the legal system. See, *e.g., Brown v. Board of Education*.

Third, would overruling the prior decision unduly upset reliance interests? This consideration focuses on the legitimate expectations of those who have reasonably relied on the precedent. In conducting that inquiry, the Court may examine a variety of reliance interests and the age of the precedent, among other factors.

In short, the first consideration requires inquiry into how wrong the precedent is as a matter of law. The second and third considerations together demand, in Justice Jackson's words, a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other."

Those three considerations together provide a structured methodology and roadmap for determining whether to overrule an erroneous constitutional precedent. The three considerations correspond to the Court's historical practice and encompass the various individual factors that the Court has applied over the years as part of the *stare decisis* calculus. And they are consistent with the Founding understanding and, for example, Blackstone's shorthand description that overruling is warranted when (and only when) a precedent is "manifestly absurd or unjust."

Taken together, those three considerations set a high (but not insurmountable) bar for overruling a precedent, and they therefore limit the number of overrulings and maintain stability in the law.[4] Those three considerations also constrain judicial discretion in deciding when to overrule an erroneous precedent. To be sure, applying those considerations is not a purely mechanical exercise, and I do not claim otherwise. I suggest only that those three considerations may better structure how to consider the many traditional *stare decisis* factors.

It is inevitable that judges of good faith applying the *stare decisis* considerations will sometimes disagree about when to overrule an erroneous constitutional precedent[.] This case illustrates that point. No Member of the Court contends that the result in *Apodaca* is correct. But the Members of the Court vehemently disagree about whether to overrule *Apodaca*.

Applying the three broad *stare decisis* considerations to this case, I agree with the Court's decision to overrule *Apodaca*.

First, *Apodaca* is egregiously wrong. The original meaning and this Court's precedents establish that the Sixth Amendment requires a unanimous jury. And the original meaning and this Court's precedents establish that the Fourteenth Amendment incorporates the Sixth Amendment jury trial right against the States. When *Apodaca* was decided, it was already an outlier in the Court's jurisprudence, and over time it has become even more of an outlier. As the Court today persuasively explains, the original meaning

[4] Another important factor that limits the number of overrulings is that the Court typically does not overrule a precedent unless a party requests overruling, or at least unless the Court receives briefing and argument on the *stare decisis* question.

of the Sixth and Fourteenth Amendments and this Court's two lines of decisions—the Sixth Amendment jury cases and the Fourteenth Amendment incorporation cases—overwhelmingly demonstrate that *Apodaca*'s holding is egregiously wrong.

Second, *Apodaca* causes significant negative consequences. It is true that *Apodaca* is workable. But *Apodaca* sanctions the conviction at trial or by guilty plea of some defendants who might not be convicted under the proper constitutional rule (although exactly how many is of course unknowable).

[In] addition, and significant to my analysis of this case, the origins and effects of the non-unanimous jury rule strongly support overruling *Apodaca*. Louisiana achieved statehood in 1812. And throughout most of the 1800s, the State required unanimous juries in criminal cases. But at its 1898 state constitutional convention, Louisiana enshrined non-unanimous juries into the state constitution. Why the change? The State wanted to diminish the influence of black jurors, who had won the right to serve on juries through the Fourteenth Amendment in 1868 and the Civil Rights Act of 1875. See *Strauder v. West Virginia* (1880). Coming on the heels of the State's 1896 victory in *Plessy v. Ferguson*, the 1898 constitutional convention expressly sought to "establish the supremacy of the white race."

[To] be clear, one could advocate for and justify a non-unanimous jury rule by resort to neutral and legitimate principles. England has employed non-unanimous juries, and various legal organizations in the United States have at times championed non-unanimous juries. And Louisiana's modern policy decision to retain nonunanimous juries—as distinct from its original decision in the late 1800s to adopt non-unanimous juries—may have been motivated by neutral principles (or just by inertia).

But the question at this point is not whether the Constitution prohibits non-unanimous juries. It does. Rather, the disputed question here is whether to overrule an erroneous constitutional precedent that allowed non-unanimous juries. And on that question—the question whether to overrule—the Jim Crow origins and racially discriminatory effects (and the perception thereof) of non-unanimous juries in Louisiana and Oregon should matter and should count heavily in favor of overruling, in my respectful view.

[*Third*,] overruling *Apodaca* would not unduly upset reliance interests. Only Louisiana and Oregon employ non-unanimous juries in criminal cases. To be sure, in those two States, the Court's decision today will invalidate some non-unanimous convictions where the issue is preserved and the case is still on direct review. But that consequence almost always ensues when a criminal-procedure precedent that favors the government is overruled. And here, at least, I would "count that a small price to pay for the uprooting of this weed."

Except for the effects on that limited class of direct-review cases, it will be relatively easy going forward for Louisiana and Oregon to transition to the unanimous jury rule that the other 48 States and the federal courts use. [Importantly,] moreover, this Court applies a separate non-retroactivity doctrine to mitigate the disruptive effects of overrulings in criminal cases [by limiting the availability of habeas relief based on new doctrinal developments]. For those reasons, the reliance interests at stake in this case are not especially substantial, and they do not mandate adherence to *Apodaca*.

In sum, *Apodaca* is egregiously wrong, it has significant negative consequences, and overruling it would not unduly upset reliance interests. I therefore agree with the Court's decision to overrule *Apodaca.*

▪ JUSTICE ALITO, with whom THE CHIEF JUSTICE joins, and with whom JUSTICE KAGAN joins as to all but [the final part noted below], dissenting.

The doctrine of *stare decisis* gets rough treatment in today's decision. Lowering the bar for overruling our precedents, a badly fractured majority casts aside an important and long-established decision with little regard for the enormous reliance the decision has engendered. If the majority's approach is not just a way to dispose of this one case, the decision marks an important turn.

I would not overrule *Apodaca*. Whatever one may think about the correctness of the decision, it has elicited enormous and entirely reasonable reliance. And before this Court decided to intervene, the decision appeared to have little practical importance going forward. Louisiana has now abolished non-unanimous verdicts, and Oregon seemed on the verge of doing the same until the Court intervened.

[There] are circumstances when past decisions must be overturned, but we begin with the presumption that we will follow precedent, and therefore when the Court decides to overrule, it has an obligation to provide an explanation for its decision.

This is imperative because the Court should have a body of *neutral* principles on the question of overruling precedent. The doctrine should not be transformed into a tool that favors particular outcomes.

What is the majority's justification for overruling *Apodaca*? With no apparent appreciation of the irony, today's majority, which is divided into four separate camps, criticizes the *Apodaca* majority as "badly fractured." But many important decisions currently regarded as precedents were decided without an opinion of the Court.[18] Does the majority mean to suggest that all such precedents are fair game?

The majority's primary reason for overruling *Apodaca* is the supposedly poor "quality" of [the decisive opinions in that case]. [T]hese charges are overblown.

[18] See, e.g., *National Federation of Independent Business v. Sebelius* (2012); *McDonald v. Chicago* (2010); *Richmond v. J. A. Croson Co.* (1989); *Regents of the University of California v. Bakke* (1978). [Some examples omitted. —BE]

[But w]hat convinces me that *Apodaca* should be retained are the enormous reliance interests of Louisiana and Oregon. For 48 years, Louisiana and Oregon, trusting that *Apodaca* is good law, have conducted thousands and thousands of trials under rules allowing non-unanimous verdicts. Now, those States face a potential tsunami of litigation on the jury-unanimity issue.

At a minimum, all defendants whose cases are still on direct appeal will presumably be entitled to a new trial if they were convicted by a less-than-unanimous verdict and preserved the issue in the trial court. And at least in Oregon, even if no objection was voiced at trial, defendants may be able to challenge their convictions based on [Oregon's state-law rules for preserving objections]. Oregon asserts that more than a thousand defendants whose cases are still on direct appeal may be able to challenge their convictions if *Apodaca* is overruled. The State also reports that "[d]efendants are arguing that a [jury] instruction allowing for non-unanimous verdicts is a structural error that requires reversal for *all* convictions, even for those for which the jury was not polled or those for which the jury was unanimous."

[T]here is no guarantee that all the cases affected by today's ruling can be retried. In some cases, key witnesses may not be available, and it remains to be seen whether the criminal justice systems of Oregon and Louisiana have the resources to handle the volume of cases in which convictions will be reversed.

These cases on direct review are only the beginning. Prisoners whose direct appeals have ended will argue that today's decision allows them to challenge their convictions on collateral review [i.e., by seeking a writ of habeas corpus from a state or federal court], and if those claims succeed, the courts of Louisiana and Oregon are almost sure to be overwhelmed. [Whatever] the ultimate resolution of the retroactivity question, the reliance here is not only massive; it is concrete. Cf. *Dickerson v. United States* (2000) (reliance weighed heavily in favor of precedent simply because the warnings in *Miranda v. Arizona* had become "part of our national culture"). In my view, it weighs decisively against overruling *Apodaca.*

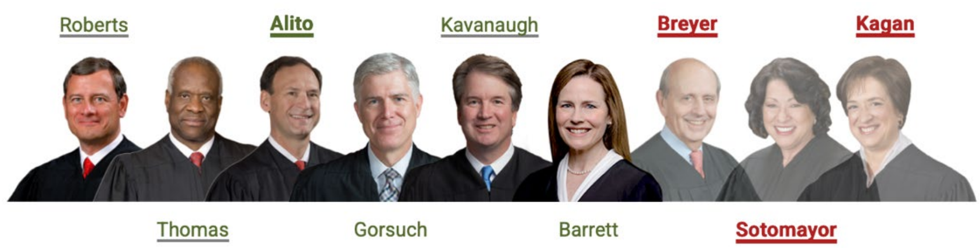
In reaching this conclusion, I do not disregard the interests of petitioner and others who were convicted by a less-than-unanimous vote. It is not accurate to imply that these defendants would have been spared conviction if unanimity had been required. In many cases, if a unanimous vote had been needed, the jury would have continued to deliberate and the one or two holdouts might well have ultimately voted to convict. [Nevertheless,] the plight of defendants convicted by non-unanimous votes is important and cannot be overlooked, but that alone cannot be dispositive of the *stare decisis* question. Otherwise, *stare decisis* would never apply in a case in which a criminal defendant challenges a precedent that led to conviction.

[Note: Justice Kagan did not join this next portion of the opinion. —BE] The reliance in this case far outstrips that asserted in recent cases in which past precedents were overruled. [By] striking down a precedent upon which there has been massive and entirely reasonable reliance, the majority sets an important precedent about *stare decisis*. I assume that those in the majority will apply the same standard in future cases.

In the balance of this section, you'll read *Dobbs* and excerpts from a few recent commentaries on the case. The debate in *Dobbs* involves both *stare decisis* and the merits. As to the former, consider whether the Court's reasons for overruling here could be persuasive to someone who favors abortion rights on the merits—and conversely, whether the dissenters' appeal to *stare decisis* could be persuasive to someone who does not. Meanwhile, quite apart from *stare decisis*, we are reading *Dobbs* now, at the end of the semester, because it builds on ideas and engages with lines of cases that we've studied over the past several weeks. Try to bring your own understanding of the relevant precedents to bear and assess for yourself *Dobbs's* consistency with them.

Dobbs v. Jackson Women's Health Organization

142 S. Ct. 2228 (2022)



[Mississippi enacted a law prohibiting abortion, "[e]xcept in a medical emergency or in the case of a severe fetal abnormality," after the fifteenth week of pregnancy. The Fifth Circuit held that the law was unconstitutional because, under *Roe* and *Casey*, a state may not prohibit abortion before viability.]

▪ JUSTICE ALITO delivered the opinion of the Court.

Abortion presents a profound moral issue on which Americans hold sharply conflicting views. [For] the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided *Roe v. Wade*. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. [After] cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature. [One] prominent constitutional scholar wrote that he "would vote for a statute very much like the one the Court end[ed] up drafting" if he were "a legislator," but his assessment of *Roe* was memorable and brutal: *Roe* was "not constitutional law" at all and gave "almost no sense of an obligation to try to be."[2]

At the time of *Roe*, 30 States still prohibited abortion at all stages. In the years prior to that decision, about a third of the States had liberalized their laws, but *Roe* abruptly ended that political process. It imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State. As Justice Byron White aptly put it in his dissent, the decision represented the "exercise of raw judicial power," and it sparked a national controversy that has embittered our political culture for a half century.[4]

Eventually, in *Planned Parenthood of Southeastern Pa. v. Casey* [*supra*, p. IV-92], the Court revisited *Roe*[.] [The plurality] opinion concluded that *stare decisis*, which calls for prior decisions to be followed in most instances, required adherence to what it called *Roe*'s "central holding"—that a State may not constitutionally protect fetal life before "viability"—even if that holding was wrong. Anything less, the opinion claimed, would undermine respect for this Court and the rule of law.

[We] hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision[.] [The Due Process Clause] has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*.

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

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

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

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

It is time to heed the Constitution and return the issue of abortion to the people's elected representatives[.]

II

[We] begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion. [W]e address that question in three steps. First, we explain the standard that our cases have used in determining whether the Fourteenth Amendment's reference to "liberty" protects a particular right. Second, we examine whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as "ordered liberty." Finally, we consider whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents.

A

Constitutional analysis must begin with "the language of the instrument[."] *Gibbons v. Ogden*. The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text. [The] Court's discussion [in *Roe*] left open [several] ways in which some combination of [the First, Fourth, Fifth, Ninth, and Fourteenth Amendments] could protect the abortion right.

[S]ome of respondents' *amici* have now offered [another] potential home for the abortion right: the Fourteenth Amendment's Equal Protection Clause. Neither *Roe* nor *Casey* saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the "heightened scrutiny" that applies to such classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other." *Geduldig v. Aiello*, n. 20 (1974). And as the Court has stated, the "goal of preventing abortion" does not constitute "invidiously discriminatory animus" against women. Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures.

With this new theory addressed, we turn to *Casey*'s bold assertion that the abortion right is an aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. The underlying theory on which this argument rests—that the Fourteenth Amendment's Due Process Clause provides substantive, as well as procedural, protection for "liberty"—has long been controversial. But our decisions have held that the Due Process Clause protects two categories of substantive rights. The first consists of rights guaranteed by the first eight Amendments. [The] second category—which is the one in question here—comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.

In deciding whether a right falls into either of these categories, the Court has long asked whether the right is "deeply rooted in [our] history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty." *McDonald v. Chicago*; *Glucksberg*. And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue. [I]n *Glucksberg*, which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of "Anglo-American common law tradition," and made clear that a fundamental right must be "objectively, deeply rooted in this Nation's history and tradition."

[On] occasion, when the Court has ignored the "[a]ppropriate limits" imposed by "'respect for the teachings of history,'" *Moore v. East Cleveland* [*supra*, p. IV-81], it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York* [*supra*, p. IV-44]. The Court must not fall prey to such an unprincipled approach. Instead, guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the *Fourteenth Amendment* means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.[22]

B

1

[At] common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy[.] *Roe* either ignored or misstated this history[.] It is therefore important to set the record straight.

2

We begin with the common law, under which abortion was a crime at least after "quickening"—*i.e.*, the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy. The "eminent common-law authorities (Blackstone, Coke, Hale, and the like)," *all* describe abortion after quickening as criminal. [And] writing near the time of the adoption of our Constitution, William Blackstone explained

[22] That is true regardless of whether we look to the Amendment's Due Process Clause or its Privileges or Immunities Clause. Some scholars and Justices have maintained that the Privileges or Immunities Clause is the provisions of the Fourteenth Amendment that guarantees substantive rights. See, *e.g.*, *McDonald* (2010) (Thomas, J., concurring in part). But even on that view, such a right would need to be rooted in the Nation's history and tradition. See *Corfield v. Coryell* (C.C.E.D. Pa. 1823) (describing unenumerated rights under the Privileges and Immunities Clause, Art. IV, §2, as those "fundamental" rights "which have, at all times, been enjoyed by the citizens of the several states")[.]

that abortion of a "quick" child was "by the ancient law homicide or manslaughter" (citing Bracton), and at least a very "heinous misdemeanor" (citing Coke). English cases dating all the way back to the 13th century corroborate the treatises' statements that abortion was a crime. In 1732, for example, Eleanor Beare was convicted of "destroying the Foetus in the Womb" of another woman and "thereby causing her to miscarry." For that crime and another "misdemeanor," Beare was sentenced to two days in the pillory and three years' imprisonment.

Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal right. Quite to the contrary, in the 1732 case mentioned above, the judge said of the charge of abortion (with no mention of quickening) that he had "never met with a case so barbarous and unnatural."

[That] the common law did not condone even pre-quickening abortions is confirmed by what one might call a proto-felony-murder rule. Hale wrote that if a physician gave a woman "with child" a "potion" to cause an abortion, and the woman died, it was "murder" because the potion was given "*unlawfully* to destroy her child within her." [In] sum, although common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, none endorsed the practice. Moreover, we are aware of no common-law case or authority, and the parties have not pointed to any, that remotely suggests a positive *right* to procure an abortion at any stage of pregnancy.

In this country, the historical record is similar. The "most important early American edition of Blackstone's Commentaries," reported Blackstone's statement that abortion of a quick child was at least "a heinous misdemeanor[.]" [And] by the 19th century, courts frequently explained that the common law made abortion of a quick child a crime.

3

[The] original ground for drawing a distinction between pre-and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. [The] Solicitor General offers a different explanation of the basis for the quickening rule, namely, that before quickening the common law did not regard a fetus "as having a 'separate and independent existence.'" [At] any rate, the original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century. [By] 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening.

[This] overwhelming consensus endured until the day *Roe* was decided. At that time, [thirty States] still prohibited abortion at all stages except to save the life of the mother.

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

4

Respondents and their *amici* have no persuasive answer to this historical evidence. [The] Solicitor General [argues] that history supports an abortion right because the common law's failure to criminalize abortion before quickening means that "at the Founding and for decades thereafter, women generally could terminate a pregnancy, at least in its early stages." But the insistence on quickening was not universal, and regardless, the fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so. When legislatures began to exercise that authority as the century wore on, no one, as far as we are aware, argued that the laws they enacted violated a fundamental right. That is not surprising since common-law authorities had repeatedly condemned abortion and described it as an "unlawful" act without regard to whether it occurred before or after quickening.

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

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

There is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being. Many judicial decisions from the late 19th and early 20th centuries made that point. [citing cases from 1868 to 1934] One may disagree with this belief [but] even *Roe* and *Casey* did not question the good faith of abortion opponents. And we see no reason to discount the significance of the state laws in question based on these *amici*'s suggestions about legislative motive.

C

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

The Court did not claim that this broadly framed right is absolute, and no such claim would be plausible. [Ordered] liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life." But the people of the various States may evaluate those interests differently.

[Nor] does the right to obtain an abortion have a sound basis in precedent. *Casey* relied on cases involving the right to marry a person of a different race, *Loving v. Virginia*; the right to marry while in prison, *Turner v. Safley*; the right to obtain contraceptives, *Griswold v. Connecticut*, *Eisenstadt v. Baird*; the right to reside with relatives, *Moore v. East Cleveland*; the right to make decisions about the education of one's children, *Pierce v. Society of Sisters*, *Meyer v. Nebraska*; the right not to be sterilized without consent, *Skinner v. Oklahoma ex rel. Williamson*; and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures. Respondents and the Solicitor General also rely on post-*Casey* decisions like *Lawrence v. Texas* [and] *Obergefell v. Hodges*[.] These attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. None of these rights has any claim to being deeply rooted in history.

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

In drawing this critical distinction between the abortion right and other rights, it is not necessary to dispute *Casey*'s claim (which we accept for the sake of argument) that "the specific practices of States at the time of the adoption of the Fourteenth Amendment" do not "mar[k] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless.

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

Americans who believe that abortion should be restricted press countervailing arguments about modern developments. They note that attitudes about the pregnancy of unmarried women have changed drastically; that federal and state laws ban discrimination on the basis of pregnancy; that leave for pregnancy and childbirth are now guaranteed by law in many cases; that the costs of medical care associated with pregnancy are covered by insurance or government assistance; that States have increasingly adopted "safe haven" laws[.]

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

D

The dissent is very candid that it cannot show that a constitutional right to abortion has any foundation, let alone a "'deeply rooted'" one, "'in this Nation's history and tradition.'" [That] is devastating to its position. We have held that the "established method of substantive-due-process analysis" requires that an unenumerated right be "'deeply rooted in this Nation's history and tradition'" before it can be recognized as a component of the "liberty" protected in the Due Process Clause. *Glucksberg*. But despite the dissent's professed fidelity to *stare decisis*, it fails to seriously engage with that important precedent—which it cannot possibly satisfy.

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

[Because] the dissent cannot argue that the abortion right is rooted in this Nation's history and tradition, it contends that the "constitutional tradition" is "not captured whole at a single moment," and that its "meaning gains content from the long sweep of our history and from successive judicial precedents." This vague formulation imposes no clear restraints on what Justice White called the "exercise of raw judicial power[.]"

[The] most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life. This is evident in the analogy that the dissent draws between the abortion right and the rights recognized in *Griswold* (contraception), *Eisenstadt* (same), *Lawrence* (sexual conduct with member of the same sex), and *Obergefell* (same-sex marriage). Perhaps this is designed to stoke unfounded fear that our decision will imperil those other rights, but the dissent's analogy is objectionable for a more important reason: what it reveals about the dissent's views on the protection of what *Roe* called "potential life." The exercise of the rights at issue in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a "potential life," but an abortion has that effect. So if the rights at issue in those cases are fundamentally the same as the right recognized in *Roe* and *Casey*, the implication is clear: The Constitution does not permit the States to regard the destruction of a "potential life" as a matter of any significance.

[Our] opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin. According to the dissent, the Constitution *requires* the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that "'theory of life.'" *Post* (quoting *Roe*).

III

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends. [But s]ome of our most important constitutional decisions have overruled prior precedents. Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country.

[Our] cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision. [Several] factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the "workability" of the rules they imposed on their country, their disruptive effect on other areas of the law, and the absence of concrete reliance.

The nature of the Court's error. An erroneous interpretation of the Constitution is always important, but some are more damaging than others. The infamous decision in *Plessy v. Ferguson*, was one such decision. [It] was "egregiously wrong" on the day it was decided. [*Roe*] was also egregiously wrong and deeply damaging. [*Roe*'s] constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed[.]

[*The*] ***quality of the reasoning***. [The] weaknesses in *Roe*'s reasoning are well-known. Without any grounding in the constitutional text, history, or precedent, it imposed on the entire country a detailed set of rules much like those that one might expect to find in a statute or regulation. [This] elaborate scheme was the Court's own brainchild. [Not] only did this scheme resemble the work of a legislature, but the Court made little effort to explain how these rules could be deduced from any of the sources on which constitutional decisions are usually based.

[Citing] a broad array of cases, the Court found support for a constitutional "right of personal privacy," but it conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference. Only the cases involving this second sense of the term could have any possible relevance to the abortion issue, and some of the cases in that category involved personal decisions that were obviously very, very far afield. See *Pierce* (right to send children to religious school); *Meyer* (right to have children receive German language instruction).

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

[What] *Roe* did not provide was any cogent justification for the lines it drew. [The most] glaring deficiency was *Roe*'s failure to justify the critical distinction it drew between pre-and post-viability abortions. [If,] as *Roe* held, a State's interest in protecting prenatal life is compelling "after viability," why isn't that interest "equally compelling before viability"? *Roe* did not say, and no explanation is apparent.

This arbitrary line has not found much support among philosophers and ethicists who have attempted to justify a right to abortion. [The] viability line, which *Casey* termed *Roe*'s central rule, makes no sense, and it is telling that other countries almost uniformly eschew such a line. The Court thus asserted raw judicial power to impose, as a matter of constitutional law, a uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy.

[When] *Casey* revisited *Roe* almost 20 years later, [it] provided no principled defense of the viability line. Instead, it merely rephrased what *Roe* had said, stating that viability marked the point at which "the independent existence of a second life can in reason and fairness be the object of state protection that now overrides the rights of the woman." Why "reason and fairness" demanded that the line be drawn at viability the Court did not explain[.]

Workability. Our precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner. *Casey*'s "undue burden" test has scored poorly on the workability scale.

Problems begin with the very concept of an "undue burden." [This concept] call[s] on courts to examine a law's effect on women, but a regulation may have a very different impact on different women for a variety of reasons[.] In order to determine whether a regulation presents a ["substantial obstacle"] to women, a court needs to know which set of women it should have in mind and how many of the women in this set must find that an obstacle is "substantial."

Casey provided no clear answer to these questions. It said that a regulation is unconstitutional if it imposes a substantial obstacle "in a large fraction of cases in which [it] is relevant," but there is obviously no clear line between a fraction that is "large" and one that is not. Nor is it clear what the Court meant by "cases in which" a regulation is "relevant." [Continued] adherence to that standard would undermine, not advance, the "evenhanded, predictable, and consistent development of legal principles."

[*Reliance*] *interests*. We last consider whether overruling *Roe* and *Casey* will upend substantial reliance interests. Traditional reliance interests arise "where advance planning of great precision is most obviously a necessity." In *Casey*, the controlling opinion conceded that those traditional reliance interests were not implicated because getting an abortion is generally "unplanned activity," and "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." [W]e agree with the *Casey* plurality that conventional, concrete reliance interests are not present here.

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

When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter. [The] contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women. The contending sides also make conflicting arguments about the status of the fetus. This Court has neither the authority nor the expertise to adjudicate those disputes[, which are better left to] legislative bodies[.]

Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process[.] Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so. In the last election in November 2020, women, who make up around 51.5 percent of the population of Mississippi, constituted 55.5 percent of the voters who cast ballots.

Unable to show concrete reliance on *Roe* and *Casey* themselves, the Solicitor General suggests that overruling those decisions would "threaten the Court's precedents holding that the Due Process Clause protects other rights." Brief for the United States (citing *Obergefell*, *Lawrence*, [and] *Griswold*). [As] even the Casey plurality recognized, "[a]bortion is a unique act" because it terminates "life or potential life." And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.

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

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

The dissent argues [that] the Court should never (or perhaps almost never) overrule an egregiously wrong constitutional precedent unless the Court can "poin[t] to major legal or factual changes undermining [the] decision's original basis." [T]he dissent claims that *Brown v. Board of*

Education, and other landmark cases overruling prior precedents "responded to changed law and to changed facts and attitudes that had taken hold throughout society." The unmistakable implication of this argument is that only the passage of time and new developments justified those decisions. Recognition that the cases they overruled were egregiously wrong on the day they were handed down was not enough.

The Court has never adopted this strange new version of *stare decisis*—and with good reason. Does the dissent really maintain that overruling *Plessy* was not justified until the country had experienced more than a half-century of state-sanctioned segregation and generations of Black school children had suffered all its effects?

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

[The Chief Justice, concurring in the judgment] would "leave for another day whether to reject any right to an abortion at all," and would hold only that if the Constitution protects any such right, the right ends once women have had "a reasonable opportunity" to obtain an abortion. The concurrence does not specify what period of time is sufficient to provide such an opportunity, but it would hold that 15 weeks, the period allowed under Mississippi's law, is enough—at least "absent rare circumstances." [But i]f we held only that Mississippi's 15-week rule is constitutional, we would soon be called upon to pass on the constitutionality of a panoply of laws with shorter deadlines or no deadline at all. The "measured course" charted by the concurrence would be fraught with turmoil until the Court answered the question that the concurrence seeks to defer.

[I]f the period required to give women a "reasonable" opportunity to obtain an abortion were pegged, as the concurrence seems to suggest, at the point when a certain percentage of women make that choice, we would have to identify the relevant percentage. It would also be necessary to explain what the concurrence means when it refers to "rare circumstances" that might justify an exception. [In] sum, the concurrence's quest for a middle way would only put off the day when we would be forced to confront the question we now decide. [It] is far better—for this Court and the country—to face up to the real issue without further delay.

VI

[U]nder our precedents, rational-basis review is the appropriate standard for [challenges to restrictions on abortion]. [It] follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." See also *Dandridge v. Williams* [*supra*, p. V-213]; *United States v. Carolene Products Co.* [*supra*, p. IV-54].

A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity." It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. These legitimate interests include respect for and preservation of prenatal life at all stages of development[.] These legitimate interests justify Mississippi's Gestational Age Act.

[We] end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.*

▪ JUSTICE THOMAS, concurring.

I join the opinion of the Court because it correctly holds that there is no constitutional right to abortion. [As] I have previously explained, "substantive due process" is an oxymoron that "lack[s] any basis in the Constitution." "The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words." The resolution of this case is thus straightforward. Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion.

The Court today declines to disturb substantive due process jurisprudence generally or the doctrine's application in other, specific contexts. [I] agree that "[n]othing in [the Court's] opinion should be understood to cast doubt on precedents that do not concern abortion." For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. [After] overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment.

▪ JUSTICE KAVANAUGH, concurring.

[Some] *amicus* briefs argue that the Court today should not only overrule *Roe* and return to a position of judicial neutrality on abortion, but should go further and hold that the Constitution *outlaws* abortion throughout the United States. No Justice of this Court has ever advanced that position. I respect those who advocate for that position, just as I respect

* [A concurrence in the judgment by CHIEF JUSTICE ROBERTS, arguing that the Court should strike down Mississippi's law on narrower grounds, is omitted. —BE]

those who argue that this Court should hold that the Constitution legalizes pre-viability abortion throughout the United States. But both positions are wrong as a constitutional matter, in my view. The Constitution neither outlaws abortion nor legalizes abortion.

To be clear, then, the Court's decision today *does not outlaw abortion* throughout the United States. On the contrary, the Court's decision properly leaves the question of abortion for the people and their elected representatives in the democratic process[.]

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

For half a century, *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey* have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be. Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

Roe and *Casey* well understood the difficulty and divisiveness of the abortion issue. [So] the Court struck a balance, as it often does when values and goals compete. It held that the State could prohibit abortions after fetal viability, so long as the ban contained exceptions to safeguard a woman's life or health. It held that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. But until the viability line was crossed, the Court held, a State could not impose a "substantial obstacle" on a woman's "right to elect the procedure" as she (not the government) thought proper, in light of all the circumstances and complexities of her own life.

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

The majority tries to hide the geographically expansive effects of its holding. Today's decision, the majority says, permits "each State" to address abortion as it pleases. That is cold comfort, of course, for the poor woman who cannot get the money to fly to a distant State for a procedure. Above all others, women lacking financial resources will suffer from today's decision. [Most] threatening of all, no language in today's decision stops the Federal Government from prohibiting abortions nationwide, once again from the moment of conception and without exceptions for rape or incest. If that happens, "the views of [an individual State's] citizens" will not matter. The challenge for a woman will be to finance a trip not to "New York [or] California" but to Toronto.

Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman's reproductive freedom, the Constitution also protected "[t]he ability of women to participate equally in [this Nation's] economic and social life." *Casey*. But no longer.

[Some] women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. See *Griswold*; *Eisenstadt*. In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. See *Lawrence*; *Obergefell*. They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does "cast[s] doubt on precedents that do not concern abortion."

But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not "deeply rooted in history": Not until *Roe*, the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, "there was no support in American law for a constitutional right to obtain [contraceptives]." So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.

One piece of evidence on that score seems especially salient: The majority's cavalier approach to overturning this Court's precedents. *Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in today's opinion. The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs. [No] recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed. Indeed, the Court in *Casey* already found all of that to be true. *Casey* is a precedent about precedent. It reviewed the same arguments made here in support of overruling *Roe*, and it found that doing so was not warranted. The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. [We] dissent.

I

[To] hear the majority tell the tale, *Roe* and *Casey* are aberrations: They came from nowhere, went nowhere—and so are easy to excise from this Nation's constitutional law. That is not true. [T]hey are rooted in—and themselves led to—other rights giving individuals control over their bodies and their most personal and intimate associations. [*Roe*] and *Casey* were from the beginning, and are even more now, embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. Those legal concepts, one might even say, have gone far toward defining what it means to be an American. For in this Nation, [we] believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once.

A

Some half-century ago, *Roe* struck down a state law making it a crime to perform an abortion unless its purpose was to save a woman's life. [The]

Court explained that a long line of precedents, "founded in the Fourteenth Amendment's concept of personal liberty," protected individual decisionmaking related to "marriage, procreation, contraception, family relationships, and child rearing and education." For the same reasons, the Court held, the Constitution must protect "a woman's decision whether or not to terminate her pregnancy." The Court recognized the myriad ways bearing a child can alter the "life and future" of a woman and other members of her family. A State could not, "by adopting one theory of life," override all "rights of the pregnant woman."

[In] the 20 years between *Roe* and *Casey*, the Court expressly reaffirmed *Roe* on two occasions, and applied it on many more. [Then,] in *Casey*, the Court considered the matter anew, and again upheld *Roe*'s core precepts. [Central] to that conclusion was a full-throated restatement of a woman's right to choose. Like *Roe*, Casey grounded that right in the Fourteenth Amendment's guarantee of "liberty." That guarantee encompasses realms of conduct not specifically referenced in the Constitution: "Marriage is mentioned nowhere" in that document, yet the Court was "no doubt correct" to protect the freedom to marry "against state interference." And the guarantee of liberty encompasses conduct today that was not protected at the time of the Fourteenth Amendment. "It is settled now," the Court said—though it was not always so—that "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity." Especially important in this web of precedents protecting an individual's most "personal choices" were those guaranteeing the right to contraception. In those cases, the Court had recognized "the right of the individual" to make the vastly consequential "decision whether to bear" a child. So too, *Casey* reasoned, the liberty clause protects the decision of a woman confronting an unplanned pregnancy. Her decision about abortion was central, in the same way, to her capacity to chart her life's course.

[The majority asserts that] *Roe* and *Casey* [are] dismissive of a "State's interest in protecting prenatal life." Nothing could get those decisions more wrong. As just described, *Roe* and *Casey* invoked powerful state interests in that protection, operative at every stage of the pregnancy and overriding the woman's liberty after viability. The strength of those state interests is exactly why the Court allowed greater restrictions on the abortion right than on other rights deriving from the Fourteenth Amendment.[1] But what *Roe* and

[1] [The majority argues] that our analogy between the right to an abortion and the rights to contraception and same-sex marriage shows that we think "[t]he Constitution does not permit the States to regard the destruction of a 'potential life' as a matter of any significance." To the contrary. The liberty interests underlying those rights are [quite] similar. But

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

B

The majority makes this change based on a single question: Did the reproductive right recognized in *Roe* and *Casey* exist in "1868, the year when the Fourteenth Amendment was ratified"? The majority says (and with this much we agree) that the answer to this question is no: In 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one.

Of course, the majority opinion refers as well to some later and earlier history. On the one side of 1868, it goes back as far as the 13th (the 13th!) century. But that turns out to be wheel-spinning. First, it is not clear what relevance such early history should have, even to the majority. [And] embarrassingly for the majority[,] early law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before "quickening"—the point when the fetus moved in the womb. And early American law followed the common-law rule.[3] So the criminal law of that early time might be taken as roughly consonant with *Roe*'s and *Casey*'s different treatment of early and late abortions. Better, then, to move forward in time. On the other side of 1868, the majority occasionally notes

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only in the sphere of abortion is the state interest in protecting potential life involved. So only in that sphere, as both *Roe* and *Casey* recognized, may a State impinge so far on the liberty interest (barring abortion after viability and discouraging it before). The majority's failure to understand this fairly obvious point stems from its rejection of the idea of balancing interests in this (or maybe in any) constitutional context. Cf. *New York State Rifle & Pistol Assn., Inc. v. Bruen* (2022) [*supra*, p. IV-116]. The majority thinks that a woman has no liberty or equality interest in the decision to bear a child, so a State's interest in protecting fetal life necessarily prevails.

[3] The majority offers no evidence to the contrary—no example of a founding-era law making prequickening abortion a crime (except when a woman died). And even in the mid-19th century, more than 10 States continued to allow pre-quickening abortions.

that many States barred abortion up to the time of *Roe*. That is convenient for the majority, but it is window dressing. As the same majority (plus one) just informed us, "post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text." *Bruen* [*supra*, p. IV-115]. Had the pre-*Roe* liberalization of abortion laws occurred more quickly and more widely in the 20th century, the majority would say (once again) that only the ratifiers' views are germane.

The majority's core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again. If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

As an initial matter, note a mistake in the just preceding sentence. We referred there to the "people" who ratified the Fourteenth Amendment: What rights did those "people" have in their heads at the time? But, of course, "people" did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase "We the People." In 1868, the first wave of American feminists were explicitly told—of course by men—that it was not their time to seek constitutional protections. (Women would not get even the vote for another half-century.) To be sure, most women in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women control over their bodies, most women could not imagine having that kind of autonomy. But that takes away nothing from the core point. Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.

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

The answer is that this Court has rejected the majority's pinched view of how to read our Constitution. [I]n the words of the great Chief Justice John Marshall, our Constitution is "intended to endure for ages to come," and must adapt itself to a future "seen dimly," if at all. *McCulloch v. Maryland* [*supra*, p. II-5]. That is indeed why our Constitution is written as it is. The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers' invitation. It has kept true to the Framers' principles by applying them in new ways, responsive to new societal understandings and conditions.

Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of "liberty" and "equality" for all. And nowhere has that approach produced prouder moments, for this country and the Court. Consider an example *Obergefell* used a few years ago. The Court there confronted a claim, based on *Washington v. Glucksberg*, that the Fourteenth Amendment "must be defined in a most circumscribed manner, with central reference to specific historical practices" — exactly the view today's majority follows. And the Court specifically rejected that view.[4] In doing so, the Court reflected on what the proposed, historically circumscribed approach would have meant for interracial marriage. The Fourteenth Amendment's ratifiers did not think it gave black and white people a right to marry each other. To the contrary, contemporaneous practice deemed that act quite as unprotected as abortion. Yet the Court in *Loving v. Virginia* read the Fourteenth Amendment to embrace the Lovings' union. If, *Obergefell* explained, "rights were defined by who exercised them in the past, then received practices could serve as their own continued justification"—even when they conflict with "liberty" and "equality" as later and more broadly understood. The Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply.

That does not mean anything goes. The majority wishes people to think there are but two alternatives: (1) accept the original applications of the Fourteenth Amendment and no others, or (2) surrender to judges' "own ardent views," ungrounded in law, about the "liberty that Americans should enjoy." [But] applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. The second Justice Harlan discussed how to strike the right balance when he explained why he would have invalidated a State's ban on contraceptive use. Judges, he said, are not "free to roam where unguided speculation might take them." *Poe v. Ullman* (1961) (dissenting

[4] [The] *Glucksberg* test, *Obergefell* said, "may have been appropriate" in considering physician-assisted suicide, but "is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy."

opinion). Yet they also must recognize that the constitutional "tradition" of this country is not captured whole at a single moment. Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions. That is why Americans, to go back to *Obergefell*'s example, have a right to marry across racial lines. And it is why, to go back to Justice Harlan's case, Americans have a right to use contraceptives so they can choose for themselves whether to have children.

[It] was settled at the time of *Roe*, settled at the time of *Casey*, and settled yesterday that the Constitution places limits on a State's power to assert control over an individual's body and most personal decisionmaking. A multitude of decisions supporting that principle led to *Roe*'s recognition and *Casey*'s reaffirmation of the right to choose; and *Roe* and *Casey* in turn supported additional protections for intimate and familial relations. The majority has embarrassingly little to say about those precedents. It (literally) rattles them off in a single paragraph; and it implies that they have nothing to do with each other, or with the right to terminate an early pregnancy. [But] that is flat wrong. The Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives. Especially women's lives, where they safeguard a right to self-determination.

[Consider] first, then, the line of this Court's cases protecting "bodily integrity." *Casey*. "No right," in this Court's time-honored view, "is held more sacred, or is more carefully guarded," than "the right of every individual to the possession and control of his own person." [So] the Court has restricted the power of government to interfere with a person's medical decisions or compel her to undergo medical procedures or treatments. See, e.g., *Winston v. Lee* (forced surgery); *Rochin v. California* (forced stomach pumping); *Washington v. Harper* (forced administration of antipsychotic drugs).

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

[So] too, *Roe* and *Casey* fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and procreation. Those cases safeguard particular choices about whom to marry; whom to have sex with; what family members to live with; how to raise children—and crucially, whether and when to have children. In varied cases, the Court explained that those choices—"the most intimate and personal" a person can make—

reflect fundamental aspects of personal identity; they define the very "attributes of personhood." *Casey*. And they inevitably shape the nature and future course of a person's life (and often the lives of those closest to her). So, the Court held, those choices belong to the individual, and not the government. That is the essence of what liberty requires.

And liberty may require it, this Court has repeatedly said, even when those living in 1868 would not have recognized the claim—because they would not have seen the person making it as a full-fledged member of the community. Throughout our history, the sphere of protected liberty has expanded, bringing in individuals formerly excluded. In that way, the constitutional values of liberty and equality go hand in hand; they do not inhabit the hermetically sealed containers the majority portrays. So before *Roe* and *Casey*, the Court expanded in successive cases those who could claim the right to marry—though their relationships would have been outside the law's protection in the mid-19th century. See, e.g., *Loving*; *Turner v. Safley* (prisoners); see also, e.g., *Stanley v. Illinois* (offering constitutional protection to untraditional "family unit[s]"). And after *Roe* and *Casey*, of course, the Court continued in that vein. With a critical stop to hold that the Fourteenth Amendment protected same-sex intimacy, the Court resolved that the Amendment also conferred on same-sex couples the right to marry. See *Lawrence*; *Obergefell*. In considering that question, the Court held, "[h]istory and tradition," especially as reflected in the course of our precedent, "guide and discipline [the] inquiry." But the sentiments of 1868 alone do not and cannot "rule the present."

Casey similarly recognized the need to extend the constitutional sphere of liberty to a previously excluded group. The Court then understood, as the majority today does not, that the men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens. A woman then, *Casey* wrote, "had no legal existence separate from her husband." ["The] ability of women to participate equally" in the "life of the Nation"—in all its economic, social, political, and legal aspects—"has been facilitated by their ability to control their reproductive lives." Without the ability to decide whether and when to have children, women could not—in the way men took for granted—determine how they would live their lives, and how they would contribute to the society around them.

For much that reason, *Casey* made clear that the precedents *Roe* most closely tracked were those involving contraception. Over the course of three cases, the Court had held that a right to use and gain access to contraception was part of the Fourteenth Amendment's guarantee of liberty. See *Griswold*; *Eisenstadt*; *Carey v. Population Services Int'l* (1977). That clause, we explained, necessarily conferred a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt*. *Casey* saw *Roe* as of a piece: In "critical respects the abortion decision is of the same character." "[R]easonable people," the Court noted, could also oppose contraception[.] Yet the views of others could not automatically prevail against a woman's right to control her own body and make her own choice about whether to bear, and probably to raise, a child.

[Faced] with all these connections between *Roe*/*Casey* and judicial decisions recognizing other constitutional rights, the majority tells everyone not to worry. It can (so it says) neatly extract the right to choose from the constitutional edifice without affecting any associated rights. (Think of someone telling you that the Jenga tower simply will not collapse.) [The majority says:] "Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion." That right is unique, the majority asserts, "because [abortion] terminates life or potential life." So the majority depicts today's decision as "a restricted railroad ticket, good for this day and train only." Should the audience for these too-much-repeated protestations be duly satisfied? We think not.

[Even] placing [Justice Thomas's] concurrence to the side, the assurance in today's opinion still does not work. Or at least that is so if the majority is serious about its sole reason for overturning *Roe* and *Casey*: the legal status of abortion in the 19th century. Except in the places quoted above, the state interest in protecting fetal life plays no part in the majority's analysis. To the contrary, the majority takes pride in not expressing a view "about the status of the fetus." The majority's departure from *Roe* and *Casey* rests instead—and only—on whether a woman's decision to end a pregnancy involves any Fourteenth Amendment liberty interest (against which *Roe* and *Casey* balanced the state interest in preserving fetal life). According to the majority, no liberty interest is present—because (and only because) the law offered no protection to the woman's choice in the 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things. It did not protect the rights recognized in *Lawrence* and *Obergefell* to same-sex intimacy and marriage. It did not protect the right recognized in *Loving* to marry across racial lines. It did not protect the right recognized in *Griswold* to contraceptive use. For that matter, it did not protect the right recognized in *Skinner v. Oklahoma ex rel. Williamson* [*supra*, p. IV-65] not to be sterilized without consent. So if the majority is right in its legal analysis, all those decisions were wrong, and all those matters properly belong to the States too—whatever the particular state interests involved. And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even "undermine"—any number of other constitutional rights.

Nor does it even help just to take the majority at its word. Assume the majority is sincere in saying, for whatever reason, that it will go so far and no further. Scout's honor. Still, the future significance of today's opinion will be decided in the future. And law often has a way of evolving without regard to original intentions—a way of actually following where logic leads, rather than tolerating hard-to-explain lines. [We] fervently hope that does not happen because of today's decision. [But] we cannot understand how anyone can be confident that today's opinion will be the last of its kind.

[Anyway,] today's decision, taken on its own, is catastrophic enough. As a matter of constitutional method, the majority's commitment to replicate in 2022 every view about the meaning of liberty held in 1868 has precious little to recommend it. [As] a matter of constitutional substance, the majority's opinion has all the flaws its method would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today. [Today's] decision strips women of agency over what even the majority agrees is a contested and contestable moral issue. It forces her to carry out the State's will, whatever the circumstances and whatever the harm it will wreak on her and her family. In the Fourteenth Amendment's terms, it takes away her liberty. Even before we get to *stare decisis*, we dissent.

II

By overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to the rule of law. [*Stare*] *decisis* is, of course, not an "inexorable command"; it is sometimes appropriate to overrule an earlier decision. But the Court must have a good reason to do so over and above the belief "that the precedent was wrongly decided."

[None] of [the traditional grounds for overruling] apply here[.] [The] majority barely mentions any legal or factual changes that have occurred since *Roe* and *Casey*. It suggests that the two decisions are hard for courts to implement, but cannot prove its case. In the end, the majority says, all it must say to override *stare decisis* is one thing: that it believes *Roe* and *Casey* "egregiously wrong." That rule could equally spell the end of any precedent with which a bare majority of the present Court disagrees. [The] majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.

A

Contrary to the majority's view, there is nothing unworkable about *Casey*'s "undue burden" standard. Its primary focus on whether a State has placed a "substantial obstacle" on a woman seeking an abortion is "the sort of inquiry familiar to judges across a variety of contexts." And it has given rise to no more conflict in application than many standards this Court and others unhesitatingly apply every day. [The] *Casey* undue burden standard [resembles] general standards that courts work with daily in other legal spheres—like the "rule of reason" in antitrust law or the "arbitrary and capricious" standard for agency decisionmaking. Applying general standards to particular cases is, in many contexts, just what it means to do law.

[Anyone] concerned about workability should consider the majority's substitute standard. The majority says a law regulating or banning abortion "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." [This] Court will surely face critical questions about how that test applies. Must a state law allow abortions when necessary to protect a woman's life and health? [Suppose] a patient with pulmonary hypertension has a 30-to-50 percent risk of dying with ongoing pregnancy; is that enough[?]

B

When overruling constitutional precedent, the Court has almost always pointed to major legal or factual changes undermining a decision's original basis. [But n]o subsequent factual developments have undermined *Roe* and *Casey*. Women continue to experience unplanned pregnancies and unexpected developments in pregnancies. Pregnancies continue to have enormous physical, social, and economic consequences. [The] majority briefly refers to arguments about changes in laws relating to healthcare coverage, pregnancy discrimination, and family leave. Many women, however, still do not have adequate healthcare coverage before and after pregnancy; and, even when insurance coverage is available, healthcare services may be far away. Women also continue to face pregnancy discrimination that interferes with their ability to earn a living.

[The] majority briefly notes the growing prevalence of safe haven laws and demand for adoption, but, to the degree that these are changes at all, they too are irrelevant. Neither reduces the health risks or financial costs of going through pregnancy and childbirth. Moreover, the choice to give up parental rights after giving birth is altogether different from the choice not to carry a pregnancy to term. The reality is that few women denied an abortion will choose adoption.[17] [Whether] or not they choose to parent, they will experience the profound loss of autonomy and dignity that coerced pregnancy and birth always impose.

Mississippi's own record illustrates how little facts on the ground have changed since *Roe* and *Casey*, notwithstanding the majority's supposed "modern developments." Sixty-two percent of pregnancies in Mississippi are unplanned, yet Mississippi does not require insurance to cover contraceptives and prohibits educators from demonstrating proper contraceptive use. The State neither bans pregnancy discrimination nor requires provision of paid parental leave. It has strict eligibility requirements for Medicaid and nutrition assistance, leaving many women and families without basic medical care or enough food. Although 86 percent of pregnancy-related deaths in the State are due to postpartum complications, Mississippi rejected federal funding to provide a year's worth of Medicaid coverage to women after giving birth. Perhaps unsurprisingly, health outcomes in Mississippi are abysmal for both women and children. Mississippi has the highest infant mortality rate in the country, and some of the highest rates for preterm birth, low birthweight, cesarean section, and maternal death. It

[17] A study of women who sought an abortion but were denied one because of gestational limits found that only 9 percent put the child up for adoption, rather than parenting themselves.

is approximately 75 times more dangerous for a woman in the State to carry a pregnancy to term than to have an abortion. We do not say that every State is Mississippi, and we are sure some have made gains since *Roe* and *Casey* in providing support for women and children. But a state-by-state analysis by public health professionals shows that States with the most restrictive abortion policies also continue to invest the least in women's and children's health.

[In] sum, the majority can point to neither legal nor factual developments in support of its decision.

C

[The] reasons for retaining *Roe* and *Casey* gain further strength from the overwhelming reliance interests those decisions have created. The Court adheres to precedent not just for institutional reasons, but because it recognizes that stability in the law is "an essential thread in the mantle of protection that the law affords the individual." So when overruling precedent "would dislodge [individuals'] settled rights and expectations," *stare decisis* has "added force." [By] characterizing *Casey*'s reliance arguments as "generalized assertions about the national psyche," it reveals how little it knows or cares about women's lives or about the suffering its decision will cause.

In *Casey*, the Court observed that for two decades individuals "have organized intimate relationships and made" significant life choices "in reliance on the availability of abortion in the event that contraception should fail." Over another 30 years, that reliance has solidified. For half a century now, in *Casey*'s words, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." Indeed, all women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe*'s and *Casey*'s protections.

The disruption of overturning *Roe* and *Casey* will therefore be profound. Abortion is a common medical procedure and a familiar experience in women's lives. About 18 percent of pregnancies in this country end in abortion, and about one quarter of American women will have an abortion before the age of 45. Those numbers reflect the predictable and life-changing effects of carrying a pregnancy, giving birth, and becoming a parent. As *Casey* understood, people today rely on their ability to control and time pregnancies when making countless life decisions: where to live, whether and how to invest in education or careers, how to allocate financial resources, and how to approach intimate and family relationships. Women may count on abortion access for when contraception fails. They may count on abortion access for when contraception cannot be used, for example, if they were raped. They may count on abortion for when something changes in the midst of a pregnancy, whether it involves family or financial circumstances, unanticipated medical complications, or heartbreaking fetal diagnoses. Taking away the right to abortion, as the majority does today, destroys all those individual plans and expectations. In so doing, it diminishes women's opportunities to participate fully and equally in the Nation's political, social, and economic life.

The majority's response to these obvious points exists far from the reality American women actually live. The majority proclaims that "'reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.'" The facts are: 45 percent of pregnancies in the United States are unplanned. Even the most effective contraceptives fail, and effective contraceptives are not universally accessible. Not all sexual activity is consensual and not all contraceptive choices are made by the party who risks pregnancy. [Finally,] [e]vents can occur after conception, from unexpected medical risks to changes in family circumstances, which profoundly alter what it means to carry a pregnancy to term. In all these situations, women have expected that they will get to decide [whether] to continue a pregnancy. For those who will now have to undergo that pregnancy, the loss of *Roe* and *Casey* could be disastrous.

[Finally,] the expectation of reproductive control is integral to many women's identity and their place in the Nation. [To] allow a State to exert control over one of "the most intimate and personal choices" a woman may make is not only to affect the course of her life, monumental as those effects might be. It is to alter her "views of [herself]" and her understanding of her "place[] in society" as someone with the recognized dignity and authority to make these choices. *Casey*. Women have relied on *Roe* and *Casey* in this way for 50 years. Many have never known anything else. When *Roe* and *Casey* disappear, the loss of power, control, and dignity will be immense.

[The] Court's failure to perceive the whole swath of expectations *Roe* and *Casey* created reflects an impoverished view of reliance. [While] many of this Court's cases addressing reliance have been in the "commercial context," none holds that interests must be analogous to commercial ones to warrant *stare decisis* protection. This unprecedented assertion is, at bottom, a radical claim to power[.]

The majority claims that the reliance interests women have in *Roe* and *Casey* are too "intangible" for the Court to consider, even if it were inclined to do so. This is to ignore as judges what we know as men and women. The interests women have in Roe and *Casey* are perfectly, viscerally concrete. Countless women will now make different decisions about careers, education, relationships, and whether to try to become pregnant than they would have when *Roe* served as a backstop. Other women will carry pregnancies to term, with all the costs and risk of harm that involves, when they would previously have chosen to obtain an abortion. For millions of women, *Roe* and *Casey* have been critical in giving them control of their bodies and their lives.

[More] broadly, the majority's approach to reliance cannot be reconciled with our Nation's understanding of constitutional rights. The majority's insistence on a "concrete," economic showing would preclude a finding of reliance on a wide variety of decisions recognizing constitutional rights—such as the right to express opinions, or choose whom to marry, or decide how to educate children. The Court, on the majority's logic, could transfer those choices to the State without having to consider a person's settled understanding that the law makes them hers. That must be wrong. [The] majority's refusal even to consider the life-altering consequences of reversing *Roe* and *Casey* is a stunning indictment of its decision.

[In] overruling *Roe* and *Casey*, this Court betrays its guiding principles. With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent.

CRITICAL PERSPECTIVES ON *DOBBS*

Dobbs has inspired a great deal of commentary from a range of perspectives. The three excerpts that follow critically assess different aspects of the Court's approach. In the first, Reva Siegel argues that the majority's appeal to history and tradition disguises its reliance on its own values. In the second, Seana Shiffrin argues that the Court gave too little weight to considerations of equity in assessing reliance. And in the third, Stephen Sachs argues that, from an originalist point of view, the question in *Dobbs* was perhaps even easier than the majority's opinion made it seem.

You should read these closely enough to get the gist of the argument in each, but given the length of this assignment, you don't need to read each as closely as you otherwise might.

Memory Games: *Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance

Reva B. Siegel[*]

[As it is deployed in *Dobbs*], originalism is a practice of living constitutionalism that is not forthright about its values, aims, and commitments. This mode of reasoning is an antidemocratic mode of constitutional interpretation, *not* because it appeals to the past, but because it refuses to own its own values as it is doing so. [As] we will see, *Dobbs*'s history-and-traditions standard projects a family-values agenda into nineteenth-century legal materials.

[In] *Dobbs*, the Court declared that the Fourteenth Amendment's liberty guarantee provides no protection against state action coercing

[*] Excerpt from Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (2023).

pregnancy. A half-century of cases under *Roe* were wrongly decided because, the Court said, liberty is defined with reference to America's history and traditions. Which history and traditions? Remarkably, the *Dobbs* opinion does not provide criteria by which judges are to ascertain the nation's history and traditions except as they can be inferred from the Court's discussion of the record in this case.

At the Founding and during the early republic, the common law criminalized abortion only *after* quickening—as late as weeks 16 to 25 in pregnancy—but Justice Alito quickly glossed over this history in his account. The Court did not focus on the Founding or the early republic or on the last half-century—as *Glucksberg* itself must have when it included *Casey* [as a relevant precedent regarding the due process inquiry]—but instead focused on the mid-nineteenth century in the years before and after the ratification of the Fourteenth Amendment. During that period, there was a campaign to ban abortion across the nation; many of the state statutes then enacted are included in an appendix to the decision. Justice Alito does not claim, however, that anyone involved with the ratification of the Fourteenth Amendment or the banning of abortion understood any connection between the Amendment and the antiabortion statutes.

One might infer from all this that the Court's finding of a tradition was based solely on the number of statutes banning abortion that were enacted in the era of the Fourteenth Amendment's ratification. But on closer reading of the *Dobbs* opinion, one can see that the Court's finding of a tradition depended on an additional critical factor—on a determination that prior practice was sufficiently respect-worthy and consistent with contemporary constitutional commitments that Americans could identify with it as their tradition.

In *Dobbs*, Justice Alito spent pages refuting arguments of amici that nineteenth-century abortion bans were not the kind of laws to which the due process guarantee of liberty should be tethered. These amici argued that the nineteenth-century campaign to ban abortion was not only concerned with protecting unborn life, but, as Justice Alito recounted, [had as] "important motives [the] fear that Catholic immigrants were having more babies than Protestants and that the availability of abortion was leading White Protestant women to 'shir[k their] maternal duties.'" His response to these claims about the historical record? Denial, in the form of a rhetorical question: "Are we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women? There is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being."

By setting up a false choice—either the laws were motivated by "hostility to Catholics and women" *or* by "a sincere belief that abortion kills a human being"—Justice Alito refused to deal with the historical record in which the laws gathered in the appendix are rooted. Through this false choice, Justice Alito excused himself from considering how prevailing beliefs about gender shaped the campaign to ban abortion, which occurred at a time when law so regularly enforced these gender-role divisions that the Supreme Court itself authorized states to bar women from voting and to deny women the right to practice law. Similarly, Justice Alito refused to consider the nativism of the campaign's leader, Horatio Storer, even though the campaign to ban abortion unfolded at a time when America was rife with religious, ethnic, and racial reasoning, and doctors advocating for abortion restrictions coupled arguments for protecting unborn life with arguments for protecting the ethno-religious character of the nation.

It was not easy to persuade Americans—who continued to reason from customary and common law views of quickening—to ban abortion from conception. Those who sought to ban abortion often embedded arguments about protecting unborn life in arguments that criminal bans were needed to enforce women's maternal and marital duties, and to protect the ethno-religious character of the nation. Arguments for protecting unborn life were not free-standing, as Justice Alito claimed, but instead were deeply entangled in arguments that today we would clearly judge unconstitutional, as documents from the period make clear.

To appreciate how deeply the "history and tradition" of banning abortion was forged through constitutionally objectionable modes of reasoning, consider an 1867 Ohio Senate Report that opponents of abortion often cite as evidence that Americans at the time of the Fourteenth Amendment's ratification believed in punishing abortion as murder. In fact, [this] very document demonstrates that at the time of [ratification], Americans continued to credit customary and common law views about quickening. Legislators complained that "[t]he erroneous opinion prevails very generally that a woman can throw off the product of conception, especially in the early stages, without moral guilt, and without danger to herself." Americans' persisting belief in quickening was, in short, an obstacle to the campaign to ban abortion. Those who wanted to change the common law rule needed *additional reasons*, beyond the argument that abortion was life-taking, to persuade legislators to change the law.

Endeavoring to persuade men to raise penalties on abortion throughout pregnancy, advocates for banning abortion supplemented their arguments about protecting unborn life with arguments that abortion bans could address nativist anxieties about the high birthrates of immigrant families and that abortion bans could enforce wives' marital and maternal obligations. Banning abortion would protect the unborn, enforce women's roles, *and* prevent ethnic replacement. Repeatedly citing the work of Horatio Storer, the leader of the national campaign to criminalize abortion whose historical influence Justice Alito disparaged, the 1867 Ohio Senate Report exhorted the people of the state:

> The demands of society and fashionable life; the desire of freedom from care and home duties and responsibilities; and the absence of

> a proper understanding of the dangers and criminality of the act, lead our otherwise amiable sisters to the commission of this crime. *Do they realize that in avoiding the duties and responsibilities of married life, they are, in effect, living in a state of legalized prostitution? Shall we permit our broad and fertile prairies to be settled only by the children of aliens?* If not, we must, by proper legislation, and by the diffusion of a correct public sentiment, endeavor to suppress a crime which has become so prevalent.

In urging the criminalization of abortion to ensure that married women did not live in a state of "legalized prostitution," the Ohio report was reiterating antiabortion attacks on women seeking "voluntary motherhood"—abolitionists and suffragists who argued that a wife had a right to her body and to say no to sex, hence to control the frequency and timing of birth. And [even] as the report condemned abortion as life-taking, it opened and closed by arguing that banning abortion would enforce women's roles and preserve the ethnic character of the nation.

As we have seen, Justice Alito refused to acknowledge that arguments of this kind played any significant role in the campaign to criminalize abortion. In a quest to find (or invent) a past to which he could defer, Justice Alito waved away all the evidence of unconstitutional motivation and focused only on constitutional motivation; he counted [the] states that banned abortion before quickening as of 1868; and then, seeming to omit reference to quickening (and 1868) altogether, he concluded "that [an] unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973." *Dobbs* employed this whitewashed and selective account of America's history and traditions to define the reach of the Fourteenth Amendment's liberty guarantee.

Perhaps one day there will be a Court to revisit the historical claims on which *Dobbs* rests, much as the Court revisited the historical premises of *Bowers v. Hardwick* in *Lawrence v. Texas*. There is so very much—of constitutional consequence—to correct. Until then, persons of all interpretive persuasions can ask: What do the statutes in the decision's appendix have to do with the Fourteenth Amendment? Alito's opinion never discusses the Fourteenth Amendment's larger historical context or animating aims or purposes. *Dobbs* does not instruct us about the original public meaning or even the expected application of the Fourteenth Amendment's liberty guarantee, as academic originalists emphasize. The Court instead determined the reach of the Fourteenth Amendment's liberty guarantee under substantive due process doctrine, employing a (new) history-and-traditions standard and counting laws stripped from context. These changes do serve the ends of *movement-identified* originalists—in particular, the Justices appointed by Republican Presidents with the express goal of overruling *Roe* and discrediting other cases hostile to family values. The Justices have employed "history and tradition" to justify these changes—through these constitutional memory frames promising to cleanse the Constitution of politics and restore the Constitution as law. This is surely not the original public meaning originalism that academic originalists practice, but it is a species of family-values traditionalism that movement originalists have practiced since the Reagan era.

[A] tradition consists in more than statutes, as Justice Alito indirectly concedes. To characterize the nation's history and traditions, one needs to know more about the conditions under which nineteenth-century abortion bans were enacted and enforced. As the Ohio report shows, the abortion bans served the ends of social control; they were efforts to *change* popular belief and conduct. [This] gap between law on the books and public belief suggests that there was resistance to law—which an account of tradition should include if it is to reflect the beliefs and actions of those who lacked authority to make the law. Their inclusion might be especially salient given the kinds of liberty at stake in this case. At the same time that we ask about how we characterize a tradition, we can also ask what aspects of that tradition we find respect-worthy—sufficiently in accord with contemporary understandings of citizenship and community that Americans today should tie their constitutional freedoms to it.

Now that we have sampled a bit of the debate leading to legislation in the decision's appendix, we can pose a fundamental question that *Dobbs* evades: Why should nineteenth-century antiabortion laws limit the ways we now understand the Constitution's liberty guarantee any more than the history and traditions of segregation limit the way we understand the Constitution's equality guarantee? There is no good reason. The problem with anchoring the meaning of our commitments to this past, [as the dissenters explained], is that "the men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens." Do those Justices who joined the *Dobbs* majority?

[The] *Dobbs* majority signed on to an opinion in which decisions and laws written by men were presented as America's history and traditions, without a single woman's voice represented, and which claimed those traditions were sufficient to justify stripping women today of a half-century of constitutional rights. This is not an account of history that is[, as Justice Scalia characterized originalism,] "conceptually quite separate from the preferences of the judge himself." Instead, as I observed earlier, the reverse is the case: In *Dobbs*, originalist judges ventriloquize historical sources. It is history that expresses judicial preferences as the nation's traditions.

[But] more is at stake than "outing" movement conservatives for practicing the very form of interpretation they claim to revile. The problem is that *Dobbs*'s originalism is a practice of living constitutionalism *that makes our constitutional order less democratic*.

[First], *Dobbs* restricts and threatens rights that enable equal participation of members of historically marginalized groups. Though John Hart Ely could not grasp this, the early abortion speak-outs, like practices of coming out, contested the shape of our constitutional democracy, posing questions about the conditions necessary to secure the equal membership of women and caregivers.

[Second,] as we have seen, *Dobbs* is antidemocratic because it locates constitutional authority in imagined communities of the past, entrenching norms, traditions, and modes of life associated with old status hierarchies. And third, as has been demonstrated, *Dobbs* presents its contested value judgments as expert claims of law and historical fact to which the public owes deference.

Reliance Arguments, Democratic Law, And Inequity

Seana Valentine Shiffrin[*]

Dobbs v. Jackson Women's Health Organization [has] raised the prospect that legislatures and courts will revisit other due process guarantees upon which individuals have organized their lives, including the constitutional rights to same-sex intimacy and marriage. These potential upheavals in the legal infrastructure of basic social status call for a careful look at the reliance argument for sustaining constitutional precedent.

[Although] arguments appealing to reliance interests are extremely familiar to lawyers, so that a glancing appeal to them might be easily forgiven, they are more straightforwardly wielded when it comes to the sorts of interactions regulated by the private law. An uncle promises financial assistance to a niece, who, in reliance, predictably resigns her menial job. The promise is not legally enforceable, as such, because it lacks consideration. Her reliance interest is instead deployed to justify enforcing the promise against the uncle's executor who wishes to revoke the gratuitous promise as imprudently made. It seems rather clear-cut to find that because the uncle's voluntary action inspired the niece to make herself vulnerable, therefore the uncle (and his estate), rather than the niece, should bear the costs of her detrimental reliance on his promise.

But reliance arguments concerning legal decisions are less straightforward. For one thing, they do not pertain merely to the balance of equities between two parties but, instead, to laws applicable to all. A great number of judicial decisions will affect the decisions and behavior of citizens other than the parties. In many cases, those decisions may make them vulnerable to disadvantage should the decision be reversed. An understanding of the reliance argument that would reify all legal decisions on which some citizens depended would have too great a range and would impede the potential for democratic change and moral progress. I call this the problem of *scope*.

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[*] Excerpt from Seana Valentine Shiffrin, *Reliance Arguments, Democratic Law, and Inequity*, 14 JURIS. 317 (2023).

Focusing on constitutional decisions, the problem of scope may be exemplified by thinking about freedom of contract and guns. Most of those who believe *Roe* should have been sustained [at least partly on reliance grounds] do not think the constitutional invalidation of hours and safety regulations [imposed] by *Lochner v. New York* [should] have been sustained. *Lochner* [surely] affected people's behaviors and business owners' investments in ways substantially disrupted by *West Coast Hotel Co. v. Parrish*, the case that [marked] the turn away from *Lochner*. Yet, these forms of reliance do not seem sufficient reason to reaffirm an otherwise deeply mistaken constitutional decision that precluded the government's ability to protect workers' financial and physical health and safety.

Similarly, many disappointed by *Dobbs*' treatment of the reliance argument would not object if the Court overturned [*District of Columbia v. Heller*.] Yet the *Heller* decision has sparked reliance by many individuals and businesses to buy and sell firearms and also decisions by individuals about where to live (decisions that critics of *Dobbs* have rightfully chastised the Court as overlooking in its description of the reliance behaviors surrounding abortion rights). How, if at all, can the reliance argument be understood such that it should protect same-sex intimacy and marriage (and should have protected *Roe*) but would not preclude the ruling in *West Coast Hotel* or the fantasized overturning of *Heller*? Notably, *Heller*, *Lochner*, and *Adkins* all purported to identify constitutional liberties, so the difference cannot be that *Roe* and *Casey* protect constitutional personal liberties.

Critics suspect the reliance argument does not really add anything to the merits arguments. Indeed, the lines so far described largely track the ideology of progressives who favor abortion rights, same-sex marriage, gun regulation and minimum wages. Yet, reliance arguments are meant to give reasons to sustain a decision notwithstanding substantive doubts about its merits. So, a convincing explication of the reliance argument has to solve the scope problem in a principled way that is *merits-independent*. That is, the argument that reliance should dictate upholding a challenged decision should not explicitly or implicitly assume the arguments [for] affirming the challenged decision on its own specific constitutional merits.

Dobbs' insensitivity

The emphasis in *Casey* upon [reliance] leading to *special hardship* and *inequity* is frequently overlooked in the often-abbreviated subsequent appeals to 'reliance interests.'[22] The general appeal to 'reliance' often seems to sweep in the general systemic reasons to support adherence to precedent. But, returning to a closer focus on the specific reliance invested by particular people or groups, the frustration of which would enact a special,

[22] This oversight is incongruous given that the most prominent source of reliance reasoning in the law, the doctrine of promissory estoppel (also known as detrimental reliance) places explicit emphasis on whether 'injustice can be avoided only by enforcement of the promise.' See *Restatement (Second) of Contracts* § [90(1)].

inequitable hardship, may provide the key to answering the scope [problem].

[An] element of what made the *Dobbs* decision so shocking was the insensitivity that Justice Alito's majority opinion showed toward women's and other impregnable people's reliance interests in the right to abortion. In his discussion of why the more than a dozen precedents that explicitly or implicitly affirmed the constitutional right to abortion were not entitled to deference, he dismissed the argument from reliance as insufficiently concrete and depending upon 'generalized assertions about the national psyche.'

This characterization glosses over the myriad, concrete ways that people may structure their lives in reliance on the legally protected opportunity to terminate an unwanted or forcibly induced pregnancy. The issue was not solely about how we have been encouraged to think about ourselves. Where people choose to live may depend, in part, on whether they will enjoy reproductive freedom as well as options to protect their health, their employment, their mortgage, their intimate associational choices, and their other life choices should they become involuntarily pregnant, whether from contraceptive failure, assault, or some other cause, or should their circumstances bearing on a reproductive choice change after the initiation of a voluntary pregnancy. Because later pregnancies may come with higher risks of health threats[,] the availability of abortion may also influence other decisions such as when and whether people invest time and resources in advanced education[,] how they plan and where they situate their career trajectories, and the timing and methods of their sexual, contraceptive, and reproductive decisions.

Justice Alito's analysis piggybacked upon the rather rushed discussion in *Casey* that did not conceive of the reliance interests at stake in the protection of abortion as like the classic commercial cases of reliance because abortions themselves are generally unplanned. Operating in the background is, I speculate, a conception of abortion as a reaction. That is, I suspect that [the majority imagined] a person's decision whether to abort to be contemplated and undertaken only upon, but not in advance of, the event of an unplanned or suddenly unwanted pregnancy. Hence, the naïve assertion that 'reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.' Abortion, from this perspective, [is] conceptualised as a lamentable, if necessary, reaction to an exigent circumstance, rather than as a contingency plan whose existence might enable and secure the formation of plans stretching across years or even decades.

Although it is true that no one would seek to undergo an abortion for the pleasure of the experience, it is a mistake to conclude that no one would make forward-looking plans that were predicated upon its availability. It appears that the majority's perceptible distaste toward abortion made it either unimaginable or intolerable to credit that women and other impregnable people might rely on the future opportunity to obtain an abortion as a sort of insurance that rendered a variety of activities and decisions safe enough to undertake. Women might choose a less effective method of contraception with fewer health side effects, but only if abortion were an option should the contraception fail. Women might only invest in advanced education and take out expensive educational loans were they confident that they could repay those loans without the financial and temporal interruptions and costs of unwanted or untimely pregnancy and parenting. [Women] might enter sexual relationships with men with whom they were not prepared to parent or to trust with the economic and personal burdens, vulnerabilities, and disruptions associated with an unplanned pregnancy. More generally, impregnable people who do not intend pregnancy might enter sexual relationships with potential impregnators. In these cases, the sexual relationships may form economic and emotional bonds from which it might prove difficult or costly to remove oneself should the protections against unwanted pregnancy constrict.

Contrary to the assertion in *Dobbs*, these concrete forms of reliance cannot be abruptly reversed when the state authority to ban abortions re-emerges. In other words, impregnable people cannot simply end their reliance or mitigate their losses by taking birth control or abstaining from penile-vaginal intercourse going forward. The nature of the investments is longer-term, deeper, and frequently irreversible. The lengthy temporal distance between the time of the reliance with life-transformative, irreversible effects and the time of revocation [belies] the notion that the reliance or its effects may end upon revocation[.] The ability to engage in these forms of reliance is what underlies the contention that reproductive freedom rights are key elements of gender equality. Abortion and contraception options permit women to make daily choices about their mobility, their careers, and their sexual activity whose repercussions approach (although do not entirely parallel) those enjoyed by most men. Whatever weight these forms of reliance should have had, Justice Alito's failure to acknowledge and credit those forms of reliance as real, and their frustration as true losses, rankled, to put it mildly.

The distinctive challenges of reliance arguments in public law contexts

[When an] error is so serious that it imperils the very legitimacy of the government, overturning the erroneous decision may be imperative. But there are a range of suboptimally decided cases that fall in between tolerable error and a threat to legitimacy. For these cases, in deciding whether to reverse the precedent, a Court should consider whether correcting the error will treat some citizens unfairly. These specific reliance claims allege that even though the error might justify the myriad costs of change from a general perspective, the upending of the precedent would impose unfair, *inequitable* burdens on a subset of the population who had justifiably relied on that precedent.

To be persuasive, however, such arguments about the costs of change need further refinement[.] Were these special reliance-based arguments [credited too broadly], [they] would foreclose the ability to make reforms in light of criticism and information learned from experience. [Such] arguments are particularly challenging for progressive, democratic theorists who regard the status quo as riven with injustice and so are intrinsically disinclined to extend much sympathy to merits-resisting arguments for inertia.

[A] reliance argument in the private law context needs to show that the investments of one party at the behest of another rightfully change the arms-length relationship between them, so that the latter party is precluded from changing course to pursue the action he thinks best (for him and for his interests). Whereas, to distinguish a good reliance claim from a claim grounded in mere disappointment or sour grapes, a reliance argument in the public law context should show that the investments of some citizens at the government's behest justify special deference to them beyond the due consideration of their needs that is inherent in the government's mission and that would otherwise be available through the rough and tumble negotiations and dynamics of democratically shared power.

[A] persuasive reliance argument for staying the course (and, [by hypothesis], affirming a mistake) in the public law setting will be one that shows that the government decision in question produced a justified form of reasonable reliance that significantly and disproportionately affects a subset of the population, who will be substantially and disproportionately burdened by the government's reversal of its prior mistake, and there is a substantial risk that this burden will entrench itself in ways that generate or reinforce a persistent inequity that is resistant to the standard cycles and methods of democratic correction. That is, a persuasive reliance argument will present itself when we cannot in good faith recite the standard responses to those who suffer disappointment and losses on the occasion of any policy change or reconsideration of a prior decision, namely that their interests and the general presumption against shifts and reversals were taken into fair and balanced account, but that the severity of the error and its effect on other populations was important to correct nonetheless; further, should that assessment be wrong, those who suffered a loss that should be corrected have a fair opportunity to persuade their fellow citizens to use the political process to override the decision or to enact remedial measures to soften the blow.

The profile of that subset of the population who can mount an argument that these responses are inapplicable thus should be one that due to its size, situation, or historical treatment, is either unfairly generally disadvantaged politically and socially, or will be made so, as a side-effect, by the decision's reversal. It will be unable to muster (or will be significantly hampered in mustering) the social power to ensure its success at protecting its legitimate interests through the democratic rough and tumble. For such vulnerable groups, when the government induces them to rely, but then changes course, we cannot with a straight face offer them the stock responses about how to wear an anorak when the political winds change. Where the affected citizens are not routinely afforded fair consideration and fair political opportunities, whether by the government or by the social environment, those arguments get less traction. When, further, the mistaken decision elicited reliance whose frustration will otherwise reinforce or exacerbate this disadvantage, there are special reasons to entertain a reliance argument for constancy. For, now, the Court's proceeding to overturn a precedent in the face of this reliance would implicate it in causing or perpetuating an insidious inequity. Although it is often remarked that *stare decisis* should exact less force in the constitutional domain given the relative permanence of constitutional decisions and the barriers to their legal change, the barriers to legal relief for these populations suggest that these reliance-based arguments should have as strong force in the constitutional domain.

Working through the cases

[Some] features of the abortion right and of same-sex intimacy rights distinguish them from gun rights and freedom of contract rights in ways that locate reliance on them in the distinctive space to which I called attention in the last section. The abortion right is directly applicable only to a portion of the population, that portion of the population that is impregnable. Moreover, the impregnable portion of the population, predominantly women but also including nonbinary people and trans men, has been historically oppressed and continues to experience significant social and legal discrimination. Pregnant people, in particular, have, also, specifically experienced significant social and legal discrimination. Further, the effect of a legal right to obtain an abortion is to ameliorate some natural and some social inequalities between the impregnable and the nonimpregnable, including the partial equalization of the gendered medical and personal consequences of sexual and marital activity. These effects in turn facilitate personal independence as well as the short and long-term economic integration of the impregnable into the workforce on equal terms.

The same-sex intimacy example shares much, though not all, of the same structure. [The] effect of the legal right to same-sex intimacy is not only to lift legal sanctions for same-sex intimacy (and eliminate the long-term downstream effects of a criminal record), but to render it legally safe for members of a discrete population to identify publicly as members of that population. This public status allows for more powerful and effective political organizing and more powerful and effective efforts to achieve other forms of social safety, social inclusion and equality, and economic equality.

Although, as I have noted, the constitutional protection of gun rights and freedom of contract does induce reliance under the banner of a constitutionally protected liberty, their protection is not intrinsically or dominantly directed at a discrete segment of the population that has been traditionally oppressed; their protection does not play a role in advancing their equal treatment. Not everyone may take advantage of their ability to own or carry a gun, but the right to carry a gun is applicable to everyone. Further, it is not, predictably or in fact, exercised predominantly by a discrete, vulnerable group in ways that work to remedy a pre-existing inequality. Similar points may be made about the freedom to contract protected by *Lochner*.

Not only do the abortion and intimacy rights benefit a discrete portion of the population and operate to facilitate their greater equality and inclusion, but, further, the reliance they engender may render this portion of the population more vulnerable to discrimination and disadvantage unique to their identity status should those rights be revoked. Those who have come out cannot retract their public identities. Women who relied on the constitutional protections and entered relationships with the intent not to reproduce, or who have located and set down roots in jurisdictions that are more restrictive of reproductive rights, cannot simply unravel these decisions[.] Whereas, if gun rights or freedom of contract rights are retracted, true financial and lifestyle losses may accrue to many gun and business owners, but those losses will not, as a general matter, systematically reinforce vulnerabilities and inequities associated with a disadvantaged population.

***Dobbs* and the Originalists**

Stephen E. Sachs[*]

Was Dobbs bad originalism?

Turn now to the critique of *Dobbs*'s originalism. [Many critics] make some version of the following claim. Prior to 1868, a large number of states followed the common-law rule whereby no indictment lay for an abortion prior to quickening[.] Many states then restricted this practice by statute in the first half of the nineteenth century. Justice Alito argues that more did, others say that fewer did, and the debate is rather contentious.

[W]hat's entirely missing from this debate [is] a coherent explanation of *why any of this quickening business matters*. If chewing gum wasn't prohibited in most states prior to 1868, that doesn't show that a right to chew gum was deeply rooted in this Nation's history and tradition, much less that chewing gum was a fundamental right of citizenship at general law. It just shows that most states chose not to prohibit it at the time. Likewise, burglary was at common law restricted to intrusions at night, but daytime burgling wasn't seen to be a privilege of American citizenship.

In identifying these privileges, what matters isn't just whether states *did* ban chewing gum or daytime burglaries, but whether the American legal

[*] Excerpt from Stephen E. Sachs, Dobbs *and the Originalists*, 47 HARV. J. L. & PUB. POL'Y (2024), https://ssrn.com/abstract=4829599.

system thought they *could*. That is, we'd want to know whether the law regarded chewing gum and daytime burglary as among the inalienable rights of American citizens[.] Rights like these might be subject to state regulation, but they were thought to be immune from state abridgment—just as *Meyer v. Nebraska* later understood the rights "to marry, establish a home and bring up children, . . . privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." On this score, the evidence on abortion is so lopsided as to make the current scholarly debate seem perverse.

[In] some ways, Justice Alito's efforts to show a widespread prohibition of pre-quickening abortion may have done the Court's opinion a disservice. Rather than making a point necessary to win, it was aimed at making the rubble bounce—showing that pre-viability abortion was *so far* from being a right as to have generally been a *crime*. [But] that goes far beyond what anyone needs to show. [What] the *advocates* of an unenumerated right have to show is that state restrictions of the right were prohibited, not just absent. That is, they'd have to show the constitutional right to be deeply rooted in the nation's history and tradition—or, more accurately, to be a privilege of citizenship, inalienable or protected by fundamental positive law (written or customary), and existing "at all times" since the Founding.* While evidence of such customary law can be hard to weigh, we should expect to find not only that state laws generally protected such a right, but also that contrary legislation faced objections from legal authorities concerned about infringing the right. Both the majority and the dissent in *Dobbs* searched for such evidence, and both came up dry.

Does Dobbs show originalism to be bad?

This leaves the critique of Dobbs' originalism in substance: that even if its history is largely correct, we shouldn't be bound by that history, which looks back before women could vote, before the Reconstruction Amendments, even before America was founded—perhaps "as far back," the joint dissenters remarked, "as the 13th (the 13th!) century."

But whether we're bound by that history is a passing strange way to describe the outer limits of rules imposed by the past. If the Fourteenth Amendment had never existed, or if it'd said nothing at all about individual rights, then for good or ill our society would plainly be *less*, rather than more, constrained by the hidebound decisions of past generations.

So the dissent in *Dobbs* tries to hedge its bets on originalism. The dissenters correctly distinguish between an original rule and its present applications, arguing that "applications of liberty and equality can evolve" even "while remaining grounded" in old "constitutional principles." As they see it, the Framers of the Fourteenth Amendment didn't "define rights by

* [These are formulations that Sachs and others have argued best capture the original meaning of the Fourteenth Amendment's Privileges or Immunities Clause, which (in their view) is the aspect of the Amendment that protects some unenumerated rights. —BE]

reference to the specific practices existing at the time," but rather "in general terms, to permit future evolution." That's a standard originalist move: "two Senators from each State includes Hawaii, though Hawaii wasn't a state at the Founding"; a "'19th-century statute criminalizing the theft of goods' applies fully 'to the theft of microwave ovens'"; and so on. But the success of that move depends on the historical claim of linguistic generality being *true*, and on the benighted Framers fortunately having chosen the *right* principle to fix. If the Amendment's authors didn't "perceive women as equals, and did not recognize women's rights," that might be a good historical *explanation* for why they failed to make more specific provision for them—and why the privileges-of-citizenship principle they *did* enact might have failed to include abortion, even as applied to modern facts.

[Of] course, if we want to enact new rights, we still can, as the electoral process since *Dobbs* has repeatedly showed. If we don't, we don't. Other countries have changed their laws on abortion through ordinary elections and legislation; if the absence of constitutional abortion rights didn't bind them to the past, why should it bind us? Only if opposition to abortion were somehow politically unreal, if prolife movements were forever condemned to the role of antediluvian holdovers [and] not ordinary present-day political actors, could we see the absence of constitutional constraint as the dead hand of the past.

B. Congress's Reconstruction Power (39 PAGES)

As you'll recall from earlier in the semester, the Reconstruction Amendments each grant to Congress a power to "enforce" their substantive provisions. Section 5 of the Fourteenth Amendment, for example, provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." (Section 2 of the Thirteenth Amendment and Section 2 of the Fifteenth Amendment are nearly identical.) Taken together, these provisions are sometimes described as granting to Congress a "Reconstruction Power."[*] In this section, we'll consider the scope of this authority.

At the outset, it will help to decompose the question of Congress's authority in this area into two parts. First, what power does Congress have to *identify* certain facts as amounting to a constitutional violation, even where the courts might not interpret the Constitution in the same way on their own? Second, what power does Congress have to *address* properly identified constitutional violations through general or prophylactic legislation, rather than simply leaving it to individuals to sue when their rights are violated? Some of the cases you'll read in this section touch on both questions, but they are not always careful about delineating the two.

The Voting Rights Act of 1965 is one of the most important statutes that Congress has enacted pursuant to its Reconstruction Power, and several of

[*] See, e.g., Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010).

the Court's leading enforcement-power cases thus concern voting rights. (In general, the Court has treated cases about enforcement power under the Fourteenth and Fifteenth Amendments as interchangeable.) In what follows, you'll first read two cases upholding provisions of the VRA: *South Carolina v. Katzenbach* (1966) and *Katzenbach v. Morgan* (1966).[*] You'll then read a series of cases in the Rehnquist and Roberts Courts that have generally taken a narrower view of Congress's authority, although, as you'll see, just how narrow remains uncertain.

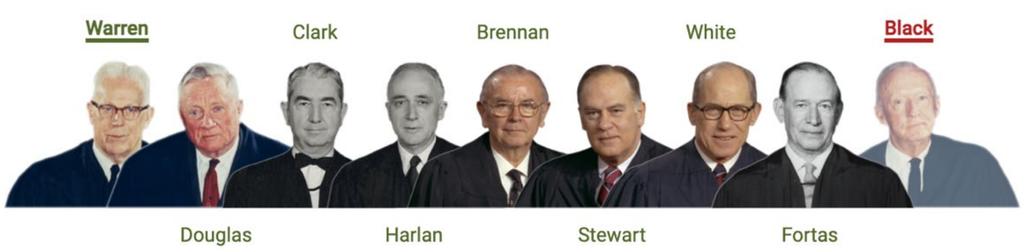
THE VOTING RIGHTS ACT OF 1965

After the Fifteenth Amendment was ratified in 1870, Southern States responded with an array of measures to block ballot access—such as literacy tests, poll taxes, and subjective "character" tests. These were often paired with so-called "grandfather" clauses, exempting would-be voters whose ancestors could have voted (i.e., white people) from the new requirements. Although much of this clearly violated the Fifteenth Amendment, case-by-case litigation against election administrators was of limited use: the litigation was slow and expensive, and when one practice was held unlawful, election administrators often just switched to some other tactic instead.

All of this fueled a movement for federal legislation to better vindicate what the Fifteenth Amendment had already promised. Public support for that legislation grew in March 1965 after millions of Americans saw police officers violently suppress a voting rights march in Selma, Alabama (an event known as "Bloody Sunday") on national television. President Johnson signed the Voting Rights Act (VRA) into law just a few months later. As enacted, the VRA had several key provisions, including a straightforward ban on race discrimination in voting rights, ancillary bans on particular "devices" (such as literacy tests), and a "preclearance" regime that was at issue in *South Carolina v. Katzenbach*, immediately below.

South Carolina v. Katzenbach

383 U.S. 301 (1966)



▪ CHIEF JUSTICE WARREN delivered the opinion of the Court.

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[*] Nicholas Katzenbach, who was a party in both cases, was President Johnson's Attorney General.

[The] Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting. The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant. Section 4(a)–(d) lays down a formula defining the States and political subdivisions to which [certain] new remedies apply. [Section] 5 prescribes [one such] remedy, the suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination. [T]he basic question presented [is]: Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?

Section 1 of the Fifteenth Amendment declares that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." [Section] 2 of the Fifteenth Amendment expressly declares that "Congress shall have power to enforce this article by appropriate legislation." By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in §1.

[The] basic test to be applied in a case involving §2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch* [*supra*, p. II-12]

The Court has subsequently echoed his language in describing each of the Civil War Amendments:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." *Ex parte Virginia* (1880).[*]

[We] therefore reject South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies

[*] [*Ex parte Virginia* was handed down on the same day as *Strauder v. West Virginia* (1880) [*supra*, p. V-32]. It upheld Congress's authority, under section 5 of the Fourteenth Amendment, to prohibit race-based exclusions from jury service and to punish state officials who violated this prohibition. —BE]

or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not circumscribed by any such artificial rules under §2 of the Fifteenth Amendment.

Congress exercised its authority under the Fifteenth Amendment in an inventive manner when it enacted the Voting Rights Act of 1965. First: The measure prescribes remedies for voting discrimination which go into effect without any need for prior adjudication. This was clearly a legitimate response to the problem, for which there is ample precedent under other constitutional provisions. See *Katzenbach* v. *McClung* (1964) [*supra*, p. II-49]; *United States* v. *Darby* (1941) [*supr*a, p. II-38]. Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.

[Second]: The Act intentionally confines these remedies to a small number of States and political subdivisions which in most instances were familiar to Congress by name. This, too, was a permissible method of dealing with the problem. Congress had learned that substantial voting discrimination presently occurs in certain sections of the country. [In] acceptable legislative fashion, [it] chose to limit its attention to the geographic areas where immediate action seemed necessary. The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared. See *Coyle v. Smith* (1911) [*supra*, p. II-89].

[We] now consider the related question of whether the specific States and political subdivisions within §4 (b) of the Act were an appropriate target for the new remedies. South Carolina contends that the coverage formula is awkwardly designed in a number of respects and that it disregards various local conditions[.] These arguments, however, are largely beside the point. Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act. The formula eventually evolved to describe these areas was relevant to the problem of voting discrimination, and Congress was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by §4 (b) of the Act. No more was required to justify the application to these areas of Congress' express powers under the Fifteenth Amendment.

[The jurisdictions with the worst records of voting rights violations—including Alabama, Louisiana, Mississippi, Georgia, South Carolina, and much of North Carolina—]share two characteristics incorporated by Congress into the coverage formula: the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average. Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters. Accordingly, the coverage formula is rational in both practice and theory. It was therefore permissible to impose the new remedies on the few remaining States and political subdivisions covered by the formula, at least in the absence of proof that they have been free of substantial voting discrimination in recent years.

[It] is irrelevant that the coverage formula excludes certain localities which do not employ voting tests and devices but for which there is evidence of voting discrimination by other means. [Legislation] need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience. See *Williamson* v. *Lee Optical Co.* (1955); *Railway Express Agency* v. *New York* (1949).

[After] enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively. Many of the areas directly affected by this development have indicated their willingness to abide by any restraints legitimately imposed upon them. We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment. Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live.[*]

In 1959, a few years before the enactment of the VRA, the Court held in ***Lassiter v. Northampton County Board of Elections*** (1959) that literacy tests were not *per se* unconstitutional (although using such a test as a pretext for racial discrimination would be). The Court reasoned that, "in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise," and that this was at least an "allowable" judgment for the state to make.[†] The Court's next ruling on the VRA, immediately below, concerned Congress's decision to prohibit literacy tests in certain circumstances nonetheless.

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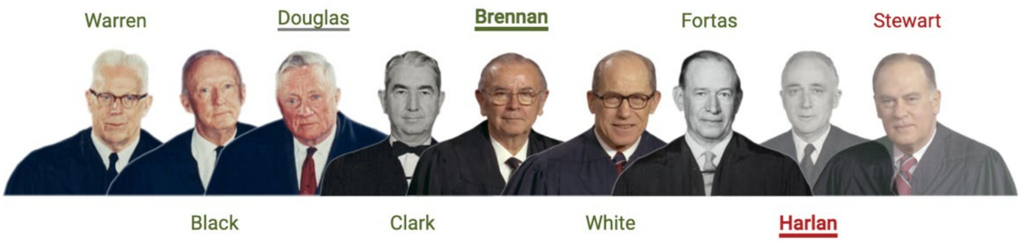
[*] [A partial dissent by JUSTICE BLACK is omitted. —BE]

[†] Similarly, in *Harper v. Virginia* (1966) [*supra*, p. V-209], the Court distinguished *Lassiter* on the ground that, unlike a poll tax, a literacy requirement "ha[d] some relation to [promoting] intelligent use of the ballot."

Katzenbach v. Morgan
384 U.S. 641 (1966)



■ JUSTICE BRENNAN delivered the opinion of the Court.

[Section 4(e)] of the Voting Rights Act of 1965 [provides] that no person who has successfully completed the sixth primary grade in [an accredited school in] Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English. [This bars] the enforcement of the election laws of New York requiring an ability to read and write English. [We hold that] § 4(e) is a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment.

[New York] argues that an exercise of congressional power under § 5 of the 14th Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, [it] urges that § 4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by § 4(e) is forbidden by the Equal Protection Clause itself. We disagree. Neither the language nor history of § 5 supports such a construction. [A] construction [that] would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.[8] It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial

[8] Senator Howard, in introducing the proposed Amendment to the Senate, described §5 as "a direct affirmative delegation of power to Congress," and added:

> "It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment."

This statement of §5's purpose was not questioned by anyone in the course of the debate.

branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment.

Thus our task in this case is not to determine whether the New York English literacy requirement as applied to deny the right to vote to a person who successfully completed the sixth grade in a Puerto Rican school violates the Equal Protection Clause. Accordingly, our decision in [*Lassiter*] is inapposite. *Lassiter* did not present the question before us here: Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement [as] applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the 14th Amendment? In answering this question, our task is limited to determining whether such legislation is, as required by § 5, appropriate legislation to enforce the Equal Protection Clause.

By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the 14th Amendment, the same broad powers expressed in the Necessary and Proper Clause. [Section 2] of the Fifteenth Amendment grants Congress a similar power to enforce by "appropriate legislation" the provisions of that amendment; and we recently held in *South Carolina* v. *Katzenbach* that "[t]he basic test to be applied in a case involving §2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." That test was identified as the one formulated in *McCulloch* v. *Maryland.* [Correctly] viewed, §5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

We therefore proceed to the consideration whether §4 (e) is "appropriate legislation" to enforce the Equal Protection Clause, that is, under the *McCulloch* v. *Maryland* standard, whether §4 (e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is "plainly adapted to that end" and whether it is not prohibited by but is consistent with "the letter and spirit of the constitution."[10]

There can be no doubt that § 4(e) may be regarded as an enactment to enforce the Equal Protection Clause. Congress explicitly declared that it enacted §4 (e) "to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant

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[10] Contrary to the suggestion of the dissent, §5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under §5 is limited to adopting measures to enforce the guarantees of the Amendment; §5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by §5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.

classroom language was other than English." The persons referred to include those who have migrated from the Commonwealth of Puerto Rico to New York and who have been denied the right to vote because of their inability to read and write English, and the Fourteenth Amendment rights referred to include those emanating from the Equal Protection Clause. More specifically, § 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.

Section 4(e) may be readily seen as "plainly adapted" to furthering these aims of the Equal Protection Clause. The practical effect of § 4(e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. [This] enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community.[11] Section 4(e) thereby enables the Puerto Rican minority better to obtain "perfect equality of civil rights and equal protection of the laws." It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interest that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis [here].

[The] result is no different if we confine our inquiry to the question whether § 4(e) was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications. We are told that New York's English literacy requirement originated in the desire to provide an incentive for non-English speaking immigrants to learn the English language and in order to assure the intelligent exercise of the franchise. Yet Congress might well have questioned, in light of the many exemptions provided, and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement, whether these were actually the interests being served. Congress might have also questioned whether denial

[11] [Cf.] the settled principle applied in the *Shreveport Case*, and expressed in *United States* v. *Darby*, that the power of Congress to regulate interstate commerce "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end[.]" *Accord*, *[Heart of] Atlanta Motel* v. *United States.*

of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise. Finally, Congress might well have concluded that as a means of furthering the intelligent exercise of the franchise, an ability to read or understand Spanish is as effective as ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs.

[Since] Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting, see *South Carolina* v. *Katzenbach,* to which it brought a specially informed legislative competence, it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement [to those protected by § 4(e)] constituted an invidious discrimination in violation of the Equal Protection Clause.

■ JUSTICE HARLAN, whom JUSTICE STEWART joins, dissenting.

Worthy as its purposes may be thought by many, I do not see how § 4(e) [can] be sustained except at the sacrifice of fundamentals in the American constitutional system—the separation between the legislative and judicial function and the boundaries between federal and state political authority. By the same token I think that the validity of New York's literacy test, a question which the Court considers only in the context of the federal statute, must be upheld. It will conduce to analytical clarity if I discuss the second issue first.

I

[Applying] the basic equal protection standard, the issue [is] whether New York has shown that its English-language literacy test is reasonably designed to serve a legitimate state interest. I think that it has. [The] same interests recounted in [*Lassiter*] indubitably point toward upholding the rationality of the New York voting test. [The] range of material available to a resident of New York literate only in Spanish is much more limited[.] [The] ballot [is] likewise in English. [And] New York may justifiably want its voters to be able to understand candidates directly, rather than through possibly imprecise translations or summaries[.] [Given] the State's legitimate concern with promoting and safeguarding the intelligent use of the ballot, and given also New York's long experience with the process of integrating non-English-speaking residents into the mainstream of American life, I do not see how it can be said that this qualification for suffrage is unconstitutional. I would uphold the validity of the New York statute, unless the federal statute prevents that result, the question to which I now turn.

II

[The] pivotal question [is] what effect the added factor of a congressional enactment has on the straight equal protection argument dealt with above. The Court declares that [the] test for judicial review [is] simply one of rationality[.] [Although] §5 most certainly does give to the Congress wide powers in the field of devising remedial legislation to effectuate the Amendment's prohibition on arbitrary state action, *Ex parte Virginia* (1880), I believe the Court has confused the issue of how much enforcement power Congress possesses under § 5 with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature.

When recognized state violations of federal constitutional standards have occurred, Congress is of course empowered by § 5 to take appropriate remedial measures to redress and prevent the wrongs. But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the § 5 power into play at all.

[*South Carolina v. Katzenbach*, decided earlier this Term,] serves to illustrate this distinction. [There], we held certain remedial sections of this [statute] constitutional under the Fifteenth Amendment, which is directed against deprivations of the right to vote on account of race. In enacting those sections of the Voting Rights Act the Congress made a detailed investigation of various state practices that had been used to deprive Negroes of the franchise. In passing upon the remedial provisions, we reviewed first the "voluminous legislative history" as well as judicial precedents supporting the basic congressional finding that the clear commands of the Fifteenth Amendment had been infringed by various state subterfuges. Given the existence of the evil, we held the remedial steps taken by the legislature under the Enforcement Clause of the Fifteenth Amendment to be a justifiable exercise of congressional initiative.

Section 4(e), however, presents a significantly different type of congressional enactment. The question here is not whether the statute is appropriate remedial legislation to cure an established violation of a constitutional command, but whether there has in fact been an infringement of that constitutional command, that is, whether a particular state practice [is] so arbitrary or irrational as to offend the Equal Protection Clause[.] That question is one for the judicial branch ultimately to determine. [In] view of this Court's holding in *Lassiter*[,] I do not think it is open to Congress to limit the effect of that decision as it has undertaken to do by §4 (e). In effect the Court reads § 5 [as] giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court. In all such cases there is room for reasonable men to differ as to whether or not a denial of equal protection or due process has occurred, and the final decision is one of judgment. Until today this judgment has always been one for the judiciary to resolve.

I do not mean to suggest [that] a legislative judgment of the type incorporated in § 4(e) is without any force whatsoever. Decisions on questions of equal protection and due process are based not on abstract logic, but on empirical foundations. To the extent "legislative facts" are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect. In [*South Carolina*], such legislative findings were made to show that racial discrimination in voting was actually occurring. Similarly, in *Heart of Atlanta Motel v. United States* [*supra*, p. II-46], and *Katzenbach v. McClung* [*supra*, p. II-49], this Court upheld Title II of the Civil Rights Act of 1964 under the Commerce Clause. There again the congressional determination that racial discrimination in a clearly defined group of public accommodations did effectively impede interstate commerce was based on "voluminous testimony" [before Congress] and in the context of which it passed remedial legislation.

But no such factual data provide a legislative record supporting § 4(e)[3] by way of showing that Spanish-speaking citizens are fully as capable of making informed decisions in a New York election as are English-speaking citizens. Nor was there any showing whatever to support the Court's alternative argument that § 4(e) should be viewed as but a remedial measure designed to cure or assure against unconstitutional discrimination of other varieties, e.g., in "public schools, public housing and law enforcement." [There] is simply no legislative record supporting such hypothesized discrimination of the sort we have hitherto insisted upon when congressional power is brought to bear on constitutionally reserved state concerns.

Thus, we have here not a matter of giving deference to a congressional estimate, based on its determination of legislative facts, bearing upon the validity [of] a statute, but rather what can at most be called a legislative announcement that Congress believes a state law to entail an unconstitutional deprivation of equal protection. Although this kind of declaration is of course entitled to the most respectful consideration, coming as it does from a concurrent branch and one that is knowledgeable in matters of popular political participation, I do not believe it lessens our responsibility to decide the fundamental issue of whether in fact the state enactment violates federal constitutional rights.

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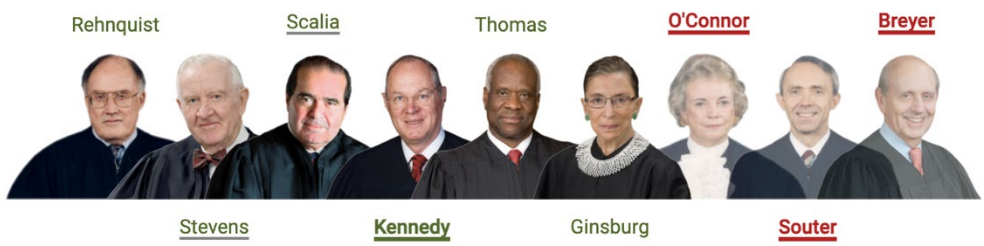
[3] There were no committee hearings or reports referring to this section, which was introduced from the floor during debate on the full Voting Rights Act.

City of Boerne v. Flores

521 U.S. 507 (1997)



▪ JUSTICE KENNEDY delivered the opinion of the Court.

A decision by local zoning authorities to deny a church a building permit was challenged under the Religious Freedom Restoration Act of 1993 (RFRA). The case calls into question the authority of Congress to enact RFRA. We conclude the statute exceeds Congress' power.

II

[Congress] enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990). There we considered a Free Exercise Clause claim brought by members of the Native American Church who were denied unemployment benefits when they lost their jobs because they had used peyote. Their practice was to ingest peyote for sacramental purposes, and they challenged an Oregon statute of general applicability which made use of the drug criminal. In evaluating the claim, we declined to apply the balancing test set forth in *Sherbert v. Verner* (1963), under which we would have asked whether Oregon's prohibition substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling government interest. [*Smith*] held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.

[This] constitutional interpretation [was] debated by Members of Congress in hearings and floor debates. Many criticized the Court's reasoning, and this disagreement resulted in the passage of RFRA. [The] Act's stated purposes are:

> "(1) to restore the compelling interest test as set forth in [*Sherbert*] and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government."

RFRA prohibits "[g]overnment" from "substantially burdening" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." The Act's mandate applies to any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States," as well as to any "State, or . . . subdivision of a State."

III

A

[Congress] relied on its Fourteenth Amendment enforcement power in [imposing] [RFRA's] requirements on the States. [The] parties disagree over whether RFRA is a proper exercise of Congress' 5 power[.]

[Legislation] which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States." For example, the Court upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce provisions of the Fifteenth Amendment as a measure to combat racial discrimination in voting, *South Carolina v. Katzenbach* (1966), despite the facial constitutionality of the tests under *Lassiter v. Northampton County Bd. of Elections* (1959).

[Congress'] power under §5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial," *South Carolina* v. *Katzenbach*. The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.

1*

* [Justice Scalia did not join this subsection of the majority opinion. —BE]

The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause. The Joint Committee on Reconstruction of the 39th Congress began drafting what would become the Fourteenth Amendment in January 1866. [In] February, Republican Representative John Bingham of Ohio reported the following draft amendment to the House of Representatives on behalf of the Joint Committee:

> "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 of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."

The proposal encountered immediate opposition[.] [T]he criticisms had a common theme: The proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure. [The] Amendment in its early form was not again considered. Instead, the Joint Committee began drafting a new [proposal, which] imposed self-executing limits on the States [and granted Congress] the power to make the substantive constitutional prohibitions against the States effective. [After] revisions not relevant here, the new measure passed both Houses and was ratified in July 1868 as the Fourteenth Amendment[.]

2

The remedial and preventive nature of Congress' enforcement power, and the limitation inherent in the power, were confirmed in our earliest cases on the Fourteenth Amendment. In the *Civil Rights Cases* (1883) [*supra*, p. V-33], the Court invalidated sections of the Civil Rights Act of 1875 which prescribed criminal penalties for denying to any person "the full enjoyment of" public accommodations and conveyances, on the grounds that it exceeded Congress' power by seeking to regulate private conduct. [The] power to "legislate generally upon" life, liberty, and property, as opposed to the "power to provide modes of redress" against offensive state action, was "repugnant" to the Constitution. Although the specific holdings of these early cases might have been superseded or modified, see, *e.g., Heart of Atlanta Motel, Inc.* v. *United States* (1964) [*supra*, p. II-46], their treatment of Congress' §5 power as corrective or preventive, not definitional, has not been questioned.

Recent cases have continued to revolve around the question of whether § 5 legislation can be considered remedial. In *South Carolina v. Katzenbach*, [we] upheld various provisions of the Voting Rights Act of 1965, finding them to be "remedies aimed at areas where voting discrimination has been most flagrant," and necessary to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." We noted evidence in the record reflecting the subsisting and pervasive discriminatory—and therefore unconstitutional—use of literacy tests. The Act's new remedies, [including] the suspension of [literacy tests,] were deemed necessary given the ineffectiveness of the existing voting rights laws and the slow costly character of case-by-case litigation.

3

Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law. [There] is language in our opinion in *Katzenbach v. Morgan* which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in §1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one. In *Morgan*, the Court [provided] two related rationales for its conclusion that § 4(e) [of the Voting Rights Act] could "be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government." Under the first rationale, Congress could prohibit New York from denying the right to vote to large segments of its Puerto Rican community, in order to give Puerto Ricans "enhanced political power" that would be "helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community." Section 4(e) thus could be justified as a remedial measure to deal with "discrimination in governmental services." The second rationale, an alternative holding, did not address discrimination in the provision of public services but "discrimination in establishing voter qualifications." The Court perceived a factual basis on which Congress could have concluded that New York's literacy requirement "constituted an invidious discrimination in violation of the Equal Protection Clause." Both rationales for upholding § 4(e) rested on unconstitutional discrimination by New York and Congress' reasonable attempt to combat it.

[If] Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." [*Marbury v. Madison.*] It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

We now turn to consider whether RFRA can be considered enforcement legislation under § 5 of the Fourteenth Amendment.

B

Respondent contends that RFRA is a proper exercise of Congress' remedial or preventive power. The Act, it is said, is a reasonable means of protecting the free exercise of religion as defined by *Smith.* It prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices. To avoid the difficulty of proving such violations, it is said, Congress can simply invalidate any law which imposes a substantial burden on a religious practice unless it is justified by a compelling interest and is the least restrictive means of accomplishing that interest.

[While] preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one. A comparison between RFRA and the Voting Rights Act is instructive. In contrast to the record which confronted Congress and the Judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. [Congress'] concern was with the incidental burdens imposed [by such laws], not the object or purpose of the legislation.

[Regardless] of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional. See *City of Rome v. United States* (1980) (since "jurisdictions with a demonstrable history of intentional racial discrimination . . . create the risk of purposeful discrimination," Congress could "prohibit changes that have a discriminatory impact" in those jurisdictions).

[RFRA] is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments [and] to all federal and state law[.] RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

The reach and scope of RFRA distinguish it from other measures passed under Congress' enforcement power, even in the area of voting rights. In *South Carolina v. Katzenbach*, the challenged provisions were confined to those regions of the country where voting discrimination had been most flagrant, and affected a discrete class of state laws, *i.e.*, state voting laws. Furthermore, [the] coverage under the Act would terminate "at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years." [This] is not to say, of course, that § 5 legislation requires termination dates, geographic restrictions or egregious predicates. Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5.

The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. [Requiring] a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. [Laws] valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. [This] is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion.

[Our] national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. [It] is for Congress in the first instance to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and its conclusions are entitled to much deference. *Katzenbach v. Morgan* [*supra*, p. VI-55]. Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.*

Although the dissenters in *Boerne* did not question the Court's overall account of § 5 power (or the "congruence and proportionality" test), that account is in substantial tension with *Katzenbach v. Morgan* (1966), and it faced powerful criticisms on originalist and other grounds. One originalist

* [Justice Stevens's concurrence, Justice Scalia's concurrence in part (joined by Justice Stevens), Justice O'Connor's dissent (joined by Justice Breyer), Justice Souter's dissent, and Justice Breyer's dissent are all omitted. The dissenters mainly took issue with the Court's adherence to *Employment Division v. Smith* and therefore did not reach the question of whether, assuming *Smith*'s correctness, RFRA was constitutional. —BE]

critique, based on an "intratextual" argument emphasizing the Thirteenth Amendment, follows immediately below.

Intratextualism

Akhil Reed Amar (1999)*

[W]ho in the end should decide the meaning of Reconstruction—Congress or the Supreme Court? The Congress, says the Congress in RFRA. The Supreme Court, says the Supreme Court in *Boerne*. Who is right? This takes us to the relationship between Section 1 and Section 5 of the Fourteenth Amendment and the larger issues of separation of powers and federalism implicated therein.

The words of Section 5 seem simple enough: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Writing for the *Boerne* Court, Justice Kennedy approaches these words in standard clause-bound fashion. To "enforce" Section 1 means to provide remedies for violations of the rights guaranteed by Section 1 (as the Supreme Court has independently interpreted those rights):

> Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

As standard clause-bound arguments go, this seems quite impressive at first. On reflection, however, we can see how a pro-Congress critic might see this passage as perfectly circular and exquisitely question-begging. Congress believes it is not *altering* or *changing* the meaning of free exercise—*Smith* wrongly altered the meaning and Congress is restoring it, *enforcing* its true meaning. Why does the Court's view of *Smith*'s rightness trump Congress's view of its wrongness? Quick allusions to *Marbury* do not easily answer the issue, for even under *Marbury* other branches of the federal government are sometimes allowed to have a broader view of a constitutional right, and to make that broader view stick. (Courts upheld the vile Sedition Act of 1798, but Jefferson deemed the Act unconstitutional and pardoned all concerned.)

Standing alone, the words of Section 5 seem to support Justice Kennedy, though not nearly so much as he thinks. But the words of Section 5 do not stand alone. They are part of a single coherent Constitution and must be read alongside the rest of the document. And when they are, a strong—

* Excerpt from Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

perhaps devastating—objection to Justice Kennedy's overly confident assertions arises, an objection that he does not see because he is reading with blinkers on. Here are the words of Section 2 of the Thirteenth Amendment: "Congress shall have power to enforce this article by appropriate legislation." These words are *in pari materia* [parallel] with the words of Section 5 of the Fourteenth Amendment. A very powerful intratextual presumption arises that these two parallel clauses must be interpreted in parallel fashion. What's sauce for one should be sauce for the other. [But] the framers of the Fourteenth Amendment itself—the Thirty-Ninth Congress—had a broad view of Section 2 of the Thirteenth Amendment. We know this because they adopted the Civil Rights Act of 1866, which swept far beyond merely prohibiting slavery and involuntary servitude, and the basis for their action was Section 2 of the Thirteenth Amendment. At the very moment that they were proposing another "enforcement" clause in the Fourteenth Amendment, they were speaking loud and clear about what the parallel enforcement clause of the Thirteenth Amendment meant. And they said it meant more than mere remedial legislation.

This noteworthy fact about the Thirty-Ninth Congress—which, again, Justice Kennedy never notices because he never sees the freight train coming—seems much stronger than the facts about that Congress that he does mention. He stresses the fact that lawmakers rejected an early draft of the Fourteenth Amendment that in effect would have given Congress plenary legislative power. But there is a large gap between plenary power on one extreme and only remedial power on the other. To reject the former is not to affirm the latter—as is clear if we spend just an instant thinking about Section 2 of the Thirteenth Amendment, under which Congress has less than plenary and more than remedial power. In the Thirteenth Amendment this middle ground is captured by the [judicially recognized] concept of "badges and incidents"[294] of slavery, which Section 1 does not abolish of its own force, but which can be abolished by Congress under Section 2.

Are there comparable middle-ground possibilities for the Fourteenth Amendment? Here are a couple of obvious contenders. Congress could have power to define rights that in good faith it considers truly fundamental and basic, and these rights, once defined—"badges and incidents of freedom and citizenship"—would thereafter be enforceable, even against states, as "privileges" and "immunities" of American "citizens." A more modest position is that even if Congress does not have this broad ontological power to *make* something a national privilege *ipso facto*, surely it should have the epistemic power to make known its views about what is truly fundamental, and have those views treated as powerful evidence of fundamentality in courts. Just as the Supreme Court looks to penal laws on the books to decide what is cruel and unusual in our culture, so it could look

[294] *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) [(upholding 42 U.S.C. § 1982, enacted in the Civil Rights Act of 1866, which provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property")].

to congressional laws as evidence of what is truly fundamental in our culture. Thus in a close case, the Court might in the absence of a congressional declaration decide that a given right was not fundamental, but if Congress were to weigh in on behalf of the right, the Court would consider the issue afresh in light of this new evidence. The *Boerne* case itself, in which Congress sought to support a view of religious freedom that several Justices themselves had embraced in *Smith*, might have seemed an obvious candidate for such a respectful attitude toward the only branch of the federal government mentioned in the Fourteenth Amendment as its enforcer. But the *Boerne* Court would have none of this.

The legislative history that *Boerne* invokes supports my middle-ground positions. [The] rejected draft [of the Fourteenth Amendment is] noteworthy for its intratextual echo of the Article I, Section 8, Necessary and Proper Clause. This clause was associated with broad congressional power in *McCulloch*. It might be thought that the abandonment of this language in the final version of Section 5 signaled a retreat from a broad view of congressional enforcement authority. On the contrary, the framers saw the Enforcement Clause phrase "appropriate legislation" as *equivalent* to the Article I, Section 8 phrase "proper laws." Ordinary dictionaries confirm the obvious etymological link between "proper" and "appropriate." And in one of *McCulloch*'s most famous passages, Marshall cemented this etymological linkage in words that the Thirty-Ninth Congress knew and relied on: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." Only a couple of years after the Fourteenth Amendment became part of our supreme law, the Supreme Court itself quoted this famous passage in full and then declared that "[i]t must be taken then as finally settled, so far as judicial decisions can settle anything, that the words" of the Necessary and Proper Clause were "equivalent" to the word "appropriate." And here is what the Court said in the 1880s [about] the Enforcement Clause of the Thirteenth Amendment: "[It] clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States . . . ."

The *Boerne* Court's self-confident and self-aggrandizing attitude about interpretive power under the Fourteenth Amendment is easy to explain but hard to justify. Perhaps the Court sees itself as the font of all constitutional wisdom and is offended by the audacity of lawmakers who "criticized the Court's reasoning" in *Smith* and who attacked it by name in a statute. At one point the Court tellingly proclaims that "Congress' power to enforce the Free Exercise Clause follows from our [the Court's] holding in *Cantwell v. Connecticut*." I might have thought that Congress's power followed from the Fourteenth Amendment itself, which was merely interpreted (correctly, I might add) in *Cantwell*. Overly exuberant statements of judicial supremacy are in vogue these days, but it is ironic to read all this back into the Fourteenth Amendment, in which Congress (the good guys) drafted emphatic constitutional language to repudiate the arrogant *Dred Scott* Court (the bad guys). Congress did not insist on being the only interpreter of fundamental rights. It was aware that it might one day fall into the wrong hands, and so it created a self-executing Section 1 that courts could enforce on their own. But courts can also at times fall into the wrong hands, as the Thirty-Ninth Congress well knew. Thus the most sensible reading of the Fourteenth Amendment would involve both courts and Congress in the task of protecting truly fundamental rights against states, with states generally held to whichever standard was stricter—more protective of fundamental freedoms—in any given instance.

CONGRESS'S ENFORCEMENT POWER AND IMPLEMENTING RULES

We've noted throughout the semester the distinction between (1) what the Constitution itself might best be taken to require of the parties whom it regulates, and (2) what "implementing" rules courts should employ to guide or circumscribe their own effort at policing those underlying requirements.[*] That distinction underlies another important critique of *Boerne* and the court-centric mindset it reflects. As Michael McConnell, a leading scholar of the Religion Clauses (and a former judge on the Tenth Circuit), explains:

> [W]hen Congress interprets the provisions of the Bill of Rights for purposes of carrying out its enforcement authority under Section Five, it is not bound by the institutional constraints that in many cases lead the courts to adopt a less intrusive interpretation from among the textually and historically plausible meanings of the clause in question. Because these institutional constraints are predicated on the need to protect the discretionary judgments of representative institutions from uncabined judicial interference, there is no reason for Congress—the representatives of the people—to abide by them. Congress need not be concerned that its interpretations of the Bill of Rights will trench upon democratic prerogatives, because its actions are the expression of the democratic will of the people. Indeed, the same institutional constraints that lead the courts, in many cases, to adopt a reading of the Constitution that produces a more modest judicial role should have led the Court to be more respectful of the congressional decision represented by RFRA.[†]

In fact, McConnell observes, Justice Scalia's opinion for the Court in *Employment Division v. Smith* is a case in point, because it

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[*] *See, e.g.*, *supra* pp. I-20, V-19.

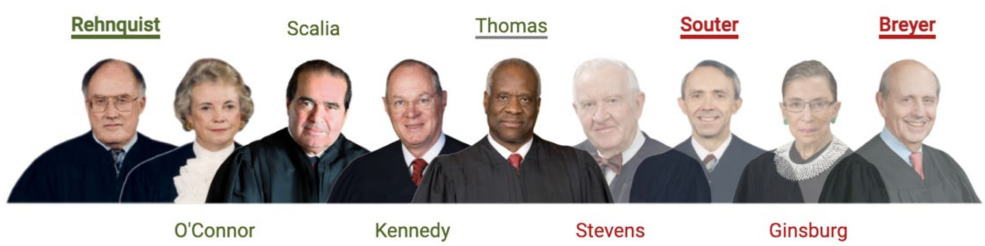
[†] Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 155–57 (1997).

> was based not on what "free exercise of religion" means (either historically or normatively), but on the institutional point that "democratic government," despite its admitted inability to accord full and equal accommodation to all religious denominations, is to be "preferred" to a system in which courts make highly subjective and intrusive judgments that "weigh the social importance of all laws against the centrality of all religious beliefs." In other words, *for purposes of judicial review*, the Court has concluded that the Free Exercise Clause must be given a nondiscrimination interpretation because under the alternative interpretation, unelected courts would assume an unwarranted degree of discretion over a broad range of governmental decisions.

Did the *Boerne* Court just fail to appreciate that judge-made constitutional doctrines do not perfectly track—or, more to the point, do not even *purport* to perfectly track—the underlying demands of the Constitution? And if the Court *did* come to recognize that (much as Justice Scalia did in his dissenting opinion in *Dickerson v. United States* (2000) [*supra*, p. I-19]), what are some areas in which it might then conclude that § 5 legislation could properly depart from the conclusions that the Court has reached in its own individual rights cases?

United States v. Morrison

529 U.S. 598 (2000)



[As we saw briefly in connection with the Commerce Clause (*supra*, p. II-62), *Morrison* involved Congress's authority to enact 42 U.S.C. § 13891, a provision of the Violence Against Women Act (VAWA) that entitled victims of gender-based violence to sue the perpetrator for damages under federal law. After concluding that the law exceeded the commerce power, the Court considered whether the same provision could be upheld as an exercise of Congress' § 5 power.]

▪ CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners' § 5 argument is founded on an assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence. This assertion is supported by a voluminous congressional record. Specifically, Congress received evidence that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions. Congress concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence. Petitioners contend that this bias denies victims of gender-motivated violence the equal protection of the laws and that Congress therefore acted appropriately in enacting a private civil remedy against the perpetrators of gender-motivated violence to both remedy the States' bias and deter future instances of discrimination in the state courts.

[However,] the language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government. Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action.

Shortly after the Fourteenth Amendment was adopted, we decided two cases interpreting the Amendment's provisions, *United States v. Harris* (1883), and the Civil Rights Cases (1883) [*supra*, p. V-33]. In *Harris*, the Court considered a challenge to §2 of the Civil Rights Act of 1871. That section sought to punish "private persons" for "conspiring to deprive any one of the equal protection of the laws enacted by the State." We concluded that this law exceeded Congress' § 5 power because the law was "directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers." [We] reached a similar conclusion in the *Civil Rights Cases*, [holding] that the public accommodation provisions of the Civil Rights Act of 1875, which applied to purely private conduct, were beyond the scope of the § 5 enforcement power.

[Petitioners] argue that, unlike the situation in the *Civil Rights Cases*, here there has been gender-based disparate treatment by state authorities[.] There is abundant evidence, however, to show that the Congresses that enacted the Civil Rights Acts of 1871 and 1875 had a purpose similar to that of Congress in enacting § 13981: There were state laws on the books bespeaking equality of treatment, but in the administration of these laws there was discrimination against newly freed slaves.

[But] even if that distinction were valid, we do not believe it would save § 13981's civil remedy. For the remedy is simply not "corrective in its character, adapted to counteract and redress the operation of such prohibited [s]tate laws or proceedings of [s]tate officers." *Civil Rights Cases*. Or, as we have phrased it in more recent cases, prophylactic legislation under § 5 must have a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*. Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.

In the present cases, for example, § 13981 visits no consequence whatever on any Virginia public official involved in investigating or prosecuting [the victim's] assault. The section is, therefore, unlike any of the § 5 remedies that we have previously upheld. [*See, e.g.*, *Katzenbach v. Morgan*; *South Carolina v. Katzenbach*; *Ex parte Virginia*.]

Section 13981 is also different from these previously upheld remedies in that it applies uniformly throughout the Nation. Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States. By contrast, the §5 remedy upheld in *Katzenbach* v. *Morgan* was directed only to the State where the evil found by Congress existed, and in *South Carolina* v. *Katzenbach,* the remedy was directed only to those States in which Congress found that there had been discrimination.

For these reasons, we conclude that Congress' power under § 5 does not extend to the enactment of § 13981.

▪ Justice Breyer, with whom Justice Stevens joins, dissenting.

Given my conclusion on the Commerce Clause question, I need not consider Congress' authority under § 5 of the Fourteenth Amendment. Nonetheless, I doubt the Court's reasoning rejecting that source of authority. The Court points out that in *United States v. Harris* and the *Civil Rights Cases*, the Court held that § 5 does not authorize Congress to use the Fourteenth Amendment to remedy the conduct of *private persons*. That is certainly so. The Federal Government's argument, however, is that Congress used § 5 to remedy the actions of *state actors*, namely, those States which, through discriminatory design or the discriminatory conduct of their officials, failed to provide adequate (or any) state remedies for women injured by gender-motivated violence—a failure that the States, and Congress, documented in depth.

Neither *Harris* nor the *Civil Rights Cases* considered this kind of claim. The Court in *Harris* specifically said that it treated the federal laws in question as "directed *exclusively* against the action of private persons, without reference to the laws of the State or their administration by her officers" (emphasis added). See also *Civil Rights Cases* (observing that the statute did "not profess to be corrective of any constitutional wrong committed by the States" and that it [simply] established "rules for the conduct of individuals in society towards each other["]).

The Court responds directly to the relevant "state actor" claim by finding that the present law lacks "'congruence and proportionality'" to the state discrimination that it purports to remedy. That is because the law, unlike federal laws prohibiting literacy tests for voting, imposing voting rights requirements, or punishing state officials who intentionally discriminated in jury selection, is not "directed . . . at any State or state actor."

But why can Congress not provide a remedy against private actors? Those private actors, of course, did not themselves violate the Constitution. But this Court has held that Congress at least sometimes can enact remedial "[l]egislation [that] prohibits conduct which is not itself unconstitutional." *Boerne*; see also *Morgan*; *South Carolina*. The statutory remedy does not in any sense purport to "determine what constitutes a constitutional violation." *Boerne*. It intrudes little upon either States or private parties. It may lead state actors to improve their own remedial systems, primarily through example. It restricts private actors only by imposing liability for private conduct that is, in the main, already forbidden by state law. Why is the remedy "disproportionate"? And given the relation between remedy and violation—the creation of a federal remedy to substitute for constitutionally inadequate state remedies—where is the lack of "congruence"?

The majority adds that Congress found that the problem of inadequacy of state remedies "does not exist in all States, or even most States." But Congress had before it the task force reports of at least 21 States documenting constitutional violations. And it made its own findings about pervasive gender-based stereotypes hampering many state legal systems, sometimes unconstitutionally so. The record nowhere reveals a congressional finding that the problem "does not exist" elsewhere. Why can Congress not take the evidence before it as evidence of a national problem? This Court has not previously held that Congress must document the existence of a problem in every State prior to proposing a national solution. And the deference this Court gives to Congress' chosen remedy under § 5 suggests that any such requirement would be inappropriate.[*]

As you just saw, Justice Breyer's dissent essentially concedes the validity of the "state action" requirement in this context, but claims that VAWA's cause of action against private wrongdoers could still be an appropriate *remedy* for state neglect. But you might also recall an alternative approach to the state action question, for purposes of Congress's Reconstruction Power, suggested in an excerpt from a book by Akhil Amar that we read in section IV.A (*supra*, p. IV-27). The *first* sentence of § 1 of the Fourteenth Amendment is not framed in terms of what "[n]o state shall" do—and yet it is within the scope of what § 5 empowers Congress, "by appropriate legislation," to enforce. Could one draw on the Citizenship Clause to mount an

[*] [An additional dissent by JUSTICE SOUTER, joined by JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER, is omitted. —BE.]

argument, parallel to Amar's defense of Reconstruction-era civil rights statutes, in support of VAWA?[*]

THE SCOPE OF THE RECONSTRUCTION POWER TODAY: *SHELBY COUNTY* AND *HIBBS*

We'll conclude with two cases that illustrate the uncertain scope of the Reconstruction Power today. The first (and much better known) is *Shelby County v. Holder* (2013), where the Court returned to the VRA and effectively invalidated the preclearance regime. The second, *Nevada Department of Human Resources v. Hibbs* (2003), illustrates the possible scope for Congress to vindicate its conception of constitutional equality in ways that even some of the Court's more conservative Justices might accept as "congruent and proportional" under *Boerne*.

Understanding *Shelby County* requires a bit more context about developments over the several decades that the VRA had been in force. As originally enacted, the VRA allowed covered jurisdictions to seek to terminate their preclearance obligations after five years. In 1970, however, Congress reauthorized the VRA and extended mandatory preclearance for an additional five years. It did the same in 1975 (for seven years) and 1982 (for twenty-five years). Throughout, the fundamental coverage formula was left unchanged—although the determinations were to be made based on 1968 and eventually 1972 data, rather than the original 1964 data. Finally, in 2006, Congress reauthorized the same regime for another twenty-five years.

In **Northwest Austin Municipal Utility District Number One v. Holder** (2009), the Supreme Court considered a Texas utility district's effort to opt out of preclearance. In an opinion by Chief Justice Roberts, the Court ruled in the district's favor on statutory grounds and noted that this conclusion made it unnecessary to address "serious constitutional questions" about the constitutionality of the preclearance regime. Nonetheless, the Court recited the petitioner's constitutional arguments against the preclearance regime at some length. In addition to other "federalism concerns" about the VRA, the Court explained that

> [the Act] differentiates between the States, despite our historic tradition that all the States enjoy "equal sovereignty." "The doctrine of the equality of States . . . does not bar . . . remedies for *local* evils which have subsequently appeared." *Katzenbach* (emphasis added). But a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it

[*] See Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 105–109 (2000) ("Rather than dwelling on Commerce Clause issues far removed from women's equality, the dissenters would have done better to begin with the Citizenship Clause, and to explain how gender-motivated violence against women can pose a threat to equal citizenship in a manner analogous (though not identical) to the ways that other power structures have threatened the equal citizenship of blacks.").

> targets. [The] evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance.

Four years later, Shelby County, Alabama squarely challenged the constitutionality of its continuing preclearance obligation.*

Shelby County v. Holder

570 U.S. 529 (2013)

▪ CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And § 4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting. [Reflecting] the unprecedented nature of the measures, they were scheduled to expire after five years.

Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031. There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, "the racial gap in voter registration and turnout [was] lower in the States originally covered by § 5 than it [was] nationwide." *Northwest Austin Municipal Util. Dist. No. One v. Holder* (2009). Since that time, Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. At the same time,

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* Richard Re has described *Northwest Austin* and certain other decisions as evincing an "emerging use of constitutional avoidance" that "might be called 'the doctrine of one last chance.'" *The Doctrine of One Last Chance*, 17 GREEN BAG 2d 173, 174 (2014). "Under this doctrine," he says, "the Court must signal its readiness to impose major disruptions before actually doing so." Re observes that "there is good reason to afford notice and postpone decision before causing massive and potentially unexpected disruptions," but "the doctrine should give us pause: by facilitating major legal change, [it] converts a cornerstone principle of judicial restraint into a playbook for judicial action." *Id.*

voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements.

II

In *Northwest Austin,* we stated that "the Act imposes current burdens and must be justified by current needs." And we concluded that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Ibid.* These basic principles guide our review of the question before us.

[The] Federal Government does not [have] a general right to review and veto state enactments before they go into effect. [Outside] the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments, [including the power to regulate elections.]

[Not] only do States retain sovereignty under the Constitution, there is also a "fundamental principle of *equal* sovereignty" among the States. *Northwest Austin* (emphasis added). Over one hundred years ago, this Court explained that our Nation "was and is a union of States, equal in power, dignity, and authority." *Coyle v. Smith* (1911). Indeed, "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Id. Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle operated as a *bar* on differential treatment outside that context. At the same time, as we made clear in *Northwest Austin,* the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.

The Voting Rights Act sharply departs from these basic principles. It suspends "*all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D. C." *Northwest Austin*. States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own[.]

[And] despite the tradition of equal sovereignty, the [preclearance requirement] applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process.

[In] 1966, we found these departures from the basic features of our system of government justified. *Katzenbach*. Several States had enacted a variety of requirements and tests "specifically designed to prevent" African-Americans from voting. Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting[.] [At] the time, the coverage formula—the means of linking the exercise of unprecedented authority with the problem that warranted it—made sense.

[Nearly] 50 years later, things have changed dramatically. [In] the covered jurisdictions, "[voter] turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Northwest Austin.*

[There] is no doubt that these improvements are in large part *because of* the Voting Rights Act. [Yet] the Act has not eased the restrictions in § 5 or narrowed the scope of the coverage formula in § 4(b) along the way. Those extraordinary and unprecedented features were reauthorized—as if nothing had changed.

[Respondents] argue that much of [the improvement] can be attributed to the deterrent effect of § 5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should § 5 be struck down. Under this theory, however, § 5 would be effectively immune from scrutiny; no matter how "clean" the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior.

III

[We] now consider whether [the § 4] coverage formula is constitutional in light of current conditions. When upholding the constitutionality of the coverage formula in 1966, we concluded that it was "rational in both theory and practice." *Katzenbach.* The formula looked to cause (discriminatory tests) and effect (low voter registration and turnout) and tailored the remedy (preclearance) to those jurisdictions exhibiting both.

[Coverage] today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. And voter registration and turnout numbers in the covered States have risen dramatically in the years since.

The Government's defense of the formula is limited. First, the Government contends that the formula is "reverse-engineered": Congress identified the jurisdictions to be covered and *then* came up with criteria to describe them. Under that reasoning, there need not be any logical relationship between the criteria in the formula and the reason for coverage; all that is necessary is that the formula happen to capture the jurisdictions Congress wanted to single out.

The Government suggests that *Katzenbach* sanctioned such an approach, but [*Katzenbach*] reasoned that the coverage formula was rational because the "formula. . . was relevant to the problem[."] Here, by contrast, the Government's reverse-engineering argument does not even attempt to demonstrate the continued relevance of the formula to the problem it targets. And in the context of a decision as significant as this one—subjecting a disfavored subset of States to "extraordinary legislation otherwise unfamiliar to our federal system," *Northwest Austin*—that failure to establish even relevance is fatal.

The Government falls back to the argument that because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States Congress identified back then—regardless of how that discrimination compares to discrimination in States unburdened by coverage. [But] history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the "current need[ ]," *Northwest Austin*, for a preclearance system that treats States differently from one another today, that history cannot be ignored.

[The Fifteenth] Amendment is not designed to punish for the past; its purpose is to ensure a better future. To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past.

[In] defending the coverage formula, the Government, the intervenors, and the dissent also rely heavily on data from the record that they claim justify disparate coverage. The court below and the parties have debated what that record shows. [But] a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day. The dissent relies on "second-generation barriers," which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the §4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution. [Contrary] to the dissent's contention, we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.

The dissent also turns to the record to argue that, in light of voting discrimination in Shelby County, the county cannot complain about the provisions that subject it to preclearance. But that is like saying that a driver pulled over pursuant to a policy of stopping all redheads cannot complain about that policy, if it turns out his license has expired. Shelby County's claim is that the coverage formula here is unconstitutional in all its applications, because of how it selects the jurisdictions subjected to preclearance. The county was selected based on that formula, and may challenge it in court.

[The] dissent proceeds from a flawed premise. It quotes the famous sentence from *McCulloch v. Maryland* with the following emphasis: "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end*, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional" (emphasis in dissent). But this case is about a part of the sentence the dissent does not emphasize—the part that asks whether a legislative means is "consist[ent] with the letter and spirit of the constitution.

[If] Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story.

[In] 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.

Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government." Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

▪ JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

In the Court's view, the very success of § 5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, § 5 remains justifiable,[1] this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments "by appropriate legislation." With overwhelming support in both Houses, Congress concluded that, for two prime reasons, §5 should continue in force, unabated. [That assessment was] well within Congress' province to make and should elicit this Court's unstinting approbation.

I

[The Court recognizes that] "[v]oting discrimination still exists[," b]ut the Court today terminates the remedy that proved to be best suited to block that discrimination. The [VRA] has worked to combat voting discrimination where other remedies had been tried and failed. Particularly effective is the VRA's requirement of federal preclearance for all changes to voting laws in

[1] The Court purports to declare unconstitutional only the coverage formula set out in § 4(b). But without that formula, § 5 is immobilized.

the regions of the country with the most aggravated records of rank discrimination against minority voting rights.

[Although] the VRA wrought dramatic changes in the realization of minority voting rights [including increased minority voter registration and turnout], the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens. [Congress] found that as "registration and voting of minority citizens increas[ed], other measures may be resorted to which would dilute increasing minority voting strength." Efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as "second-generation barriers" to minority voting.

Second-generation barriers come in various forms. One of the blockages is racial gerrymandering, the redrawing of legislative districts in an "effort to segregate the races for purposes of voting." Another is adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority. [A] similar effect could be achieved if the city engaged in discriminatory annexation by incorporating majority-white areas into city limits, thereby decreasing the effect of VRA-occasioned increases in black voting. Whatever the device employed, this Court has long recognized that vote dilution, when adopted with discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot.

[In] the long course of the legislative process [leading to the 2006 reauthorization], Congress "amassed a sizable record." The House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages. The compilation presents countless "examples of flagrant racial discrimination" since the last reauthorization; Congress also brought to light systematic evidence that "intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed."

After considering the full legislative record, Congress made the following findings: The VRA has directly caused significant progress in eliminating first-generation barriers to ballot access, leading to a marked increase in minority voter registration and turnout and the number of minority elected officials. 2006 Reauthorization §2(b)(1). But despite this progress, "second generation barriers constructed to prevent minority voters from fully participating in the electoral process" continued to exist, as well as racially polarized voting in the covered jurisdictions, which increased the political vulnerability of racial and language minorities in those jurisdictions. §§2(b)(2)-(3). Extensive "[e]vidence of continued discrimination," Congress concluded, "clearly show[ed] the continued need for Federal oversight" in covered jurisdictions. §§2(b)(4)-(5). The overall record demonstrated to the federal lawmakers that, "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." §2(b)(9).

[Based] on these findings, Congress reauthorized preclearance for another 25 years[.] The question before the Court is whether Congress had the authority under the Constitution to act as it did.

II

[It] is well established that Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference. The VRA addresses the combination of race discrimination and the right to vote, which is "preservative of all rights." When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height.

[It] cannot tenably be maintained that the VRA [is] inconsistent with the letter or spirit of the Fifteenth Amendment or any provision of the Constitution read in light of the Civil War Amendments. Nowhere in today's opinion, or in *Northwest Austin,*[3] is there clear recognition of the transformative effect the Fifteenth Amendment was aimed to achieve. [The] Civil War Amendments used "language [that] authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality" and provided "sweeping enforcement powers . . . to enact 'appropriate' legislation targeting state abuses." A. Amar, America's Constitution: A Biography (2005). See also McConnell, Institutions and Interpretation: A Critique of *City of Boerne v. Flores,* 111 Harv. L. Rev. 153 (1997) (quoting Civil War-era framer: "[T]he remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative.").

The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States. In exercising that power, then, Congress may use "all means which are appropriate, which are plainly adapted" to the constitutional ends declared by these Amendments. *McCulloch*. So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end. "It is not for us to review the congressional resolution of [the need for its chosen remedy]. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Katzenbach v. Morgan* (1966).

[3] Acknowledging the existence of "serious constitutional questions" does not suggest how those questions should be answered.

III

[The] surest way to evaluate whether [preclearance] remains in order is to see if [it] is still effectively preventing discriminatory changes to voting laws. On that score, the record before Congress was huge. [All] told, between 1982 and 2006, [Justice Department] objections blocked over 700 voting changes [in covered jurisdictions] based on a determination that the changes were discriminatory, [the majority of which] included findings of discriminatory intent[.] [Congress] also received evidence that litigation under § 2 of the VRA was an inadequate substitute for preclearance in the covered jurisdictions. Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency. [And] litigation places a heavy financial burden on minority voters. [The] number of discriminatory changes blocked or deterred by the preclearance requirement suggests that the state of voting rights in the covered jurisdictions would have been significantly different absent this remedy.

[The] evidence just described, of the preclearance's continuing efficacy in blocking constitutional violations in the covered jurisdictions, itself grounded Congress' conclusion that the remedy should be retained in those jurisdictions. [And] Congress was satisfied that the VRA's bailout mechanism[*] provided an effective means of adjusting the VRA's coverage over time. [The] experience [of the bail-out and bail-in provisions] exposes the inaccuracy of the Court's portrayal of the Act as static, unchanged since 1965. [True,] many covered jurisdictions may not have been able to bail out due to recent acts of noncompliance with the VRA, but that truth reinforces the congressional judgment that these jurisdictions were rightfully subject to preclearance, and ought to remain under that regime.

IV

Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court's opinion today. The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story. Without even identifying a standard of review, the Court dismissively brushes off arguments based on "data from the record," and declines to enter the "debat[e about] what [the] record shows." One would expect more from an opinion striking at the heart of the Nation's signal piece of civil-rights legislation.

[The] Court stops any application of § 5 by holding that § 4(b)'s coverage formula is unconstitutional. It pins this result, in large measure, to "the fundamental principle of equal sovereignty." In *Katzenbach*, however, the

[*] [Since 1982, section 4 of the VRA has permitted covered jurisdictions to "bail out" of the preclearance regime. To avail itself of that option, a jurisdiction must establish to a court's satisfaction that it satisfies certain statutory criteria, such as a ten-year record of triggering no objections by DOJ or a federal court to voting changes. —BE]

Court held, in no uncertain terms, that the principle "*applies only to the terms upon which States are admitted to the Union*, and not to the remedies for local evils which have subsequently appeared" (emphasis added).

[The] Court clouds that once clear understanding by citing dictum from *Northwest Austin* to convey that the principle of equal sovereignty "remains highly pertinent in assessing subsequent disparate treatment of States." If the Court is suggesting that dictum in *Northwest Austin* silently overruled *Katzenbach*'s limitation of the equal-sovereignty doctrine to "the admission of new States," the suggestion is untenable. *Northwest Austin* cited *Katzenbach*'s holding in the course of *declining to decide* whether the VRA was constitutional or even what standard of review applied to the question. In today's decision, the Court ratchets up what was pure dictum in *Northwest Austin,* attributing breadth to the equal-sovereignty principle in flat contradiction of *Katzenbach.* The Court does so with nary an explanation of why it finds *Katzenbach* wrong, let alone any discussion of whether *stare decisis* nonetheless counsels adherence to *Katzenbach*'s ruling on the limited "significance" of the equal-sovereignty principle.

[Today's] unprecedented extension of the equal sovereignty principle outside its proper domain—the admission of new States—is capable of much mischief. Federal statutes that treat States disparately are hardly novelties. See, *e.g.,* 26 U.S.C. §142(*l*) (Environmental Protection Agency required to locate green building project in a State meeting specified population criteria); 42 U.S.C. §3796bb(b) (at least 50 percent of rural drug enforcement assistance funding must be allocated to States with "a population density of fifty-two or fewer persons per square [mile]"); §§13925, 13971 (similar population criteria for funding to combat rural domestic violence)[.] Do such provisions remain safe given the Court's expansion of equal sovereignty's sway?

Of gravest concern, Congress relied on our pathmarking *Katzenbach* decision in each reauthorization of the VRA. It had every reason to believe that the Act's limited geographical scope would weigh in favor of, not against, the Act's constitutionality. See, *e.g., United States v. Morrison* (2000)[.] Congress could hardly have foreseen that the VRA's limited geographic reach would render the Act constitutionally suspect. See Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 195 (2007) ("[S]upporters of the Act sought to develop an evidentiary record for the principal purpose of explaining why the covered jurisdictions should remain covered, rather than justifying the coverage of certain jurisdictions but not others.").

[Throwing] out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet. [The] sad irony of today's decision lies in its utter failure to grasp why the VRA has proved effective. The Court appears to believe that the VRA's success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed. With that belief, and the argument derived from it, history repeats itself. The same assumption—that the problem could be solved when particular methods of voting discrimination are identified and eliminated—was indulged and proved wrong repeatedly prior to the VRA's enactment. Unlike prior statutes, which singled out particular tests or devices, the VRA is grounded in Congress' recognition of the "variety and persistence" of measures designed to impair minority voting rights. *Katzenbach*. In truth, the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding.[*]

As noted earlier, the final reading in this section—and in this course!—is *Nevada Department of Human Resources v. Hibbs* (2003). Although *Hibbs* predated *Shelby County*, it seems a better note on which to conclude the semester. What do you think made Congress's exercise of authority here acceptable to Chief Justice Rehnquist, and what other possible statutes might be defensible in broadly parallel terms?

Nevada Department of Human Resources v. Hibbs

538 U.S. 721 (2003)

[The Family and Medical Leave Act (FMLA) entitles all eligible employees to take up to 12 weeks' unpaid leave to care for a family member. It also provides a cause of action to seek damages from any employer, including a public employer, that fails to respect this obligation. Under the Court's "sovereign immunity" precedents—which we have not covered in this class—Congress may only compel States to submit to private suits for money damages when it acts pursuant to the Reconstruction Power (rather than, say, the commerce power). So, in this FMLA suit by a state employee against Nevada, whether the FMLA is a lawful exercise of Congress's § 5 power is the key issue.]

■ CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional. "Congress' power "to

[*] [JUSTICE THOMAS's concurrence, arguing that § 5 is also unconstitutional, is omitted. —BE]

enforce" the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.

[According] to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits. Reliance on such stereotypes cannot justify the States' gender discrimination in this area. *United States v. Virginia* [*supra*, p. V-132]. The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny; here, [the] persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic § 5 legislation.

As the FMLA's legislative record reflects, a 1990 Bureau of Labor Statistics (BLS) survey stated that 37 percent of surveyed private-sector employees were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies. [Thus,] stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread.

Congress also heard testimony that "[p]arental leave for fathers . . . is rare. Even . . . [w]here child-care leave policies do exist, men, *both in the public and private sectors*, receive notoriously discriminatory treatment in their requests for such leave." Many States offered women extended "maternity" leave that far exceeded the typical 4- to 8-week period of physical disability due to pregnancy and childbirth, but very few States granted men a parallel benefit[.] This and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work.

[The] impact of the discrimination targeted by the FMLA is significant. Congress determined:

> "Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be."

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

We believe that Congress' chosen remedy, the family-care leave provision of the FMLA, is "congruent and proportional to the targeted violation." *Boerne*. Congress had already tried unsuccessfully to address this problem through Title VII and the amendment of Title VII by the Pregnancy Discrimination Act. Here, as in *Katzenbach*, Congress again confronted a "difficult and intractable problem," where previous legislative attempts had failed. Such problems may justify added prophylactic measures in response.

By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.

The dissent characterizes the FMLA as a "substantive entitlement program" rather than a remedial statute because it establishes a floor of 12 weeks' leave. In the dissent's view, in the face of evidence of gender-based discrimination by the States in the provision of leave benefits, Congress could do no more in exercising its §5 power than simply proscribe such discrimination. But this position cannot be squared with our recognition that Congress "is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment," but may prohibit "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." For example, this Court has upheld certain prophylactic provisions of the Voting Rights Act as valid exercises of Congress' §5 power, including the literacy test ban and preclearance requirements for changes in States' voting procedures. See, *e.g.*, *Katzenbach v. Morgan*; *South Carolina v. Katzenbach*.

Indeed, in light of the evidence before Congress, a statute mirroring Title VII, that simply mandated gender equality in the administration of leave benefits, would not have achieved Congress' remedial object. Such a law would allow States to provide for no family leave at all. Where "[t]wo-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women," and state practices continue to reinforce the stereotype of women as caregivers, such a policy would exclude far more women than men from the workplace.

Unlike the statute[] at issue in *City of Boerne*, [the] FMLA is narrowly targeted at the fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship. [For] the above reasons, we conclude that [the FMLA's money damages provision] is congruent and proportional to its remedial object, and can "be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*.

■ JUSTICE KENNEDY, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

[The] Court is unable to show that States have engaged in a pattern of unlawful conduct which warrants the remedy of opening state treasuries to private suits. [All] would agree that women historically have been subjected to conditions in which their employment opportunities are more limited than those available to men. As the Court acknowledges, however, Congress responded to this problem by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964,

[The] relevant question, as the Court seems to acknowledge, is whether, notwithstanding the passage of Title VII and similar state legislation, the States continued to engage in widespread discrimination on the basis of gender in the provision of family leave benefits. [Persisting] overall effects of gender-based discrimination at the workplace must not be ignored; but simply noting the problem is not a substitute for evidence which identifies some real discrimination the family leave rules are designed to prevent.

Respondents fail to make the requisite showing. [The] question is not whether the family leave provision is a congruent and proportional response to general gender-based stereotypes in employment which "ha[ve] historically produced discrimination in the hiring and promotion of women"*;* the question is whether it is a proper remedy to an alleged pattern of unconstitutional discrimination by States in the grant of family leave. The evidence of gender-based stereotypes is too remote to support the required showing.[*]

[*] [JUSTICE SOUTER's concurrence, joined by JUSTICE GINSBURG and JUSTICE BREYER; JUSTICE STEVENS's concurrence in the judgment; and a separate dissent by JUSTICE SCALIA, are all omitted. —BE]