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Molar v. Gates

Court of Appeal of California, Fourth Appellate District, Division Two

October 23, 1979

Civ. No. 20517

Reporter

98 Cal. App. 3d 1 *; 159 Cal. Rptr. 239 **; 1979 Cal. App. LEXIS 2250 ***; 12 A.L.R.4th 1197

BARBARA DRETZKA MOLAR, Plaintiff and Respondent, v. BRAD GATES, as Sheriff, etc., et al., Defendants and Appellants

Prior History: [***1] Superior Court of Orange County, No. 279851, Everett W. Dickey, Judge.

Disposition: We conclude that the trial court was correct in holding that plaintiff's right to equal protection was violated under the provisions of both the California and United States Constitutions. The judgment below is affirmed.

Case Summary

Procedural Posture

Defendants, sheriff, board of county supervisors and others, sought review of a judgment of the Superior Court of Orange County (California), which held that defendants' policies that provided minimum security jail facilities to male prisoners, but denied such facilities to female prisoners, violated the equal protection clauses of the state and federal constitutions, and which directed defendant sheriff to end the discriminatory treatment.

Overview

Plaintiff female inmate filed petition for a writ of mandate against defendants, sheriff and county board of supervisors, which challenged defendants' practices that provided minimum security jail facilities for male prisoners, but not for female prisoners. Plaintiff contended that defendants only

maintained a maximum security jail facility for female prisoners, and maintained both minimum and maximum security facilities, with outside job assignment and other privileges, for male prisoners. Defendants contended that [Cal Penal Code §§ 4002](#), [4021](#) and [4029](#) mandated complete separation of men and women in county jails, and that equal treatment required deferral until receipt of funds was provided by the Legislature. The trial court held that defendants had denied female inmates as a class the equal protection of the law as mandated by [Cal. Const. art. I, § 7](#) and [U.S. Const. amend. XIV](#). The trial court held that defendants' reasons met neither the "compelling state interest" test required by the state constitution, nor the "important governmental interest" test required by the federal constitution. The court affirmed and held that defendants violated plaintiff's equal protection rights.

Outcome

The court affirmed the judgment of the trial court and held that plaintiff female inmate's right to equal protection was violated under the state and federal Constitutions. The court held that the trial court's remedy was not void for vagueness, and that defendants sheriff and county board of supervisors were only required to offer the same jail facilities or privileges, and were not required to provide any particular facilities.

LexisNexis® Headnotes

Constitutional Law > Equal Protection > Gender & Sex

Governments > Legislation > Statutory Remedies & Rights

HN1 See [Cal. Penal Code § 4002](#).

Constitutional Law > Equal Protection > Gender & Sex

Governments > Legislation > Statutory Remedies & Rights

HN2 See [Cal. Penal Code § 4021](#).

Constitutional Law > Equal Protection > Gender & Sex

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

Governments > Legislation > Statutory Remedies & Rights

HN3 See [Cal. Penal Code § 4029](#).

Constitutional Law > Equal Protection > Gender & Sex

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN4 In a given case the equal protection provisions of the state constitution demand an analysis different from that which would obtain if only [U.S. Const. amend. XIV](#) is applicable. Because a given case involves a classification based upon gender, California courts apply a standard of review different from that applied by the federal courts under [U.S. Const. amend. XIV](#).

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN5 Both the federal and state courts hold that prisoners do not lose their right to equal protection of the laws upon incarceration.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN6 Equal protection provisions of [Cal. Const. art. I, § 7](#) are possessed of an independent validity from [U.S. Const. amend. XIV](#) so that a decision based upon a determination that the equal protection guaranteed by the state constitution has been violated will stand on the state ground alone.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN7 See [Cal. Const. art. I, § 7](#).

Governments > Legislation > Interpretation

HN8 See [Cal. Const. art. IV, § 16\(a\)](#).

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN9 In evaluating legislative classifications under California's equal protection provisions, the California Supreme Court has adopted the traditional two-level standard of review. Under this bifurcated standard, classifications in the area of economic regulation are presumed to be constitutional, and will stand if they bear some rational relationship to a conceivable legitimate state purpose. Distinctions involving "suspect classifications" or "fundamental interests," however, demand the active and critical analysis referred to as "strict scrutiny." Under strict scrutiny, the state must show both that it has a compelling interest which justifies the classification and that the classification is necessary to further that compelling interest.

Constitutional Law > Equal Protection > Gender & Sex

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN10 Gender-based differentials are to be treated as "suspect classifications" which must be subjected to intense judicial scrutiny to determine if they violate the right to equal protection guaranteed by Cal. Const. art. I, §7. The strict scrutiny-compelling state interest test must govern sex discrimination challenges under Cal. Const. art. I, §7. Classifications predicated on gender are deemed suspect in California.

Constitutional Law > Substantive Due Process > Citizenship

Constitutional Law > Equal Protection > Gender & Sex

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN11 Gender-based classifications, like those based on lineage or race, must be strictly scrutinized irrespective of the nature of the interest implicated because the classifications in and of themselves are an affront to the dignity and self-respect of the members of the class set apart for disparate treatment. Such classifications, sex, race, and lineage, violate the most fundamental interest of all, the interest in being treated by the organized society as a respected and participating member.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN12 The right to liberty is a fundamental interest

under both the California and the United States Constitutions so that a classification scheme affecting the liberty interest must be subjected to the strict standard of review. Prisoners do not lose their liberty interest upon incarceration. Cal. Penal Code § 2600.

Constitutional Law > Equal Protection > Gender & Sex

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN13 "Administrative convenience" is not an adequate state interest to meet the "strict scrutiny" test -- i.e., that it is bureaucratically efficient for an agency to provide its services or allocate its resources through classifications based on race, sex, or some other suspect factor does not render such a classification constitutional. While avoidance of administrative costs is a valid state concern, it cannot justify a suspect classification in the face of the strict scrutiny test -- that budgetary considerations may not be used to exclude certain groups from equal protection of the laws or restrict certain fundamental rights.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

In a class action proceeding by female inmates of county jail facilities, the trial court found that the county's practice of providing minimum security jail facilities with their attendant privileges, including outside work assignments, for male prisoners while denying such facilities and privileges to female inmates was in violation of the equal protection clauses of the state and federal Constitutions, and it directed issuance of a writ of mandate commanding the sheriff and the board of

supervisors to end the discriminatory treatment of female inmates. The court held that the practice of providing minimum security facilities only for men met neither the compelling state interest test required by the state Constitution nor the important governmental interest test required by the federal Constitution. In commanding defendants to end the discriminatory practice, the trial court deferred to defendants' judgment the choice of whether to eliminate such privileges for male inmates or to provide such privileges for female inmates. The court required that defendants apply similar criteria to all inmates, regardless of sex, in determining eligibility for such facilities, except that the order did not require the confinement of male and female inmates in the same facility or the joint participation of male and female prisoners in any program. (Superior Court of Orange County, No. 279851, Everett W. Dickey, Judge.)

The Court of Appeal affirmed. The court held that the trial court correctly analyzed and resolved the equal protection challenge under the state and federal Constitutions to the disparate treatment of female inmates of the county jail, and that the court's mandate was not void for vagueness, ambiguity or unintelligibility. (Opinion by Tamura, J., with Gardner, P. J., and McDaniel, J., concurring.)

Headnotes

[CA\(1\)](#) (1)

Constitutional Law § 76—Equal Protection—Nature and Scope—14th Amendment and State Constitution—Gender Classifications.

-- California courts applying the equal protection provision of the state Constitution apply a different standard of review for a classification based upon gender from that applied by the federal courts under the equal protection provisions of [U.S. Const., 14th Amend.](#)

[CA\(2\)](#) (2)

Constitutional Law § 76—Equal Protection—Nature and Scope—State and Federal Constitutions.

--The equal protection provisions of the state Constitution are possessed of an independent validity from the equal protection provisions of [U.S. Const., 14th Amend.](#), so that a decision based upon a determination that the equal protection guaranteed by the state Constitution has been violated will stand on the state ground alone.

[CA\(3\)](#) (3)

Constitutional Law § 87—Equal Protection—Classification—Judicial Review—Strict Standard of Review for Suspect Classifications or Classifications Touching on Fundamental Interests—State Constitution.

--A two-level standard of review is used in evaluating legislative classification under the equal protection provisions of the state Constitution. Under this bifurcated standard, classifications in the area of economic regulation are presumed to be constitutional, and will stand if they bear some rational relationship to a conceivable legitimate state purpose. Distinctions involving suspect classifications or fundamental interests, however, demand the active and critical analysis referred to as strict scrutiny. Under strict scrutiny, the state must show both that it has a compelling interest which justifies the classification and that the classification is necessary to further that compelling interest.

[CA\(4a\)](#) (4a) [CA\(4b\)](#) (4b)

Constitutional Law § 99—Equal Protection—Bases of Classification—Sex—State Constitution.

--Under the equal protection provisions of the state Constitution, gender-based differentials are to be treated as suspect classifications which must be

subjected to intense judicial scrutiny to determine if they violate the right to equal protection. Gender-based classifications, like those based on lineage or race, must be strictly scrutinized irrespective of the nature of the interests implicated because the classifications in and of themselves are an affront to the dignity and self-respect of the members of the class set apart for disparate treatment.

CA(5) (5)

Constitutional Law § 87—Equal Protection—Classification—Judicial Review—Strict Standard of Review for Suspect Classifications or Classifications Touching on Fundamental Interests—Federal and State Cases.

--In both federal and California cases involving classifications other than sex, the strict scrutiny test must be applied if a classification involves either a suspect classification or a fundamental interest.

CA(6) (6)

Constitutional Law § 101—Equal Protection—Classification—Bases—Criminal Conviction or Acquittal—Incarceration—Right to Liberty.

--The right to liberty is a fundamental interest under the equal protection provisions of both the state and federal Constitutions, so that a classification scheme affecting a liberty interest must be subjected to the strict standard of review. Prisoners do not lose their liberty interest upon incarceration.

CA(7) (7)

Constitutional Law § 94—Equal Protection—Classification—Bases—Sex, Race and Lineage.

--Classifications based on sex, race and lineage violate the most fundamental interest of all, the interest in being treated by the organized society as a respected and participating member.

CA(8a) (8a) CA(8b) (8b) CA(8c) (8c)

Penal and Correctional Institutions § 11—Prisons and Prisoners—Custody and Control of Prisoners—Minimum Security—Equal Treatment of Female and Male Inmates.

--The policy and practices pursued by a county of providing minimum security jail facilities with their attendant privileges, including outside work arrangements, for male prisoners while denying such facilities and privileges to female inmates, violated the equal protection clauses of both the state and federal Constitutions, and thus the trial court, in a proceeding by female inmates challenging such practices, properly issued a writ of mandate directing the county sheriff and the board of supervisors to end the discriminatory treatment of female inmates. Defendants demonstrated no compelling state interest which could be accomplished only by the gender-based classification which they had imposed in allocating use of minimum security facilities.

CA(9) (9)

Constitutional Law § 87—Equal Protection—Classification—Judicial Review—Strict Standard of Review for Suspect Classifications or Classifications Touching on Fundamental Interests—State Constitution—Administrative Convenience or Economy.

--Under the strict scrutiny equal protection test developed under the state Constitution, for suspect classifications or classifications touching on fundamental interests, administrative convenience or administrative economy is not an adequate state interest. The fact that it is bureaucratically efficient for an agency to provide its services or allocate its resources through classifications based on race, sex or some other suspect factor does not render such a classification constitutional. While avoidance of administrative cost is a valid state concern, it cannot justify a suspect classification in the face of

the strict scrutiny test, and budgetary considerations will not be used to exclude certain groups from equal protection of the laws or restrict certain fundamental rights. However, in requiring a governmental unit to end an equal protection violation, the court may consider relative financial as well as social costs in weighing alternative approaches to a solution.

CA(10) (10)

Constitutional Law § 99—Equal Protection—Classification—Bases —Sex—Federal Constitution.

--To withstand a challenge under the equal protection provisions of [U.S. Const., 14th Amend.](#), classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. The need for administrative economy or administrative convenience do not justify gender-based discrimination.

CA(11a) (11a) CA(11b) (11b)

Penal and Correctional Institutions § 11—Prisons and Prisoners—Custody and Control of Prisoners—Equal Treatment of Male and Female Inmates—Statutory Implementation.

--In a proceeding by female inmates of a county jail system claiming that the county's practice of providing minimum security jail facilities with their attendant privileges only for male prisoners while denying such facilities and privileges to female inmates constituted invidious discrimination, the trial court did not err in failing to condition the implementation of its judgment directing the county to cease the discriminatory treatment of female inmates on legislative funding pursuant to [Pen. Code, § 4029](#), mandating the extension to women of jail programs enjoyed by men. The statute does not require that advantageous programs such as a minimum security facility detention be offered to

inmates of county jails, and the trial court in its order, left the county with the option of meeting both statutory and constitutional mandates of equal treatment of male and female prisoners either by discontinuing the privileges presently extended only to male inmates or by taking appropriate steps to extend like privileges to female inmates.

CA(12) (12)

Constitutional Law § 6—Operation, Effect and Construction—Supremacy of Constitutional Provisions.

--Legislative mandates cannot take precedence over constitutional provisions.

CA(13a) (13a) CA(13b) (13b)

Constitutional Law § 83—Equal Protection—Classification —Judicial Review—Remedies—Judicial Discretion.

--In framing the judicial remedy for equal protection violations, courts are vested with wide discretion. Thus, in a proceeding by female inmates of county jail facilities claiming as invidious discrimination the county's practice of providing minimum security jail facilities for male prisoners while denying such facilities to female inmates, the trial court's judgment requiring the county to end such discriminatory practice and to apply similar criteria to all inmates, regardless of sex, in determining eligibility for and in making assignments to minimum security facilities and related work programs was not void for vagueness, ambiguity and unintelligibility. The court merely ordered the end to such discriminatory practices and deferred to the county's judgment whether to extend such facilities to female inmates or whether to eliminate them altogether.

CA(14) (14)

Mandamus and Prohibition § 6—Mandamus—

**Conditions Affecting Issuance—Acts and Duties
Enforceable—Equal Protection Violations.**

--Mandamus was an appropriate remedy to enforce the constitutional right to equal protection of female prisoners to have access to use of minimum security facilities equal to that of the male prisoners.

CA(15) (15)

**Mandamus and Prohibition § 70—Mandamus—
Peremptory Writ —Enforcement—Continuing
Jurisdiction.**

--A court retains continuing jurisdiction to make any orders necessary and proper for the complete enforcement of a peremptory writ of mandamus.

Counsel: Adrian Kuyper, County Counsel, and Arthur C. Wahlstedt, Jr., Assistant County Counsel, for Defendants and Appellants.

Lawrence Buckley and Donald J. Hobson for Plaintiff and Respondent.

Judges: Opinion by Tamura, J., with Gardner, P. J., and McDaniel, J., concurring.

Opinion by: TAMURA

Opinion

[*6] [**242] This appeal involves the constitutionality of the policy and practices pursued by the Sheriff and Board of Supervisors of Orange County of providing minimum security jail facilities with their attendant privileges, including outside work assignments, for male prisoners while denying such facilities and privileges to female inmates. The trial court decided that the practice was violative of the equal protection clauses of the state as well as the federal Constitutions and directed issuance of a peremptory writ of mandate commanding the sheriff and the board of supervisors (defendants) [***2] to end the

discriminatory treatment of female inmates. Defendants appeal from the judgment.

Plaintiff, a female inmate serving a one-year sentence in the county jail, filed a petition for writ of mandate on behalf of herself and all other women who are now or in the future will be sentenced to the Orange County jail to require defendants (1) to permit female inmates to be housed and detained at minimum security branch jails now used exclusively to house male inmates; (2) to apply the same criteria to female applicants as are applied to male applicants in determining their eligibility for such housing; (3) to house female inmates who are eligible for minimum security detention at the minimum security branch jails; and (4) to permit female inmates housed at branch facilities to apply for, and be assigned to, available jobs on the same basis and under the same circumstances as male inmates. The court certified the suit as a proper class action and ordered defendants to show cause why the relief sought in the petition should not be granted.

Defendants answered and the matter was heard and submitted on the pleadings and oral and documentary evidence. The evidence reveals the following [***3] facts about the correctional facilities maintained by Orange County:

[*7] All incarcerated females are housed in the women's jail located in downtown Santa Ana. The building, first occupied in 1968, is a concrete and steel structure with opaque windows so that inmates cannot see out. The inmates sleep in dorms designed to hold 15 prisoners. When not sleeping or working, they may use adjacent day rooms furnished with television, radios, books, magazines, box games and puzzles. They are permitted to see a movie once a week. Outdoor recreation is available 4 hours per week on the roof of the jail in an area approximately 33 feet square. Inmates are permitted to make telephone calls during the recreation periods. Inmates may have visitors five days per week in half hour increments but they are separated from their visitors by a glass partition so

that they cannot hold infants or otherwise touch their guests.

The daily count of female inmates averages 124. The number of sentenced women averages 68 per day and the average number of unsentenced women is 42. In 1977, 2,111 women were sentenced to the Orange County jail. Among sentenced women, two to ten may be serving on a [***4] work furlough program at any one time; the average number of women on work furlough at a given time is two or three.¹ All other sentenced inmates, except those who are ill or refuse to work, perform jobs in the jail facility. Some unsentenced inmates also work, though they are not required to do so. The jobs for the women consist of washing and ironing, cooking, stocking food shelves and serving food, cleaning the kitchen area, mopping and waxing floors, cleaning windows, collecting trash, sewing and mending clothes for male inmates, making mattress covers for the jail system, and serving as beauty [**243] operators. Approximately 57 inmates are utilized in these tasks on a daily basis and a minimum of 35 women are needed to carry out these programs.

Approximately 10 times as many men as women are sentenced to jail in Orange County each year. The men serve their sentences in one of three [***5] jail facilities maintained by the county -- the main men's jail, the Theo Lacy Branch jail, and the James A. Musick Branch jail. The main men's jail is a concrete and steel structure in downtown Santa Ana housing approximately 1,000 inmates. Conditions at the men's main jail were found to be "more onerous" than those of the women's jail. About 45 percent of all males sentenced to jail serve their time at one of the branch jails.

[*8] The Theo Lacy Branch jail (the Lacy facility) is a minimum security facility located near the UCI Medical Center. It is designed to house 400 inmates. Its average daily count on weekdays is

approximately 233; on weekends the influx of those serving weekend sentences brings it close to capacity. The facility consists of an eight-acre campus surrounded by a chain link fence. Inmates are housed in unlocked barracks which provide little privacy, since both guards and prisoners can see into the barracks and toilet facilities. The campus has a library, mess hall, various shops, a central guard station, an athletic field, a handball court, basketball hoop, and horse shoe pitches. Inmates are permitted to move freely about the compound or utilize [***6] the athletic areas during daylight hours when they are not working. There are no telephones for inmates but there is one movie night each week and one television is available for inmates' viewing. Inmates may have visitors for one hour on both Saturday and Sunday and are allowed to shake hands with or kiss their visitors as well as to hold children.

All of the inmates at the Lacy facility are either on work furlough or assigned to jobs within the jail system. Of those men assigned jail system jobs, approximately 31 percent work on the Lacy facility campus; they cook, clean and maintain the yard, clean and polish floors, do minor repairs in the living quarters, barber, launder and mark clothes. About 59 percent of the men have work assignments off campus; they are assigned to the county animal shelter, county service station, environmental management agency, sheriff's department, road department, county transportation, and the forestry division. Their work is supervised by a civilian work crew supervisor, usually an employee of the agency to which the men are assigned.

The James A. Musick Branch jail (the Musick facility) with a capacity of 200 inmates and currently housing approximately [***7] 100 men, is located in a rural area of the county. The facility consists of a 100-acre farm surrounded by a chain link fence topped with barbed wire. All of the men assigned to Musick, except for a small crew, work on the compound; they raise crops, poultry, and livestock, and do the cooking and maintenance

¹ Inmates on work furlough go outside the jail to work at a civilian job during the day and return in the evening.

work for the facility. The men live in barracks with high windows; the barracks are locked from the outside after 10 o'clock at night. The men may use the athletic field and handball court after work during daylight hours, and can move freely about the acre-and-one-half inner compound after dark. Inmates are allowed a one-hour visit on both Saturday and Sunday; they may shake hands or kiss their guest [*9] and hold infants. Once a month, each inmate is permitted a two-hour picnic with visitors in the compound. Once a week there is a movie night; there is a library and there are two televisions for inmates. Inmates do not have telephone privileges.

The court found that inmates assigned to the branch jails undergo substantially less onerous and restrictive confinement than those confined in the main jails; that defendants have pursued the policy and practice of providing [***8] minimum security branch jail facilities and related outdoor work programs only for male inmates and intend to continue that policy and practice unless the law requires them to do otherwise and that by virtue of defendants' policy, female inmates are required to serve their time in the maximum security main jail without being afforded the opportunity for assignment to minimum security facilities and related outdoor work assignments regardless [**244] of whether they meet the criteria applied to male inmates in making assignments to such facilities and programs. The court further found that it was untrue that the gender classification established by defendants was necessary to carry out either their duty to protect inmates from each other or their duty not to permit females to sleep, dress or undress, bathe or perform eliminatory functions in the same room with male inmates.

The court concluded that women inmates as a class were denied the equal protection of the law mandated by the California and United States Constitutions in that the reasons put forward by defendants to justify the policy and practice of providing minimum security facilities and related work programs and privileges [***9] only for men

met neither the "compelling state interest" test required by the California Constitution nor the "important governmental interest" test required by the federal Constitution.²

Although the court concluded that defendants' policy and practice constituted invidious sex discrimination in violation of the equal protection clauses of the state and federal Constitutions, it decided that since defendants were not under a legal duty to provide minimum security facilities and related privileges to any prisoner, it would be inappropriate to grant relief in the form requested by plaintiff. In his memorandum of intended decision, the judge stated that "the determination of the kind of facilities and programs to be provided for county jail inmates, within [*10] budgetary constraints, is best determined by the legislative and executive officials of the County. Their [***10] constitutional duty is to not make an invidious discrimination against female inmates as a class when making such facilities and programs available." Consequently, the court directed that a judgment be entered for the issuance of a peremptory writ of mandate commanding defendants to "(1) end the practice of failing to provide minimum-security branch jail facilities and related work programs for female county jail inmates while providing such facilities and programs for male inmates; and (2) end the practice of denying to inmates all opportunity for assignment to such facilities and programs on the basis of the inmates' sex; and (3) apply similar criteria to all inmates, regardless of sex, in determining eligibility for and in making assignments to such facilities and programs, except that nothing herein shall require the confinement of male and female inmates in the same facility or the joint participation of male and female prisoners in any program." Judgment was entered accordingly.

Defendants appeal contending that the practice of

²The court's findings of fact and conclusions of law are in accordance with its thoughtful and comprehensive memorandum of intended decision.

providing minimum security facilities and their attendant advantageous programs only to male inmates does not offend the equal protection clause of the [***11] state or federal Constitutions. They argue that the trial court erred in using the strict scrutiny test in assessing the validity of the disparate treatment of female prisoners and further, that even under the most rigorous standard of review, there are compelling state interests which justify the difference in treatment. Next, defendants contend that [Penal Code sections 4002, 4021, and 4029](#) legislate complete separation of men and women in county jail facilities and also legislate equal treatment of men and women only upon receipt of funds allocated by the Legislature and that since the trial court did not find these statutes unconstitutional its order for equal protection should have been deferred until the Legislature implements these statutes.³ Defendants

also contend that the [*11] mandate of the court is void for vagueness, ambiguity and unintelligibility. For reasons explained below, we have determined that the trial court correctly analyzed and resolved the equal protection challenge under the state and federal Constitutions to the disparate treatment of female inmates of the county jail [**245] and that the court's mandate is not void for vagueness, ambiguity [***12] or unintelligibility. Accordingly, we have concluded that the judgment should be affirmed.

where appropriate, shall be provided for prisoners of the opposite sex for such purpose.

"(b) Whenever within any county adult detention facility or part of any county detention facility used for the confinement of adults, not including any city jail, any program, service or privilege, including but not limited to any general or vocational education, physical education or recreation, work furlough program, psychological counseling, work within the institution, visiting privileges, or medical treatment, is provided for any prisoner, such a program, service or privilege of equal quality shall be provided for prisoners of the opposite sex, except when the proportion of prisoners of one sex is so small that the cost of providing any program, service or privilege described in this subdivision, other than medical treatment or health maintenance, for such prisoners would not be justified in relation to the reduction in the level of any other program, service or privilege that would result from the diversion of funds for such purpose.

"(c) Nothing in this section shall require the establishment of any facility for the use of, or the making available of any program, service or privilege to, any prisoner. Nothing in this section shall require any facility, program, service or privilege established or available prior or subsequent to the effective date of this section to be made available to any particular male or female prisoner or number of such prisoners, except that any type of facility, program, service or privilege which is made accessible or available to all male or female prisoners in any class defined by subdivisions 1, 2, and 3 of Section 4001 shall be made accessible or available to all prisoners of the opposite sex in such class as provided in subdivisions (a) and (b), and any criterion other than the sex of the prisoner which is used for the selection of a particular prisoner or group of prisoners to have, or to have access to, any facility, program, service or privilege shall be equally applied to the selection of all prisoners, regardless of sex.

"(d) Every county shall comply with subdivisions (a), (b), and (c) by January 1, 1979. Such compliance shall not be required unless the Legislature provides funds to assist in the accomplishment of such compliance. Every county shall report to the Legislature by January 1, 1976, as to whether such compliance can be accomplished, and stating the reasons why it cannot be accomplished if that be the case."

³ [Penal Code section 4002](#) provides: [HN1](#) "Persons committed on criminal process and detained for trial, persons convicted and under sentence, and persons committed upon civil process, must not be kept or put in the same room, nor shall male and female prisoners (except husband and wife) sleep, dress or undress, bathe, or perform eliminatory functions in the same room. Nothing in the section shall be construed to impose any requirement upon a county to confine male and female prisoners in the same or an adjoining facility or impose any duty upon a county to establish or maintain programs which involve the joint participation of male and female prisoners."

[Penal Code section 4021](#) provides: [HN2](#) "Whenever any female prisoner or prisoners are confined in any county jail in the state, and no regular jail female deputy sheriff has been appointed, there shall be designated by the sheriff some suitable woman who shall have immediate care of such female prisoner or prisoners, and who shall be paid out of the general fund of the county upon claims to be presented and allowed by the board of supervisors as other claims against the county. It shall be unlawful for any officer or jailer to search the person of any prisoner of the opposite sex, or to enter into the room or cell occupied by any prisoner of the opposite sex, except in the company of a deputy sheriff of the same sex as the prisoner."

[Penal Code section 4029](#) provides: [HN3](#) "(a) Whenever within any county adult detention facility or part of any county detention facility used for the confinement of adults, not including any city jail, any facility, including but not limited to any room or cell, vocational training facility, recreation area, rest area, dining room, store, or facility for the exercise of religious freedom, is provided for use by any prisoner for any purpose, a separate facility of equal quality, or separate use of the same facility, or joint use of the same facility

[***13] [*12] I

Constitutionality of Differential Treatment of Men and Women in the Orange County Jail System

CA(1) (1) HN4 In a given case the equal protection provisions of our state Constitution "demand an analysis different from that which would obtain if only the [Fourteenth Amendment] were applicable." (*Serrano v. Priest*, 18 Cal.3d 728, 764 [135 Cal.Rptr. 345, 557 P.2d 929].) This is such a case because it involves a classification based upon gender, to which California courts have applied a standard of review different from that applied by the federal courts under the Fourteenth Amendment. Accordingly, in the ensuing discussion we analyze separately plaintiff's equal protection [**246] claims under the state and federal Constitutions.⁴

[***14] 1. Equal Protection Under the California Constitution

CA(2) (2) We start with the proposition that HN6 equal protection provisions of the California Constitution are "possessed of an independent validity" from the Fourteenth Amendment so that a decision based upon a determination that the equal protection guaranteed by the state Constitution has been violated will stand on the state ground alone.⁵

⁴ HN5 Both the federal and state courts hold that prisoners do not lose their right to equal protection of the laws upon incarceration. (See *Wolff v. McDonnell*, 418 U.S. 539, 556 [41 L.Ed.2d 935, 950-951, 94 S.Ct. 2963]; *Jackson v. Godwin*, 400 F.2d 529, 541-542; *Washington v. Lee*, 263 F.Supp. 327, 331, affd. 390 U.S. 333 [19 L.Ed.2d 1212, 88 S.Ct. 994]; *In re Kapperman*, 11 Cal.3d 542 [114 Cal.Rptr. 97, 522 P.2d 657]; *In re Jones*, 57 Cal.2d 860, 862 [22 Cal.Rptr. 478, 372 P.2d 310]; *In re Hutchinson*, 23 Cal.App.3d 337, 341 [100 Cal.Rptr. 124]; *Denial of Work Release Programs to Women: A Violation of Equal Protection* (1974) 47 So.Cal.L.Rev. 1453, 1462-1463, fn. 68.)

⁵ Article I, section 7 of the California Constitution provides: HN7 "(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.

"(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges

(*Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, 24 Cal.3d 458, 469 [156 Cal.Rptr. 14, 595 P.2d 592]; *Serrano v. Priest* (*Serrano II*), *supra*, 18 Cal.3d 728, 764; *Dept. of Mental Hygiene v. Kirchner* (*Kirchner II*), 62 Cal.2d 586, 588 [43 Cal.Rptr. 329, 400 P.2d 321, 20 A.L.R.3d 361]; see note, *Camping on Adequate State Grounds: California Ensures the Reality of Constitutional Ideals* (1977) 9 Sw.U.L.Rev. 1157.)

[***15] CA(3) (3) HN9

[*13] In evaluating legislative classifications under this state's equal protection provisions, our Supreme Court has adopted the traditional two-level standard of review. (*Hawkins v. Superior Court*, 22 Cal.3d 584, 592 [150 Cal.Rptr. 435, 586 P.2d 916]; *Serrano v. Priest*, 5 Cal.3d 584, 597 [96 Cal.Rptr. 601, 487 P.2d 124]; *Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 16 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351]; see *Arp v. Workers' Comp. Appeals* [**247] *Bd.*, 19 Cal.3d 395 [138 Cal.Rptr. 293, 563 P.2d 849]; *Westbrook v. Mihaly*, 2 Cal.3d 765, 784-785 [87 Cal.Rptr. 839, 471 P.2d 487]; *Purdy & Fitzpatrick v. State of California*, 71 Cal.2d 566, 578-579 [79 Cal.Rptr. 77, 456 P.2d 645, 38 A.L.R.3d 1194].) Under this bifurcated standard, classifications in the area of economic regulation are presumed to be constitutional, and will stand if they bear some rational relationship to a conceivable legitimate state purpose. Distinctions involving "suspect classifications" or "fundamental interests," however, demand the active and critical analysis referred to as "strict scrutiny." Under strict scrutiny, the state must [***16] show both that it has a *compelling interest* which justifies the classification and that the classification is *necessary* to further that compelling interest. (*Westbrook v. Mihaly*, *supra*, 2 Cal.3d 765, 784-785.)

In *Sail'er Inn, Inc. v. Kirby*, *supra*, 5 Cal.3d 1, a

or immunities granted by the Legislature may be altered or revoked."

Article IV, section 16, subdivision (a), of the California Constitution provides: HN8 "(a) All laws of a general nature have uniform operation."

female citizen challenged the constitutionality of a California law prohibiting women from tending bar unless they or their husbands held the liquor license on equal protection grounds. Our Supreme Court held that the bartending law was indeed unconstitutional under the equal protection clauses of the state and federal Constitutions and in doing so declared that "classifications based upon sex should be treated as suspect." (*Id.*, at p. 17.)

CA(4a) (4a) *Sail'er Inn* thus clearly established the principle that **HN10** gender-based differentials are to be treated as "suspect classifications" which must be subjected to intense judicial scrutiny to determine if they violate the right to equal protection guaranteed by the state Constitution. (*Id.*, at pp. 17-20.) The Supreme Court has consistently reaffirmed this principle. Thus, in *Arp v. Workers Comp. Appeals Bd.*, *supra*, 19 Cal.3d 395, 400, the court [***17] stated that "the strict scrutiny/compelling state interest test must govern sex discrimination challenges under *article I, section 7, of the California Constitution*," and in *Hardy v. Stumpf*, 21 Cal.3d 1, 7 [145 Cal.Rptr. 176, 576 P.2d 1342], the court acknowledged that "[classifications] predicated on gender are deemed suspect in California."

[*14] Defendants argue, nevertheless, that strict scrutiny does not apply in gender discrimination cases in California unless there is also a fundamental right or interest involved. To support this argument, they cite the following language of *Sail'er Inn, Inc. v. Kirby*, *supra*, 5 Cal.3d 1, 20: "We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment."

CA(5) (5) In both federal and California cases involving classifications other than sex, the courts have consistently stated that if a classification involves either a suspect classification or a fundamental interest, strict scrutiny must be applied. (E.g., *Shapiro v. Thompson*, 394 U.S. 618 [22 L.Ed.2d 600, 89 S.Ct. 1322]; *Harper*

*v. [***18] Virginia State Board of Elections*, 383 U.S. 663 [16 L.Ed.2d 169, 86 S.Ct. 1079]; *Korematsu v. United States*, 323 U.S. 214 [89 L.Ed. 194, 65 S.Ct. 193]; *Serrano v. Priest (Serrano II)*, *supra*, 18 Cal.3d 728, 761; *Westbrook v. Mihaly*, *supra*, 2 Cal.3d 765, 784-785; *Purdy & Fitzpatrick v. State of California*, *supra*, 71 Cal.2d 566, 578-579; see Bice, *Standards of Judicial Review under the Equal Protection and Due Process Clauses* (1977) 50 So.Cal.L.Rev. 689, 693-698; Tribe, *Sex Discrimination and Equal Protection: Do We Need A Constitutional Amendment?* (1971) 84 Harv.L.Rev. 1499, 1503.) In its *Sail'er Inn* pronouncement that sex-based classifications are "suspect," the California Supreme Court reiterated this disjunctive language, though it also said that the gender discrimination with which it dealt involved a fundamental right as well. ⁶ [***20] (*Sail'er Inn, Inc. v. Kirby*, *supra*, 5 Cal.3d 1, 16-17.) In *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 18 [112 Cal.Rptr. 786, 520 P.2d 10], the court dispelled any doubt that *Sail'er Inn* established the proposition that sex-based discrimination in and of itself is the basis [***19] for strict scrutiny. The court emphasized: "The fundamental thrust of *Sail'er Inn* is against discrimination on the basis of sex, a classification which is clearly 'suspect' and therefore subject *on that basis* to review under the 'strict scrutiny' test." (Italics added.) And in its most recent [*15] decision involving gender classification, *Arp v. Workers' Comp. Appeals Bd.*, *supra*, 19 Cal.3d 395, the court's entire analysis is based upon the invidious discrimination wrought by the gender

⁶On the federal level the stricter standard of review has not been reserved only for cases in which gender-based classifications are linked with rights which approach the fundamental level. This is illustrated by *Craig v. Boren*, 429 U.S. 190 [50 L.Ed.2d 397, 97 S.Ct. 451], and *Reed v. Reed*, 404 U.S. 71 [30 L.Ed.2d 225, 92 S.Ct. 251]. As discussed in the text below, the United States Supreme Court brought to bear a stricter analysis than the "rational basis" test in these cases, yet *Reed* dealt with whether a woman may be passed over as an administrator of an estate in favor of a man, while *Craig* decides the less than weighty issue of whether teenage boys can be barred from purchasing beer while their female counterparts of the same age are allowed to buy beer.

classification without any discussion of the presence or absence of a fundamental right or interest.⁷ Finally, as we noted earlier, in [Hardy v. Stumpf, supra, 21 Cal.3d 1, 7](#), the court declared **[**248]** without qualification that gender classifications are deemed suspect in California.

In *Sail'er Inn*, Justice Peters, writing for a unanimous court, eloquently expressed the reasons why classifications based on sex should be subject to the same strict scrutiny applied in reviewing suspect classifications such as those based on race, lineage or national origin: "An analysis of classifications which the Supreme Court has previously designated as suspect reveals why sex is properly placed among them . . . [para.] Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates **[***21]** sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. [Citations.] The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. [Citations.] Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.

"Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. [Citations.] Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. Like black citizens, they

were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states. They are excluded from or discriminated against in employment and educational opportunities. Married women in particular have been **[***22]** treated as inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts.

[*16] "Laws which disable women from full participation in the political, business and economic arenas are often characterized as 'protective' and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage." ([5 Cal.3d at pp. 18-20.](#))

[CA\(4b\)](#) (4b) For reasons expressed by Justice Peters, [HN11](#) gender-based classifications, like those based on lineage or race, must be strictly scrutinized irrespective of the nature of the interest implicated because the classifications in and of themselves are an affront to the dignity and self-respect of the members of the class set apart for disparate treatment. [CA\(6\)](#) (6) (See fn. 8.) (See Karst, *The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment* (1977) 91 Harv.L.Rev. 1, 5-9, 26, 56-59. ⁸) [CA\(7\)](#) (7) Such classifications -- sex, race

⁸ Although we have concluded that sex-based classification demands strict judicial scrutiny irrespective of the interest affected, in the case at bench, a fundamental interest may also be affected.

[HN12](#) The right to liberty is a fundamental interest under both the California and the United States Constitutions so that a classification scheme affecting the liberty interest must be subjected to the strict standard of review. ([People v. Saffell, 25 Cal.3d 223, 228 \[157 Cal.Rptr. 897, 599 P.2d 92\]](#); [People v. Olivas, 17 Cal.3d 236, 251 \[131 Cal.Rptr. 55, 551 P.2d 375\]](#).) Prisoners do not lose their liberty interest upon incarceration. ([Pen. Code, § 2600](#); see [In re Reynolds, 25 Cal.3d 131, 133 \[157 Cal.Rptr. 892, 599 P.2d 86\]](#); [In re Brandt, 25 Cal.3d 136, 137 \[157 Cal.Rptr. 894, 599 P.2d 89\]](#).) The classification in question may be said to affect the residual liberty interest which women inmates retain despite their incarceration in that it denies them the opportunities afforded male inmates to serve their terms in minimum security facilities with the attendant

⁷ Since [Arp v. Workers' Comp. Appeals Bd., supra, 19 Cal.3d 395](#), involved a widower's right to claim maximum death benefits on the same basis as a widow, it is arguable that the issue of a property right or "vested interest" was present in the case. (See [Strumsky v. San Diego County Employees Retirement Assn., 11 Cal.3d 28 \[112 Cal.Rptr. 805, 520 P.2d 29\]](#).) Nevertheless, we think that the court's total reliance on the "suspect" gender classification in *Arp* is significant for the above analysis.

and lineage -- violate "the most fundamental interest of all, the interest in being treated [***23] by the organized society as a respected and participating member." (Karst, *The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment* (1977) 91 Harv.L.Rev. 1, 33.)

[***24] Defendants urge that we should apply an intermediate standard of review rather than the traditional two-tiered analysis. That a middle-tiered standard has not yet [**249] been adopted in California is amply borne out by the discussion of equal protection doctrine found in the majority opinion and separate concurring opinions of Justice Mosk and Chief Justice Bird in [Hawkins v. Superior Court, supra, 22 Cal.3d 584](#). Furthermore, in light of the repeated affirmations by our Supreme Court that gender-based classifications are suspect and on that basis alone are subject to strict scrutiny, even if the Supreme Court should adopt an intermediate level of analysis, we are satisfied that sex-based [*17] classifications will continue to be subjected to the highest level of review.⁹

[***25] [CA\(8a\)](#) (8a) We now apply the strict scrutiny test as it has been developed under the California Constitution to the case at bench. In defense of their policy of excluding women from minimum facilities, defendants argue that they have a compelling interest in protecting women in the jail system from sexual assaults and that the only effective way to do this is to keep men and women completely separated at all times.¹⁰ They further

privileges.

⁹ We note, as Chief Justice Bird points out in her concurring opinion in [Hawkins v. Superior Court, supra, 22 Cal.3d at page 610](#), that Professor Tribe has suggested that the United States Supreme Court has probably underclassified gender-based discriminations. (Tribe, *American Constitutional Law* (1978) p. 1089.) We further note that Professor Karst predicts that under the Fourteenth Amendment "classifications based on sex will soon be at least fundamentally 'suspect.'" (Karst, *The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment* (1977) 91 Harv.L.Rev. 1, 54.)

¹⁰ Defendants also argue that [Penal Code sections 4002, 4021](#), and

argue that the small number of women who could take advantage of the opportunity for a minimum security program, the large number of inmates needed to perform labor essential to maintain the women's jail and the need to run the jails as economically as possible are sufficient justifications to render this gender-based classification constitutional.

[CA\(9\)](#) (9) In the course of developing "strict scrutiny" analysis, it has been established that [HN13](#) "administrative [***26] convenience" is not an adequate state interest to meet that test -- i.e., that it is bureaucratically efficient for an agency to provide its services or allocate its resources through classifications based on race, sex, or some other suspect factor does *not* render such a classification constitutional. ([Arp v. Workers' Comp. Appeals Bd., supra, 19 Cal.3d 395, 409](#).) The Supreme Court has also held repeatedly that while avoidance of administrative costs is a valid state concern, it cannot justify a suspect classification in the face of the strict scrutiny test -- that budgetary considerations may not be used to exclude certain groups from equal protection of the laws or restrict certain fundamental rights. ([Young v. Gnos, 7 Cal.3d 18, 28 \[101 Cal.Rptr. 533, 496 P.2d 445\]](#); [Castro v. State of California, 2 Cal.3d 223, 241-242 \[85 Cal.Rptr. 20, 466 P.2d 244\]](#).)¹¹

[***27] [*18] [CA\(8b\)](#) (8b) We agree that the county has a compelling interest in protecting female jail inmates from sexual assault while they are incarcerated; one of the primary goals of prison administration is physical protection of the inmates. However, we cannot agree that the necessary and only effective way to do this is to deny to women inmates privileges and programs available to male inmates. We fail to find a logical and substantial

[4029](#) mandate such complete separation. We deal with this contention in some detail below.

¹¹ However, in requiring a governmental unit to end an equal protection violation, the court may consider relative financial as well as social "costs" in weighing alternative approaches to a solution. ([Crawford v. Board of Education, 17 Cal.3d 280, 309-310 \[130 Cal.Rptr. 724, 551 P.2d 28\]](#).)

relationship between the *goal* expressed by defendants -- protection -- and its attainment by denying female inmates the opportunity to be incarcerated in a minimum security facility. It is *not* placement in minimum security which will arguably put women in physical danger; rather, it is placement in minimum security facilities without adequate separation or protection from male inmates and jailers. Defendants state that the reason for not building separate **[**250]** minimum security facilities for women is the expense such construction would involve. Their "protection" argument is thus nothing more than a defense based on the "administrative costs" of providing equal facilities and programs for women. As we explained above, budgetary considerations **[***28]** do not justify governmental violation of the right to equal protection of the laws.

Nor are we persuaded by defendants' additional arguments to support the constitutionality of the gender-based classification; namely, that the small number of women inmates, the number of inmates needed to maintain the women's jail, and the need to run an efficient jail justify the difference in treatment. Initially, we note that the fact that some 2,111 women were sentenced to jail in Orange County in 1977 indicates that the number of women who could potentially take advantage of a minimum security program is not insignificant or negligible. Next, we point out that to argue that a group of people is too small in number to be afforded a constitutional right is merely another argument that the right to equal protection should hinge on "administrative convenience." The argument that women cannot be sent to minimum security facilities because the county would be forced to hire civilian personnel to maintain the women's jail is also based on "administrative convenience" and as such cannot withstand strict scrutiny. Likewise, the contention that it is too expensive to provide minimum security for both **[***29]** men and women, so that women must wait for such privileges until additional funds are available, based as it is on a consideration of administrative costs must also fail.

Defendants contend that the decision in [*Long v. State Personnel Bd.*, 41 Cal.App.3d 1000 \[116 Cal.Rptr. 562\]](#), requires reversal of the trial **[*19]** court's holding in the instant case. In *Long*, a female prison chaplain applied for a chaplain's job at a training center for young male offenders aged 18 to 23 years operated by the California Youth Authority. Upon being denied the position because of her sex, she challenged the State Personnel Board's decision on the ground of equal protection. The trial court's judgment denying a writ of mandate was affirmed by the Court of Appeal. Defendants point to that part of the *Long* decision rejecting the argument that the addition of security guards, alarm systems and some building reconstruction would make it safe for a female chaplain to function in a male youth facility, to support their argument that in the instant case budgetary and administrative concerns render their gender-based classification of male and female inmates constitutional.

The section **[***30]** of the *Long* opinion on which defendants rely is inapposite to this case. In rejecting the female chaplain's contention that guards, alarms, and other protections should be provided so that she could safely pursue her career as a chaplain in the youth authority setting, the court was dealing with the question of sex discrimination in employment. In doing so, the court adopted a standard of review akin to the "bona fide occupational qualification" of the 1964 Civil Rights Act and held that an employer is not required "to alter substantially his facility and procedure to suit the sex of the person involved." ([*Id.*, at p. 1015.](#))¹² But, it is the court's analysis of the interests of the prisoners in the youth facility and of the state that is relevant to the present case.

¹²We are not convinced that the "bona fide occupational qualification," developed to meet the statutory needs of the Civil Rights Act of 1964 rather than the constitutional requirements of strict scrutiny (see [*Long v. State Personnel Board*, *supra*, 41 Cal.App.3d 1000, 1015-1018](#)) is an adequate test of the constitutionality of an employment classification based on sex. As we note in the text, however, such considerations are not apposite to the decision in the instant case.

In this regard, the court concluded the inmates' interests in privacy, comfort and rehabilitation and the state's interest in their rehabilitation were irreconcilable with the chaplain's interest in employment at the facility -- that these interests could not be met while a woman was functioning as the facility's chaplain. "Thus, the interests of the public and those of the inmates are **[**251]** substantially **[***31]** different from those of the petitioner and the members of her class. The former interests are so overwhelming as to constitute a compelling state interest in the male-only classification, thus satisfying equal protection standards. The classification is clearly necessary to further this interest." (*Id.*, at p. 1014.) Defendants, unlike those in *Long*, have demonstrated no compelling **[*20]** state interest which can be accomplished *only* by the gender-based classification which they have imposed in allocating minimum security facilities.

[*32]** Having explained our conclusion that women inmates of the Orange County jail system must be afforded equal protection of the laws in assignment to jail facilities, we emphasize again that the trial court has neither ordered defendants to provide women with separate minimum security facilities, nor ordered defendants to sexually integrate their minimum security facilities and attendant programs. Rather, the court has ordered that, in accordance with the principles of equal protection, defendants may not provide such facilities and programs for men only. The problem of whether to solve the equal protection violation by eliminating all minimum security jails, integrating them, or providing partially or completely separated facilities and programs, is left to the discretion of the county officials. The court's concern, and properly so, has been that in the guise of offering women "protection," they should not be confined in a "cage within a cage," while their male counterparts enjoy greater liberty only because of their sex. (See *Sail'er Inn, Inc. v. Kirby*, *supra*, 5 Cal.3d 1, 20.)

2. Equal Protection Under the Fourteenth

Amendment

Turning from the California Constitution **[***33]** to the [Fourteenth Amendment of the United States Constitution](#), we note that the federal equal protection clause has not been applied to the issue of sex discrimination in the same manner as has our state clause. The federal application has been described as "rational basis" with a "bite." (Karst, *The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment* (1977) 91 Harv.L.Rev. 1, 54; Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection* (1972) 86 Harv.L.Rev. 1, 20-24.) In [Frontiero v. Richardson](#), 411 U.S. 677, 682 [36 L.Ed.2d 583, 589, 93 S.Ct. 1764], a plurality of the Supreme Court held that classifications based on sex were "suspect" and must be strictly scrutinized, but this view has never been embraced by a majority of the court. [CA\(10\) \(10\)](#) In [Reed v. Reed](#), *supra*, 404 U.S. 71, however, the high court began the process of carving out a special middle-tier test, neither rational basis nor yet strict scrutiny, for gender-based classifications, stating that "[a] classification must be reasonable, not arbitrary, and must rest upon some ground of difference **[***34]** having a *fair and substantial [*21]* relation to the object of the legislation." (*Id.*, at p. 76 [30 L.Ed.2d at p. 229], (italics added.) And in [Craig v. Boren](#), *supra*, 429 U.S. 190, 197 [50 L.Ed.2d 397, 407], the court set out a more definitive statement of the middle-tier test: "To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." (Accord, [Califano v. Goldfarb](#), 430 U.S. 199, 210-211 [51 L.Ed.2d 270, 278-279, 97 S.Ct. 1021]; [Califano v. Webster](#), 430 U.S. 313, 316-317 [51 L.Ed.2d 360, 363-364, 97 S.Ct. 1192]; see Karst, *The Supreme Court 1976 Term, Forward: Equal Citizenship Under the Fourteenth Amendment*, *supra*, 91 Harv.L.Rev. 1, 177-188.)

In the course of developing and applying the

middle-tier test for sex discrimination, the United States Supreme Court has rejected "administrative convenience" as a valid basis for gender-based classifications. ([Califano v. Goldfarb, supra, 430 U.S. 199, 211, fn. 9 \[51 L.Ed.2d 270, 279\]](#); [Craig v. Boren, supra, 429 U.S. 190, 198 \[50 L.Ed.2d 397, 407\]](#); [***35] [Reed v. Reed, supra, 404 U.S. 71, 76-77 \[30 L.Ed.2d 225, 229-230\]](#); see e.g., [Frontiero v. Richardson, supra, 411 U.S. 677, 690 \[**252\] \[36 L.Ed.2d 583, 594\]](#); [Stanley v. Illinois, 405 U.S. 645, 656 \[31 L.Ed.2d 551, 561-562, 92 S.Ct. 1208\]](#).) Likewise, the court has intimated that the need for "administrative economy" does not justify gender-based discrimination. (See [Califano v. Goldfarb, supra, 430 U.S. 199, 211, fn. 9 \[51 L.Ed.2d 270, 279\]](#); [Craig v. Boren, supra, 429 U.S. 190, 198 \[50 L.Ed.2d 397, 407\]](#); [Weinberger v. Wiesenfeld, 420 U.S. 636 \[43 L.Ed.2d 514, 95 S.Ct. 1225\]](#); see also Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 Sup. Ct. Rev. 1.) As we pointed out in our discussion of California law, defendants' claim that physical protection of female inmates is a compelling justification for the denial of equal treatment is in reality a justification based only on "administrative convenience" and "administrative economy" and, as such, will not withstand the scrutiny required by the state or federal Constitutions.

Although the United States Supreme Court has not yet dealt with the application [***36] of the Fourteenth Amendment to gender-based classifications of inmates in the prison setting,¹³ there are several lower federal court decisions on the subject of sex discrimination in prisons: [Hill v. Estelle \(5th Cir. 1976\) 537 F.2d 214](#); [Mitchell v. Untreiner \(N.D.Fla. 1976\) 421 F.Supp. 886](#); [Tate](#)

[v. Kassulke \(W.D.Ky. 1975\) 409 F.Supp. 651](#); [McAuliffe v. Carlson \(D.Conn. 1974\) 377 F.Supp. 896](#). [Hill v. Estelle, supra, 537 F.2d 214](#), offers us no insight since it erroneously [**22] applies the rational basis test to a gender-based discrimination and merely holds that the classification involved is neither arbitrary nor unreasonable. ([Id., at p. 216](#).) [Tate v. Kassulke, supra, 409 F.Supp. 651](#), also provides little help, since the court there concluded that the difference in cleanliness between men's and women's jails was a product of the women's industry in cleaning their facilities and that injunctive relief was inappropriate to correct alleged inequities in space and custodial nature of the two jails because construction of new facilities for both men and women was imminent. ([Id., at p. 660](#).) The other cases, however, offer [***37] some guidance in applying the federal equal protection clause to the case at bench.

In [McAuliffe v. Carlson, supra, 377 F.Supp. 896](#), males incarcerated in state prisons who became ill enough to be hospitalized during their imprisonment were charged hospital costs for their stays in state hospitals. Female prisoners who had to be hospitalized, however, were not charged for their hospitalization. The [***38] male prisoners brought suit charging a lack of equal protection of the laws. To justify its gender-based classification, the state argued that most female inmates had no means to pay hospital costs while most male inmates had the means; consequently, it was administratively convenient to apply the blanket sex-based rule it had developed. The court held that the gender-based classification was invalid under the Fourteenth Amendment both because it embodied an outdated notion of the economic status of women in our culture and because mere administrative convenience cannot justify a gender-based classification. ([Id., at pp. 902-903](#).)

[Mitchell v. Untreiner, supra, 421 F.Supp. 886](#), is particularly relevant to the instant case. In [Mitchell](#), a United States District Court was asked to examine conditions of incarceration at a county jail in rural Florida. The conditions revealed by the

¹³ Defendants cite a recent Supreme Court case, [Bell v. Wolfish, 441 U.S. 520 \[60 L.Ed.2d 447, 99 S.Ct. 1861\]](#), for the proposition that lawful incarceration justifies limitations on the constitutional rights of prisoners, including the equal protection rights of female jail inmates. [Bell](#), however, deals with the rights of pretrial detainees versus those of sentenced prisoners, rather than those of female versus male inmates which are entitled to a higher level of scrutiny. Moreover, [Bell](#) mandates equal treatment to promote prison security instead of condoning unequal treatment.

evidence were deplorable, amounting in many instances to cruel and unusual punishment. Cells were grossly overcrowded so that many inmates slept on the floor, often without mattresses; prisoners had received no exercise in many months; change of clothing and toilet articles were not provided; [***39] [**253] cells had not [*23] been cleaned regularly; vermin infested the jail; no inmates except trustees were provided with tables on which to eat their food or taken from their cells for meals. Besides ruling on the issue of cruel and unusual punishment, the court concluded that women inmates of the jail were denied equal protection of the laws because they were denied the opportunity to be trustees, to have contact visitation privileges, to have regular outdoor exercise, and to serve their sentences in a less severe facility than the county jail. (*Id.*, at p. 895.) The instant case also involves denial of the opportunity for housing in a minimum security facility, contact visitation, and greater access to outdoor exercise on the basis of an inmate's sex.¹⁴

[***40] CA(8c) (8c) We conclude that defendants' policies and practices in the treatment of female inmates of the county jail offend the equal protection clause of the Fourteenth Amendment.

II

The Applicability of Penal Code Sections 4002, 4021, and 4029 to This Case

¹⁴Defendants point to the fact that the detailed injunctive order issued by the district court in *Mitchell* contained no relief for the equal protection violations cited in the opinion and argue that this omission means that judicial relief for such violations is inappropriate and unnecessary. We do not know why the court's disposition contained no specific relief for the equal protection violations and speculation on this question would be fruitless. However, we do note that the court's order contained instructions for immediate planning of new jail facilities (*id.*, at p. 899), and that the court retained jurisdiction of the case for the purpose of issuing "other orders as are appropriate." (*Id.*, at p. 902.) In light of these facts, we cannot conclude that the court did not mean to provide a remedy for the equal protection violations which it identified, or that it determined that judicial relief was inappropriate for such violations.

CA(11a) (11a) Defendants contend that the problem presented by this suit -- the provision of jail housing and programs to the sexes on an equal basis -- is covered by Penal Code sections 4002, 4021, and 4029¹⁵ and that compliance with the court's order would be in contravention of the statutes. They maintain that these sections dictate virtually complete separation of the sexes while in jail, arguing that this precludes housing both men and women at either of the existing minimum security facilities. They also point out that section 4029 mandating the extension to women of jail programs enjoyed by men does not require the implementation of that mandate until the Legislature provides the [*24] funds necessary to extend these programs. They argue that since the trial court did not hold section 4029 to be unconstitutional, it erred in directing defendants to provide equality of programming before receiving funds from the Legislature.

[***41] CA(12) (12) Initially, we note that legislative mandates cannot take precedence over constitutional provisions. (E.g., United States v. County of Fresno, 429 U.S. 452 [50 L.Ed.2d 683, 97 S.Ct. 699]; People v. Navarro, 7 Cal.3d 248, 260 [102 Cal.Rptr. 137, 497 P.2d 481]; Sail'er Inn, Inc. v. Kirby, *supra*, 5 Cal.3d 1.) Thus, cessation of a violation of the constitutional right to equal protection of the laws in cases of gender discrimination may not wait upon the convenience of the Legislature. CA(11b) (11b) Moreover, insofar as separation of the sexes is concerned, the court made it crystal clear in its judgment that "nothing herein shall require the confinement of male and female inmates in the same facility or the joint participation of male and female prisoners in any program." Insofar as section 4029 is concerned, while subdivisions (a), (b), and (d) do require that better housing and other advantageous programs offered to inmates of one sex must also be provided to inmates of the other sex, subdivision (c) is the most important clause of the section for the

¹⁵For the complete texts of Penal Code sections 4002, 4021, and 4029, see footnote 3, *ante*.

purposes of the instant case. It states in salient part that "[nothing] in this section shall require the establishment [***42] of any facility for the use of, or [**254] the making available of any program, service or privilege to, any prisoner." [Section 4029](#) thus does not require that advantageous programs such as minimum security facility detention, contact visitations, opportunities for outdoor work and recreation be offered to inmates of Orange County jails. Consequently, defendants have open to them an avenue for meeting both statutory and constitutional mandates either by discontinuing the privileges presently extended only to male inmates or by taking appropriate steps to extend like privileges to female inmates. Accordingly, the trial court did not err in failing to condition the implementation of its judgment on legislative funding.

III

The Appropriateness of the Trial Court's Remedy

[CA\(13a\)](#) (13a) Defendants contend that the judgment below is void for vagueness, ambiguity and unintelligibility because it fails to tell them whether and how they must extend the minimum security facilities and attendant programs now available to male inmates to female inmates and that this lack of specificity invalidates the judgment. They also object [*25] to the word "similar" in the phrase "apply similar criteria [***43] to all inmates, regardless of sex" on the ground that the word "similar" is too vague to give them guidance in implementing the judgment. The contentions lack merit.

[CA\(14\)](#) (14) Plaintiff has a clear right to the enjoyment of the equal protection of the laws and defendants have a clear duty to respect that right. Accordingly, mandamus is an appropriate remedy to enforce plaintiff's constitutional right to equal protection. ([Code Civ. Proc., § 1085](#); cf. [National Assn. for Advancement of Colored People v. San Bernardino City Unified Sch. Dist.](#), 17 Cal.3d 311 [130 Cal.Rptr. 744, 551 P. 2d 48]; [Silver v. Brown](#), 63 Cal.2d 270 [46 Cal. Rptr. 531, 405 P.2d 571];

[Jackson v. Pasadena City School Dist.](#), 59 Cal.2d 876 [31 Cal.Rptr. 606, 382 P.2d 878]; [People ex rel. Lynch v. San Diego Unified School Dist.](#), 19 Cal.App.3d 252 [96 Cal.Rptr. 658].) [CA\(13b\)](#) (13b) In framing the judicial remedy for equal protection violations such as those found in the case at bench, the court is vested with wide discretion. (Cf. [Crawford v. Board of Education](#), *supra*, 17 Cal.3d 280, 305-307.) Since defendants are not under a legal duty to provide minimum security facilities or outdoor [***44] work opportunities at all, the kind of facilities and programs to be provided consistent with the requirement of equal treatment of the sexes should be determined by the county and its officials. The court exercised commendable judicial caution by simply ordering defendants to refrain from providing facilities and programs to one sex which are not provided to the other and to provide like criteria in offering branch jail privileges to the two sexes, deferring to defendants' judgment the choice of the various options open to them to comply with that mandate. The judgment is not void for uncertainty, ambiguity or unintelligibility.

When the court issues its peremptory writ, it will be required to fix a reasonable time within which defendants must file their return showing how they have complied with the terms of the writ. If there is any uncertainty whether the steps taken by defendants as shown by their return constitute compliance with the judgment, such uncertainties may be resolved at a hearing on the return. [CA\(15\)](#) (15) Since the court retains continuing jurisdiction to make any orders necessary and proper for the complete enforcement of the writ ([Code Civ. Proc., § 1097](#); [County of Inyo v. City of Los Angeles](#), 71 Cal.App. 3d 185, 205 [139 Cal.Rptr. 396]), any inadequacy in the measures taken to correct the existing invidious discrimination may be dealt with in subsequent orders of the court.

[*26] We conclude that the trial court was correct in holding that plaintiff's right to equal protection was violated under the provisions of both the California and United States [***255]

98 Cal. App. 3d 1, *26; 159 Cal. Rptr. 239, **255; 1979 Cal. App. LEXIS 2250, ***45

Constitutions. The judgment below is affirmed.

End of Document

Moody v. NetChoice, LLC

Supreme Court of the United States

February 26, 2024, Argued; July 1, 2024, Decided*

Nos. 22-277 and 22-555.

*Together with No. 22-555, *NetChoice, LLC, dba NetChoice, et al. v. Paxton, Attorney General of Texas*, on certiorari to the United States Court of Appeals for the Fifth Circuit.

Reporter

603 U.S. 707 *; 144 S. Ct. 2383 **; 219 L. Ed. 2d 1075 ***; 2024 U.S. LEXIS 2884 ****; 30 Fla. L. Weekly Fed. S 565; 2024 WL 3237685

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, ET AL., PETITIONERS v. NETCHOICE, LLC, DBA NETCHOICE, ET AL.; NETCHOICE, LLC, DBA NETCHOICE, ET AL., PETITIONERS v. KEN PAXTON, ATTORNEY GENERAL OF TEXAS

Notice: The pagination of this document is subject to change pending release of the final published version.

Subsequent History: As Revised July 11, 2024.

On remand at, Remanded by [Netchoice, L.L.C. v. Paxton, 2024 U.S. App. LEXIS 28534 \(5th Cir. Tex., Nov. 7, 2024\)](#)

Prior History: [****1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[Netchoice, L.L.C. v. Paxton, 49 F.4th 439, 2022 U.S. App. LEXIS 26062, 2022 WL 4285917 \(5th Cir. Tex., Sept. 16, 2022\)](#)
[NetChoice, LLC v. AG, Fla., 34 F.4th 1196, 2022 U.S. App. LEXIS 13852, 2022 WL 1613291 \(11th Cir. Fla., May 23, 2022\)](#)

Disposition: [No. 22-277, 34 F. 4th 1196](#); [No. 22-555, 49 F. 4th 439](#); vacated and remanded.

Core Terms

platform, facial challenge, user, message, feed, facial, social-media, algorithm, editorial, federal court, content-moderation, doctrine, media, third-party, curated, entity, host, disclosure, platforms, law's, website, convey, parade, moderate, sweep, video, viewpoint, homepage, editor, laws

Case Summary**Overview**

HOLDINGS: [1]-Where an internet trade association brought a [First Amendment](#) facial challenge to Texas and Florida laws that regulated social-media platforms and other websites, the lower courts were required to determine whether the laws' unconstitutional applications were substantial compared to its constitutional ones. To make that judgment, the lower courts had to determine the laws' full set of applications, evaluate which were constitutional and which were not, and compare the one to the other. Since neither lower court performed that necessary inquiry, the cases were remanded for each court to conduct that analysis.

Outcome

Judgments vacated and remanded. 9-0 decision; 2 concurrences; 2 concurrences in judgment.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Expressive Conduct

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

[HN1](#) Freedom of Speech, Expressive Conduct

To the extent that social-media platforms create expressive products, they receive the [First Amendment's](#) protection.

Constitutional Law > ... > Fundamental

Freedoms > Freedom of Speech > Scope

HN2 Fundamental Freedoms, Freedom of Speech

Traditional publishers and editors also select and shape other parties' expression into their own curated speech products. And it is repeatedly held that laws curtailing their editorial choices must meet the [First Amendment's](#) requirements. The principle does not change because the curated compilation has gone from the physical to the virtual world. In the latter, as in the former, government efforts to alter an edited compilation of third-party expression are subject to judicial review for compliance with the [First Amendment](#).

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Governments > Legislation > Overbreadth

HN3 Fundamental Freedoms, Freedom of Speech

The question in a facial challenge case is whether a law's unconstitutional applications are substantial compared to its constitutional ones. To make that judgment, a court must determine a law's full set of applications, evaluate which are constitutional and which are not, and compare the one to the other.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Anticipatory Challenges

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN4 Constitutionality of Legislation, Anticipatory Challenges

For a host of good reasons, courts usually handle constitutional claims case by case, not en masse. Claims of facial invalidity often rest on speculation

about the law's coverage and its future enforcement. And facial challenges threaten to short circuit the democratic process by preventing duly enacted laws from being implemented in constitutional ways. The United States Supreme Court has therefore made facial challenges hard to win.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Anticipatory Challenges

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN5 Constitutionality of Legislation, Anticipatory Challenges

That facial challenges are hard to win is true even when a facial suit is based on the [First Amendment](#), although then a different standard applies. In other cases, a plaintiff cannot succeed on a facial challenge unless he establishes that no set of circumstances exists under which the law would be valid, or he shows that the law lacks a plainly legitimate sweep. In [First Amendment](#) cases, however, the U.S. Supreme Court has lowered that very high bar. To provide breathing room for free expression, the Court has substituted a less demanding though still rigorous standard. The question is whether a substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep. So in this singular context, even a law with a plainly legitimate sweep may be struck down in its entirety. But that is so only if the law's unconstitutional applications substantially outweigh its constitutional ones.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN6 Fundamental Freedoms, Freedom of Speech

The first step in the proper facial analysis under the [First Amendment](#) is to assess the state laws' scope. What activities, by what actors, do the laws prohibit or otherwise regulate?

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

[HN7](#) Fundamental Freedoms, Freedom of Speech

Before a court can do anything else with facial challenges under the [First Amendment](#), it must determine what the law covers.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

[HN8](#) Fundamental Freedoms, Freedom of Speech

After determining what the law covers, the next order of business in a facial challenge is to decide which of the laws' applications violate the [First Amendment](#), and to measure them against the rest. For content-moderation provisions, that means asking, as to every covered platform or function, whether there is an intrusion on protected editorial discretion. And for the individualized-explanation provisions, it means asking, again as to each thing covered, whether the required disclosures unduly burden expression.

Civil Procedure > ... > Jurisdiction on
 Certiorari > Considerations Governing
 Review > Federal Court Decisions

Governments > Courts > Authority to
 Adjudicate

[HN9](#) Considerations Governing Review, Federal Court Decisions

The U.S. Supreme Court is a court of review, not of

first view.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

[HN10](#) Fundamental Freedoms, Freedom of Speech

The U.S. Supreme Court has repeatedly held that ordering a party to provide a forum for someone else's views implicated the [First Amendment](#) if, though only if, the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt. So too the Court has held, when applying that principle, that expressive activity includes presenting a curated compilation of speech originally created by others.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

[HN11](#) Fundamental Freedoms, Freedom of Speech

A private party's collection of third-party content into a single speech product is itself expressive, and intrusion into that activity must be specially justified under the [First Amendment](#).

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Expressive
 Conduct

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

[HN12](#) Freedom of Speech, Expressive Conduct

The [First Amendment](#) offers protection when an entity engaging in expressive activity, including compiling and curating others' speech, is directed to accommodate messages it would prefer to exclude. The editorial function itself is an aspect of speech. Or said just a bit differently: An entity

exercising editorial discretion in the selection and presentation of content is engaged in speech activity. And that is as true when the content comes from third parties as when it does not. Deciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive activity of its own. And that activity results in a distinctive expressive product. When the government interferes with such editorial choices, say, by ordering the excluded to be included, it alters the content of the compilation. (It creates a different opinion page or parade, bearing a different message.) And in so doing, in overriding a private party's expressive choices, the government confronts the [First Amendment](#).

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Expressive
 Conduct

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

[HN13](#) Freedom of Speech, Expressive Conduct

A narrow, succinctly articulable message is not a condition of constitutional protection. It is enough for a compiler to exclude the handful of messages it most disfavors.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Expressive
 Conduct

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

[HN14](#) Freedom of Speech, Expressive Conduct

The government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas. It is critically important to have a well-functioning sphere of expression, in

which citizens have access to information from many sources. That is the whole project of the [First Amendment](#). And the government can take varied measures, like enforcing competition laws, to protect that access. But in case after case, the U.S. Supreme Court has barred the government from forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

[HN15](#) Fundamental Freedoms, Freedom of Speech

Whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of the [First Amendment](#) do not vary.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Expressive
 Conduct

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

[HN16](#) Freedom of Speech, Expressive Conduct

The government may not, in supposed pursuit of better expressive balance, alter a private speaker's own editorial choices about the mix of speech it wants to convey.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Expressive
 Conduct

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

[HN17](#) Freedom of Speech, Expressive Conduct

For [First Amendment](#) purposes, the choice of

material, the decisions made as to content, the treatment of public issues, —whether fair or unfair—all these constitute the exercise of editorial control and judgment.

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Speech > Expressive
Conduct

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Speech > Scope

HN18 Freedom of Speech, Expressive Conduct

The major social-media platforms do not lose their [First Amendment](#) protection just because no one will wrongly attribute to them the views in an individual post.

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Speech > Scope

HN19 Fundamental Freedoms, Freedom of Speech

Under the less stringent [First Amendment](#) standard, a law must further a substantial governmental interest that is unrelated to the suppression of free expression.

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Speech > Expressive
Conduct

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Speech > Scope

HN20 Freedom of Speech, Expressive Conduct

A State may not interfere with private actors' speech to advance its own vision of ideological balance. States (and their citizens) are right to want an expressive realm in which the public has access to a wide range of views. That is, indeed, a

fundamental aim of the [First Amendment](#). But the way the [First Amendment](#) achieves that goal is by preventing the government from tilting public debate in a preferred direction. It is not by licensing the government to stop private actors from speaking as they wish and preferring some views over others. And that is so even when those actors possess enviable vehicles for expression.

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Speech > Expressive
Conduct

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Speech > Scope

HN21 Freedom of Speech, Expressive Conduct

The government cannot prohibit speech to improve or better balance the speech market. On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana. That is why the U.S. Supreme Court has said in so many contexts that the government may not restrict the speech of some elements of society in order to enhance the relative voice of others. That unadorned interest is not unrelated to the suppression of free expression, and the government may not pursue it consistent with the [First Amendment](#).

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Speech > Scope

HN22 Fundamental Freedoms, Freedom of Speech

To succeed on its [First Amendment](#) claim, a plaintiff must show that the law at issue prohibits a substantial amount of protected speech relative to its plainly legitimate sweep.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

HN23 Fundamental Freedoms, Freedom of Speech

Even in the [First Amendment](#) context, facial challenges are disfavored, and neither parties nor courts can disregard the requisite inquiry into how a law works in all of its applications.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Expressive
 Conduct

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

HN24 Freedom of Speech, Expressive Conduct

Presenting a curated and edited compilation of third party speech is itself protected speech. A State cannot advance some points of view by burdening the expression of others. To give government that power is to enable it to control the expression of ideas, promoting those it favors and suppressing those it does not. And that is what the [First Amendment](#) protects everyone from.

Syllabus

[*707] [2388]** In 2021, Florida and Texas enacted statutes regulating large social-media companies and other internet platforms. The States’ laws differ in the entities they cover and the activities they limit. But both curtail the platforms’ capacity to engage in content moderation—to filter, prioritize, and label the varied third-party messages, videos, and other content their users wish to post. Both laws also include individualized-explanation provisions, requiring a platform to give reasons to a user if it removes or alters her posts.

NetChoice LLC and the Computer &
 Communications Industry Association

(collectively, NetChoice)—trade associations whose members include Facebook and YouTube—brought facial [First Amendment](#) challenges against the two laws. District courts in both States entered preliminary injunctions.

The Eleventh Circuit upheld the injunction of Florida’s law, as to all provisions relevant here. The court held that the State’s restrictions on content moderation trigger [First Amendment](#) scrutiny under this Court’s cases protecting “editorial discretion.” [34 F. 4th 1196, 1209, 1216](#). The court then concluded that the content-moderation **[****2]** provisions are unlikely to survive heightened scrutiny. [Id., at 1227-1228](#). Similarly, the Eleventh Circuit thought the statute’s individualized-explanation requirements likely to fall. Relying on [Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U. S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315](#), the court held that the obligation to explain “millions of [decisions] per day” is “unduly burdensome and likely to chill platforms’ protected speech.” [34 F. 4th, at 1230](#).

The Fifth Circuit disagreed across the board, and so reversed the preliminary injunction of the Texas law. In that court’s view, the platforms’ content-moderation **[**2389]** activities are “not speech” at all, and so do not implicate the [First Amendment](#). [49 F. 4th 439, 466, 494](#). But even if those activities were expressive, the court determined the State could **[*708]** regulate them to advance its interest in “protecting a diversity of ideas.” [Id., at 482](#). The court further held that the statute’s individualized-explanation provisions would likely survive, even assuming the platforms were engaged in speech. It found no undue burden under *Zauderer* because the platforms needed only to “scale up” a “complaint-and-appeal process” they already used. [49 F. 4th, at 487](#).

Held: The judgments are vacated, and the cases are remanded, because neither the Eleventh Circuit nor the Fifth Circuit conducted a proper analysis of the facial [First Amendment](#) challenges to

Florida [****3] and Texas laws regulating large internet platforms. Pp. 723-745.

(a) NetChoice’s decision to litigate these cases as facial challenges comes at a cost. The Court has made facial challenges hard to win. In the [First Amendment](#) context, a plaintiff must show that “a substantial number of [the law’s] applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” [Americans for Prosperity Foundation v. Bonta](#), 594 U. S. 595, 615, 141 S. Ct. 2373, 210 L. Ed. 2d 716.

So far in these cases, no one has paid much attention to that issue. Analysis and arguments below focused mainly on how the laws applied to the content-moderation practices that giant social-media platforms use on their best-known services to filter, alter, or label their users’ posts, *i.e.*, on how the laws applied to the likes of Facebook’s News Feed and YouTube’s homepage. They did not address the full range of activities the laws cover, and measure the constitutional against the unconstitutional applications.

The proper analysis begins with an assessment of the state laws’ scope. The laws appear to apply beyond Facebook’s News Feed and its ilk. But it’s not clear to what extent, if at all, they affect social-media giants’ other services, like direct messaging, or what they have to say about other platforms and [****4] functions. And before a court can do anything else with these facial challenges, it must “determine what [the law] covers.” [United States v. Hansen](#), 599 U. S. 762, 770, 143 S. Ct. 1932, 216 L. Ed. 2d 692.

The next order of business is to decide which of the laws’ applications violate the [First Amendment](#), and to measure them against the rest. For the content-moderation provisions, that means asking, as to every covered platform or function, whether there is an intrusion on protected editorial discretion. And for the individualized-explanation provisions, it means asking, again as to each thing covered, whether the required disclosures unduly burden

expression. See [Zauderer](#), 471 U. S., at 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315.

Because this is “a court of review, not of first view,” [Cutter v. Wilkinson](#), 544 U. S. 709, 718, n. 7, 125 S. Ct. 2113, 161 L. Ed. 2d 1020, this Court cannot undertake the needed inquiries. And because neither the Eleventh nor the Fifth Circuit performed [**709] the facial analysis in the way described above, their decisions must be vacated and the cases remanded. Pp. 723-726.

(b) It is necessary to say more about how the [First Amendment](#) relates to the laws’ content-moderation provisions, to ensure that the facial analysis proceeds on the right path in the courts below. That need is especially stark for the Fifth Circuit, whose decision rested on a serious misunderstanding of [First Amendment](#) precedent and principle. Pp. 726-743.

[**2390] (1) The Court [****5] has repeatedly held that ordering a party to provide a forum for someone else’s views implicates the [First Amendment](#) if, though only if, the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt. First, in [Miami Herald Publishing Co. v. Tornillo](#), 418 U. S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730, the Court held that a Florida law requiring a newspaper to give a political candidate a right to reply to critical coverage interfered with the newspaper’s “exercise of editorial control and judgment.” *Id.*, at 243, 258, 94 S. Ct. 2831, 41 L. Ed. 2d 730. Florida could not, the Court explained, override the newspaper’s decisions about the “content of the paper” and “[t]he choice of material to go into” it, because that would substitute “governmental regulation” for the “crucial process” of editorial choice. *Id.*, at 258, 94 S. Ct. 2831, 41 L. Ed. 2d 730. The next case, [Pacific Gas & Elec. Co. v. Public Util. Comm’n of Cal.](#), 475 U. S. 1, 106 S. Ct. 903, 89 L. Ed. 2d 1, involved California’s attempt to force a private utility to include material from a certain consumer-advocacy group in its regular newsletter to consumers. The Court held that an interest in

“offer[ing] the public a greater variety of views” could not justify compelling the utility “to carry speech with which it disagreed” and thus to “alter its own message.” *Id.*, at 11, n. 7, 12, 16, 106 S. Ct. 903, 89 L. Ed. 2d 1. Then in *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497, the Court considered federal “must-carry” rules, which required cable operators to allocate certain [****6] channels to local broadcast stations. The Court had no doubt the *First Amendment* was implicated, because the rules “interfere[d]” with the cable operators’ “editorial discretion over which stations or programs to include in [their] repertoire.” *Id.*, at 636, 643-644, 114 S. Ct. 2445, 129 L. Ed. 2d 497. The capstone of this line of precedents, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487, held that the *First Amendment* prevented Massachusetts from compelling parade organizers to admit as a participant a gay and lesbian group seeking to convey a message of “pride.” *Id.*, at 561, 115 S. Ct. 2338, 132 L. Ed. 2d 487. It held that ordering the group’s admittance would “alter the expressive content of the[] parade,” and that the decision to exclude the group’s message was the organizers’ alone. *Id.*, at 572-574, 115 S. Ct. 2338, 132 L. Ed. 2d 487.

From that slew of individual cases, three general points emerge. First, the *First Amendment* offers protection when an entity engaged [*710] in compiling and curating others’ speech into an expressive product of its own is directed to accommodate messages it would prefer to exclude. Second, none of that changes just because a compiler includes most items and excludes just a few. It “is enough” for the compiler to exclude the handful of messages it most “disfavor[s].” *Hurley*, 515 U. S., at 574, 115 S. Ct. 2338, 132 L. Ed. 2d 487. Third, the government cannot get its way just by asserting an interest in better balancing the marketplace of ideas. In case after [****7] case, the Court has barred the government from forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm. Pp. 727-

733.

(2) “[W]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles” of the *First Amendment* “do not vary.” *Brown v. Entm’t Merchants Ass’n*, 564 U. S. 786, 790, 131 S. Ct. 2729, 180 L. Ed. 2d 708. And the principles elaborated in the above-summarized decisions establish that Texas is not likely to succeed in enforcing its law against the platforms’ application of their content-moderation policies to their main feeds.

Facebook’s News Feed and YouTube’s homepage present users with a continually [**2391] updating, personalized stream of other users’ posts. The key to the scheme is prioritization of content, achieved through algorithms. The selection and ranking is most often based on a user’s expressed interests and past activities, but it may also be based on other factors, including the platform’s preferences. Facebook’s Community Standards and YouTube’s Community Guidelines detail the messages and videos that the platforms disfavor. The platforms write algorithms to implement those standards—for example, to prefer content deemed particularly trustworthy or to suppress content viewed as deceptive. [****8] Beyond ranking content, platforms may add labels, to give users additional context. And they also remove posts entirely that contain prohibited subjects or messages, such as pornography, hate speech, and misinformation on certain topics. The platforms thus unabashedly control the content that will appear to users.

Texas’s law, though, limits their power to do so. Its central provision prohibits covered platforms from “censor[ing]” a “user’s expression” based on the “viewpoint” it contains. *Tex. Civ. Prac. & Rem. Code Ann. §143A.002(a)(2)*. The platforms thus cannot do any of the things they typically do (on their main feeds) to posts they disapprove—cannot demote, label, or remove them—whenever the action is based on the post’s viewpoint. That limitation profoundly alters the platforms’ choices

about the views they convey.

The Court has repeatedly held that type of regulation to interfere with protected speech. Like the editors, cable operators, and parade organizers this Court has previously considered, the major social-media [*711] platforms curate their feeds by combining “multifarious voices” to create a distinctive expressive offering. [Hurley](#), 515 U. S., at 569, 115 S. Ct. 2338, 132 L. Ed. 2d 487. Their choices about which messages are appropriate give the feed a particular expressive quality [****9] and “constitute the exercise” of protected “editorial control.” [Tornillo](#), 418 U. S., at 258, 94 S. Ct. 2831, 41 L. Ed. 2d 730. And the Texas law targets those expressive choices by forcing the platforms to present and promote content on their feeds that they regard as objectionable.

That those platforms happily convey the lion’s share of posts submitted to them makes no significant [First Amendment](#) difference. In [Hurley](#), the Court held that the parade organizers’ “lenient” admissions policy did “not forfeit” their right to reject the few messages they found harmful or offensive. 515 U. S., at 569, 115 S. Ct. 2338, 132 L. Ed. 2d 487. Similarly here, that Facebook and YouTube convey a mass of messages does not license Texas to prohibit them from deleting posts they disfavor. Pp. 733-740.

(3) The interest Texas relies on cannot sustain its law. In the usual [First Amendment](#) case, the Court must decide whether to apply strict or intermediate scrutiny. But here, Texas’s law does not pass even the less stringent form of review. Under that standard, a law must further a “substantial governmental interest” that is “unrelated to the suppression of free expression.” [United States v. O’Brien](#), 391 U. S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672. Many possible interests relating to social media can meet that test. But Texas’s asserted interest relates to the suppression of free expression, and it is not valid, let alone [****10] substantial.

Texas has never been shy, and always been consistent, about its interest: The objective is to correct the mix of viewpoints that major platforms present. But a State may not interfere with private actors’ speech to advance its own vision of ideological balance. States (and their citizens) are of course right to want an expressive realm in which the public has access to a wide range of views. But the [**2392] way the [First Amendment](#) achieves that goal is by preventing the government from “tilt[ing] public debate in a preferred direction,” [Sorrell v. IMS Health Inc.](#), 564 U. S. 552, 578-579, 131 S. Ct. 2653, 180 L. Ed. 2d 544, not by licensing the government to stop private actors from speaking as they wish and preferring some views over others. A State cannot prohibit speech to rebalance the speech market. That unadorned interest is not “unrelated to the suppression of free expression.” And Texas may not pursue it consistent with the [First Amendment](#). Pp. 740-743.

[No. 22-277](#), 34 F. 4th 1196; [No. 22-555](#), 49 F. 4th 439; vacated and remanded.

Counsel: Henry C. Whitaker argued the cause for petitioners.

Paul D. Clement argued the cause for respondents.

Elizabeth B. Prelogar argued the cause for petitioner as amicus curiae, by special leave of court.

Judges: Kagan, J., delivered the opinion of the Court, in which Roberts, C. J., and Sotomayor, Kavanaugh, and Barrett, JJ., joined in full, and in which Jackson, J., joined as to Parts I, II and III-A. Barrett, J., filed a concurring opinion. Jackson, J., filed an opinion concurring in part and concurring in the judgment. [****11] Thomas, J., filed an opinion concurring in the judgment. Alito, J., filed an opinion concurring in the judgment, in which Thomas and Gorsuch, JJ., joined.

Opinion by: KAGAN

Opinion

[*713] [***1085] [**2393] JUSTICE KAGAN delivered the opinion of the Court.*

Not even thirty years ago, this Court felt the need to explain to the opinion-reading public that the “Internet is an [*714] international network of interconnected computers.” *Reno v. American Civil Liberties Union*, 521 U. S. 844, 849, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997). Things have changed since then. At the time, only 40 million people used the internet. See *id.*, at 850, 117 S. Ct. 2329, 138 L. Ed. 2d 874. Today, Facebook [*715] and YouTube alone have over two billion users each. See App. in No. 22-555, p. 67a. [***1086] And the public likely no longer needs this Court to define the internet.

[*716] These years have brought a dizzying transformation in how people communicate, and with it a raft of public policy issues. Social-media platforms, as well as other websites, have gone from unheard-of to inescapable. They structure how we relate to family and friends, as well as to businesses, civic organizations, and governments. The novel services they offer make our lives better, and make them worse—create unparalleled opportunities and unprecedented dangers. The questions of whether, when, and how to regulate online entities, and in [****12] particular the social-media giants, are understandably on the front-burner of many legislatures and agencies. And those government actors will generally be better positioned than courts to respond to the emerging challenges social-media entities pose.

But courts still have a necessary role in protecting those entities’ rights of speech, as courts have historically protected traditional media’s rights. *HN1* To the extent that social-media platforms

create expressive products, they receive the *First Amendment’s* protection. And although these cases are here in a preliminary posture, the current record suggests that some platforms, in at least some functions, are indeed engaged in expression. In constructing certain feeds, those platforms make choices about what third-party speech to display and how to display it. They include and exclude, organize and prioritize—and in making millions of those decisions each day, produce their own distinctive compilations of expression. And while much about social media is new, the essence of that project is something this Court [*717] has seen before. *HN2* Traditional publishers and editors also select and shape other parties’ expression into their own curated speech products. And we [****13] have repeatedly held that laws curtailing their editorial choices must meet the *First Amendment’s* requirements. The principle does not change because the curated compilation has gone from the physical to the virtual world. In the latter, as in the former, government efforts to alter an edited compilation of third-party expression are subject to judicial review for compliance with the *First Amendment*.

Today, we consider whether two state laws regulating social-media platforms and other websites facially violate the *First Amendment*. The laws, from Florida and Texas, restrict the ability of social-media platforms to control whether and how third-party posts are presented to other users. Or otherwise put, the laws limit the platforms’ capacity to engage in content moderation—to filter, prioritize, and label the varied messages, videos, and other content their users wish to post. In addition, though far less addressed in this Court, the laws require a platform to provide an individualized explanation to a user if it removes or alters her posts. NetChoice, an internet trade association, challenged both laws on their face—as a whole, rather than as to particular applications. [**2394] The cases come to us at an early stage, on review of preliminary [****14] injunctions. The Court of Appeals for the Eleventh Circuit upheld such an injunction, finding that the Florida law was not

* JUSTICE JACKSON joins Parts I, II, and III-A of this opinion.

likely to survive [First Amendment](#) review. The Court of Appeals for the Fifth Circuit reversed a similar injunction, primarily reasoning that the [***1087] Texas law does not regulate any speech and so does not implicate the [First Amendment](#).

Today, we vacate both decisions for reasons separate from the [First Amendment](#) merits, because neither Court of Appeals properly considered the facial nature of NetChoice’s challenge. The courts mainly addressed what the parties had focused on. And the parties mainly argued these cases [*718] as if the laws applied only to the curated feeds offered by the largest and most paradigmatic social-media platforms—as if, say, each case presented an as-applied challenge brought by Facebook protesting its loss of control over the content of its News Feed. But argument in this Court revealed that the laws might apply to, and differently affect, other kinds of websites and apps. In a facial challenge, that could well matter, even when the challenge is brought under the [First Amendment](#). [HN3](#) As explained below, the question in such a case is whether a law’s unconstitutional applications are substantial compared to its [****15] constitutional ones. To make that judgment, a court must determine a law’s full set of applications, evaluate which are constitutional and which are not, and compare the one to the other. Neither court performed that necessary inquiry.

To do that right, of course, a court must understand what kind of government actions the [First Amendment](#) prohibits. We therefore set out the relevant constitutional principles, and explain how one of the Courts of Appeals failed to follow them. Contrary to what the Fifth Circuit thought, the current record indicates that the Texas law does regulate speech when applied in the way the parties focused on below—when applied, that is, to prevent Facebook (or YouTube) from using its content-moderation standards to remove, alter, organize, prioritize, or disclaim posts in its News Feed (or homepage). The law then prevents exactly the kind of editorial judgments this Court has previously held to receive [First Amendment](#)

protection. It prevents a platform from compiling the third-party speech it wants in the way it wants, and thus from offering the expressive product that most reflects its own views and priorities. Still more, the law—again, in that specific application—is unlikely to withstand [****16] [First Amendment](#) scrutiny. Texas has thus far justified the law as necessary to balance the mix of speech on Facebook’s News Feed and similar platforms; and the record reflects that Texas officials passed it because they thought those [*719] feeds skewed against politically conservative voices. But this Court has many times held, in many contexts, that it is no job for government to decide what counts as the right balance of private expression—to “un-bias” what it thinks biased, rather than to leave such judgments to speakers and their audiences. That principle works for social-media platforms as it does for others.

In sum, there is much work to do below on both these cases, given the facial nature of NetChoice’s challenges. But that work must be done consistent with the [First Amendment](#), which does not go on leave when social media are involved.

I

As commonly understood, the term “social media platforms” typically refers to websites and mobile apps that [***1088] allow users to upload content—messages, pictures, videos, and so on—to share with [**2395] others. Those viewing the content can then react to it, comment on it, or share it themselves. The biggest social-media companies—entities like Facebook and YouTube—host a staggering amount of [****17] content. Facebook users, for example, share more than 100 billion messages every day. See App. in No. 22-555, at 67a. And YouTube sees more than 500 hours of video uploaded every minute. See *ibid*.

In the face of that deluge, the major platforms cull and organize uploaded posts in a variety of ways. A user does not see everything—even everything from the people she follows—in reverse-chronological order. The platforms will have

removed some content entirely; ranked or otherwise prioritized what remains; and sometimes added warnings or labels. Of particular relevance here, Facebook and YouTube make some of those decisions in conformity with content-moderation policies they call Community Standards and Community Guidelines. Those rules list the subjects or messages the platform prohibits or discourages—say, pornography, hate speech, or misinformation on select topics. [*720] The rules thus lead Facebook and YouTube to remove, disfavor, or label various posts based on their content.

In 2021, Florida and Texas enacted statutes regulating internet platforms, including the large social-media companies just mentioned. The States’ laws differ in the entities they cover and the activities they limit. [****18] But both contain content-moderation provisions, restricting covered platforms’ choices about whether and how to display usergenerated content to the public. And both include individualized-explanation provisions, requiring platforms to give reasons for particular content-moderation choices.

Florida’s law regulates “social media platforms,” as defined expansively, that have annual gross revenue of over \$100 million or more than 100 million monthly active users. [Fla. Stat. §501.2041\(1\)\(g\)](#) (2023).¹ The statute restricts varied ways of “censor[ing]” or otherwise disfavoring posts—including deleting, altering, labeling, or deprioritizing them—based on their content or source. [§501.2041\(1\)\(b\)](#). For example, the law prohibits a platform from taking those actions against “a journalistic enterprise based on the content of its publication or broadcast.” [§501.2041\(2\)\(j\)](#). Similarly, the law prevents deprioritizing posts by or about political candidates.

See [§501.2041\(2\)\(h\)](#). And the law requires platforms to apply their content-moderation practices to users “in a consistent manner.” [§501.2041\(2\)\(b\)](#).

In addition, the Florida law mandates that a platform provide an explanation to a user any time it removes or alters any of her posts. See [§501.2041\(2\)\(d\)\(1\)](#). The requisite notice must be delivered within [****19] seven days, and contain both a “thorough rationale” for the action and an account of how the platform became aware of the targeted material. [§501.2041\(3\)](#).

[*721] [***1089] The Texas law regulates any social-media platform, having over 50 million monthly active users, that allows its users “to communicate with other users for the primary purpose of posting information, comments, messages, or images.” [Tex. Bus. & Com. Code Ann. §§120.001\(1\), 120.002\(b\)](#) (West Cum. Supp. 2023).² With several [**2396] exceptions, the statute prevents platforms from “censor[ing]” a user or a user’s expression based on viewpoint. [Tex. Civ. Prac. & Rem. Code Ann. §§143A.002\(a\), 143A.006](#) (West Cum. Supp. 2023). That ban on “censor[ing]” covers any action to “block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression.” [§143A.001\(1\)](#). The statute also requires that “concurrently with the removal” of user content, the platform shall “notify the user” and “explain the reason the content was removed.” [§120.103\(a\)\(1\)](#). The user gets a right of appeal, and the platform must address an appeal within 14 days. See [§§120.103\(a\)\(2\), 120.104](#).

Soon after Florida and Texas enacted those statutes, NetChoice LLC and the Computer & Communications Industry Association

¹ The definition of “social-media platforms” covers “any information service, system, Internet search engine, or access software provider” that “[p]rovides or enables computer access by multiple users to a computer server, including an Internet platform or a social media site.” [Fla. Stat. §501.2041\(1\)\(g\)\(1\)](#).

² The statute further clarifies that it does not cover internet service providers, email providers, and any online service, website, or app consisting “primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider.” [§120.001\(1\)](#).

(collectively, NetChoice)—trade associations whose members include [****20] Facebook and YouTube—brought facial [First Amendment](#) challenges against the two laws. District courts in both States entered preliminary injunctions, halting the laws’ enforcement. See [546 F. Supp. 3d 1082, 1096 \(ND Fla. 2021\)](#); [573 F. Supp. 3d 1092, 1117 \(WD Tex. 2021\)](#). Each court held that the suit before it is likely to succeed because the statute infringes on the constitutionally protected “editorial judgment” of NetChoice’s members about what material they will display. See [546 F. Supp. 3d, at 1090](#); [573 F. Supp. 3d, at 1107](#).

[*722] The Eleventh Circuit upheld the injunction of Florida’s law, as to all provisions relevant here. The court held that the State’s restrictions on content moderation trigger [First Amendment](#) scrutiny under this Court’s cases protecting “editorial discretion.” [34 F. 4th 1196, 1209, 1216 \(2022\)](#). When a social-media platform “removes or deprioritizes a user or post,” the court explained, it makes a “judgment rooted in the platform’s own views about the sorts of content and viewpoints that are valuable and appropriate for dissemination.” [Id., at 1210](#). The court concluded that the content-moderation provisions are unlikely to survive “intermediate—let alone strict—scrutiny,” because a State has no legitimate interest in counteracting “private ‘censorship’” by “tilt[ing] public debate in a preferred direction.” [Id., at 1227-1228](#). Similarly, the Eleventh Circuit thought the statute’s individualized-explanation [****21] requirements likely to fall. Applying the standard from [Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio](#), [471 U. S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 \(1985\)](#), the court held that the obligation to explain “millions of [decisions] per day” is “unduly burdensome and likely to chill platforms’ protected speech.” [34 F. 4th, at 1230](#).

The Fifth Circuit disagreed across [***1090] the board, and so reversed the preliminary injunction before it. In that court’s view, the platforms’ content-moderation activities are “not speech” at all, and so do not implicate the [First Amendment](#).

[49 F. 4th 439, 466, 494 \(2022\)](#). But even if those activities were expressive, the court continued, the State could regulate them to advance its interest in “protecting a diversity of ideas.” [Id., at 482](#) (emphasis deleted). The court further held that the statute’s individualized explanation provisions would likely survive, again even assuming that the platforms were engaged in speech. Those requirements, the court maintained, are not unduly burdensome under *Zauderer* because the platforms needed only to “scale up” a “complaint-and-appeal process” they already used. [49 F. 4th, at 487](#).

[*723] [**2397] We granted certiorari to resolve the split between the Fifth and Eleventh Circuits. [600 U. S. ___, 144 S. Ct. 477, 216 L. Ed. 2d 1313 \(2023\)](#).

II

NetChoice chose to litigate these cases as facial challenges, and that decision comes at a cost. [HN4](#) For a host of good reasons, courts usually handle constitutional [****22] claims case by case, not en masse. See [Washington State Grange v. Washington State Republican Party](#), [552 U. S. 442, 450-451, 128 S. Ct. 1184, 170 L. Ed. 2d 151 \(2008\)](#). “Claims of facial invalidity often rest on speculation” about the law’s coverage and its future enforcement. [Id., at 450, 128 S. Ct. 1184, 170 L. Ed. 2d 151](#). And “facial challenges threaten to short circuit the democratic process” by preventing duly enacted laws from being implemented in constitutional ways. [Id., at 451, 128 S. Ct. 1184, 170 L. Ed. 2d 151](#). This Court has therefore made facial challenges hard to win.

[HN5](#) That is true even when a facial suit is based on the [First Amendment](#), although then a different standard applies. In other cases, a plaintiff cannot succeed on a facial challenge unless he “establish[es] that no set of circumstances exists under which the [law] would be valid,” or he shows that the law lacks a “plainly legitimate sweep.” [United States v. Salerno](#), [481 U. S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 \(1987\)](#); [Washington State Grange](#), [552 U. S., at 449, 128 S. Ct. 1184,](#)

[170 L. Ed. 2d 151](#). In [First Amendment](#) cases, however, this Court has lowered that very high bar. To “provide[] breathing room for free expression,” we have substituted a less demanding though still rigorous standard. [United States v. Hansen, 599 U. S. 762, 769, 143 S. Ct. 1932, 216 L. Ed. 2d 692 \(2023\)](#). The question is whether “a substantial number of [the law’s] applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” [Americans for Prosperity Foundation v. Bonta, 594 U. S. 595, 615, 141 S. Ct. 2373, 210 L. Ed. 2d 716 \(2021\)](#); see [Hansen, 599 U. S., at 770, 143 S. Ct. 1932, 216 L. Ed. 2d 692](#) (likewise asking whether the law “prohibits a substantial amount of protected speech relative to its plainly legitimate sweep”). So in this singular context, [****23] even a law with “a plainly legitimate sweep” may be struck down in its entirety. [*724] But that is so only if the law’s unconstitutional applications substantially outweigh its constitutional ones.

So far in these cases, no one has paid much attention to that issue. In the lower courts, NetChoice and the [****1091] States alike treated the laws as having certain heartland applications, and mostly confined their battle to that terrain. More specifically, the focus was on how the laws applied to the content-moderation practices that giant social-media platforms use on their best-known services to filter, alter, or label their users’ posts. Or more specifically still, the focus was on how the laws applied to Facebook’s News Feed and YouTube’s homepage. Reflecting the parties’ arguments, the Eleventh and Fifth Circuits also mostly confined their analysis in that way. See [34 F. 4th, at 1210, 1213](#) (considering “platforms like Facebook, Twitter, YouTube, and TikTok” and content moderation in “viewers’ feeds”); [49 F. 4th, at 445, 460, 478, 492](#) (considering platforms “such as Facebook, Twitter, and YouTube” and referencing users’ feeds); see also [id., at 501](#) (Southwick, J., concurring in part and dissenting in part) (analyzing a curated feed). On their way to opposing conclusions, [****24] they concentrated on the same issue: whether a state law can regulate

the content-moderation practices used in Facebook’s News Feed (or near equivalents). They did not address the full range of activities the laws cover, and measure the constitutional against the un [**2398] constitutional applications. In short, they treated these cases more like as-applied claims than like facial ones.

[HN6](#) The first step in the proper facial analysis is to assess the state laws’ scope. What activities, by what actors, do the laws prohibit or otherwise regulate? The laws of course differ one from the other. But both, at least on their face, appear to apply beyond Facebook’s News Feed and its ilk. Members of this Court asked some of the relevant questions at oral argument. Starting with Facebook and the other giants: To what extent, if at all, do the laws affect their other services, like direct messaging or events management? See [*725] Tr. of Oral Arg. in No. 22-555, pp. 62-63; Tr. of Oral Arg. in No. 22-277, pp. 24-25; App. in No. 22-277, pp. 129, 159. And beyond those social-media entities, what do the laws have to say, if anything, about how an email provider like Gmail filters incoming messages, how an online marketplace [****25] like Etsy displays customer reviews, how a payment service like Venmo manages friends’ financial exchanges, or how a ride-sharing service like Uber runs? See Tr. of Oral Arg. in No. 22-277, at 74-79, 95-98; see also *id.*, at 153 (Solicitor General) (“I have some sympathy [for the Court] here. In preparation for this argument, I’ve been working with my team to say, does this even cover direct messaging? Does this even cover Gmail?”). Those are examples only. The online world is variegated and complex, encompassing an ever-growing number of apps, services, functionalities, and methods for communication and connection. Each might (or might not) have to change because of the provisions, as to either content moderation or individualized explanation, in Florida’s or Texas’s law. [HN7](#) Before a court can do anything else with these facial challenges, it must address that set of issues—in short, must “determine what [the law] covers.” [Hansen, 599 U. S., at 770, 143 S. Ct. 1932,](#)

[216 L. Ed. 2d 692](#).

HN8 The next order of business is to decide which of the laws’ applications violate the [First Amendment](#), and to measure them against the rest. For the content-moderation provisions, that means asking, as to every covered [***1092] platform or function, whether there is an intrusion on protected [****26] editorial discretion. See *infra*, at 727-733. And for the individualized-explanation provisions, it means asking, again as to each thing covered, whether the required disclosures unduly burden expression. See [Zauderer, 471 U. S., at 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652](#). Even on a preliminary record, it is not hard to see how the answers might differ as between regulation of Facebook’s News Feed (considered in the courts below) and, say, its direct messaging service (not so considered). Curating a feed and transmitting direct messages, one might think, involve [*726] different levels of editorial choice, so that the one creates an expressive product and the other does not. If so, regulation of those diverse activities could well fall on different sides of the constitutional line. To decide the facial challenges here, the courts below must explore the laws’ full range of applications—the constitutionally impermissible and permissible both—and compare the two sets. Maybe the parties treated the content-moderation choices reflected in Facebook’s News Feed and YouTube’s homepage as the laws’ heartland applications because they *are* the principal things regulated, and should have just that weight in the facial analysis. Or maybe not: Maybe the parties’ focus [****27] had all to do with litigation strategy, and there is a sphere of other applications—and constitutional ones—that would prevent the laws’ facial invalidation.

The problem for this Court is that it cannot undertake the needed inquiries. [**2399] **HN9** [W]e are a court of review, not of first view.” [Cutter v. Wilkinson, 544 U. S. 709, 718, n. 7, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 \(2005\)](#). Neither the Eleventh Circuit nor the Fifth Circuit performed the facial analysis in the way just described. And even

were we to ignore the value of other courts going first, we could not proceed very far. The parties have not briefed the critical issues here, and the record is underdeveloped. So we vacate the decisions below and remand these cases. That will enable the lower courts to consider the scope of the laws’ applications, and weigh the unconstitutional as against the constitutional ones.

III

But it is necessary to say more about how the [First Amendment](#) relates to the laws’ content-moderation provisions, to ensure that the facial analysis proceeds on the right path in the courts below. That need is especially stark for the Fifth Circuit. Recall that it held that the content choices the major platforms make for their main feeds are “not speech” at all, so States may regulate them free of the [*727] [First Amendment’s](#) restraints. [49 F. 4th, at 494](#); see *supra*, at 722 [****28]. And even if those activities were expressive, the court held, Texas’s interest in better balancing the marketplace of ideas would satisfy [First Amendment](#) scrutiny. See [49 F. 4th, at 482](#). If we said nothing about those views, the court presumably would repeat them when it next considers NetChoice’s challenge. It would thus find that significant applications of the Texas law—and so significant inputs into the appropriate facial analysis—raise no [First Amendment](#) difficulties. But that conclusion would rest on a serious misunderstanding of [First Amendment](#) precedent and principle. [***1093] The Fifth Circuit was wrong in concluding that Texas’s restrictions on the platforms’ selection, ordering, and labeling of third-party posts do not interfere with expression. And the court was wrong to treat as valid Texas’s interest in changing the content of the platforms’ feeds. Explaining why that is so will prevent the Fifth Circuit from repeating its errors as to Facebook’s and YouTube’s main feeds. (And our analysis of Texas’s law may also aid the Eleventh Circuit, which saw the [First Amendment](#) issues much as we do, when next considering NetChoice’s facial challenge.) But a caveat: Nothing said here

addresses any of the laws' other applications, which may or may not share [****29] the [First Amendment](#) problems described below.³

A

Despite the relative novelty of the technology before us, the main problem in this case—and the inquiry it calls for—[*728] is not new. At bottom, Texas's law requires the platforms to carry and promote user speech that they would rather discard or downplay. The platforms object that the law thus forces them to alter the content of their expression—a particular edited compilation of third-party speech. See Brief for NetChoice in No. 22-555, pp. 18-34. That controversy sounds a familiar note. We have repeatedly faced the question whether ordering a party to provide a forum for someone else's views implicates [**2400] the [First Amendment](#). [HN10](#) And we have repeatedly held that it does so if, though only if, the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt. So too we have held, when applying that principle, that expressive activity includes presenting a curated compilation of speech originally created by others. A review of the relevant precedents will help resolve the question here.

The seminal case is [Miami Herald Publishing Co. v. Tornillo](#), 418 U. S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974). There, a Florida law required a newspaper to give a political candidate a right to reply when it published “criticism and [****30] attacks on his record.” [Id.](#), at 243, 94 S. Ct. 2831,

41 L. Ed. 2d 730. The Court held the law to violate the [First Amendment](#) because it interfered with the newspaper's “exercise of editorial control and judgment.” [Id.](#), at 258, 94 S. Ct. 2831, 41 L. Ed. 2d 730. Forcing the paper to print what “it would not otherwise print,” the Court explained, “intru[ded] into the function of editors.” [Id.](#), at 256, 258, 94 S. Ct. 2831, 41 L. Ed. 2d 730. For that function was, first and foremost, to make decisions about the “content of the paper” and “[t]he choice of material to go into” it. [Id.](#), at 258, 94 S. Ct. 2831, 41 L. Ed. 2d 730. In protecting that right of editorial control, the Court recognized a possible downside. It noted the access advocates' view (similar to the States' view here) that “modern media empires” [***1094] had gained ever greater capacity to “shape” and even “manipulate popular opinion.” [Id.](#), at 249-250, 94 S. Ct. 2831, 41 L. Ed. 2d 730. And the Court expressed some sympathy with that diagnosis. See [id.](#), at 254, 94 S. Ct. 2831, 41 L. Ed. 2d 730. But the cure proposed, it concluded, collided with the [First Amendment's](#) antipathy to *state* manipulation of the speech [**729] market. Florida, the Court explained, could not substitute “governmental regulation” for the “crucial process” of editorial choice. [Id.](#), at 258, 94 S. Ct. 2831, 41 L. Ed. 2d 730.

Next up was [Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.](#), 475 U. S. 1, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986) ([PG&E](#)), which the Court thought to follow naturally from [Tornillo](#). See 475 U. S., at 9-12, 106 S. Ct. 903, 89 L. Ed. 2d 1 (plurality opinion); [id.](#), at 21 (Burger, C. J., concurring). A private utility in California regularly put a newsletter in its billing [****31] envelopes expressing its views of energy policy. The State directed it to include as well material from a consumer-advocacy group giving a different perspective. The utility objected, and the Court held again that the interest in “offer[ing] the public a greater variety of views” could not justify the regulation. [Id.](#), at 12, 106 S. Ct. 903, 89 L. Ed. 2d 1. California was compelling the utility (as Florida had compelled a newspaper) “to carry speech with which it disagreed” and thus to “alter its own

³Although the discussion below focuses on Texas's content-moderation provisions, it also bears on how the lower courts should address the individualized-explanation provisions in the upcoming facial inquiry. As noted, requirements of that kind violate the [First Amendment](#) if they unduly burden expressive activity. See [Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio](#), 471 U. S. 626, 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985); *supra*, at 725. So our explanation of why Facebook and YouTube are engaged in expression when they make content-moderation choices in their main feeds should inform the courts' further consideration of that issue.

message.” *Id.*, at 11, n. 7, 16, 106 S. Ct. 903, 89 L. Ed. 2d 1.

In *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) (*Turner I*), the Court further underscored the constitutional protection given to editorial choice. At issue were federal “must-carry” rules, requiring cable operators to allocate some of their channels to local broadcast stations. The Court had no doubt that the *First Amendment* was implicated, because the operators were engaging in expressive activity. They were, the Court explained, “exercising editorial discretion over which stations or programs to include in [their] repertoire.” *Id.*, at 636, 114 S. Ct. 2445, 129 L. Ed. 2d 497. And the rules “interfere[d]” with that discretion by forcing the operators to carry stations they would not otherwise have chosen. *Id.*, at 643-644, 114 S. Ct. 2445, 129 L. Ed. 2d 497. In a later decision, the Court ruled that the regulation survived *First Amendment* review because it was necessary to prevent the demise of local [****32] broadcasting. See *Turner Broadcasting System, Inc. v. FCC*, 520 U. S. 180, 185, 189-190, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997) (*Turner II*); see *infra*, at 742, n. [**2401] 10. *HN11* But for purposes of today’s cases, the takeaway of *Turner* is this holding: A private party’s collection of third-party content into a [*730] single speech product (the operators’ “repertoire” of programming) is itself expressive, and intrusion into that activity must be specially justified under the *First Amendment*.

The capstone of those precedents came in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995), when the Court considered (of all things) a parade. The question was whether Massachusetts could require the organizers of a St. Patrick’s Day parade to admit as a participant a gay and lesbian group seeking to convey a message of “pride.” *Id.*, at 561, 115 S. Ct. 2338, 132 L. Ed. 2d 487. The Court held unanimously that the *First Amendment* [***1095] precluded that compulsion. The “selection of contingents to make a parade,” it

explained, is entitled to *First Amendment* protection, no less than a newspaper’s “presentation of an edited compilation of [other persons’] speech.” *Id.*, at 570, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (citing *Tornillo*, 418 U. S., at 258, 94 S. Ct. 2831, 41 L. Ed. 2d 730). And that meant the State could not tell the parade organizers whom to include. Because “every participating unit affects the message,” said the Court, ordering the group’s admittance would “alter the expressive content of the[] parade.” *Hurley*, 515 U. S., at 572-573, 115 S. Ct. 2338, 132 L. Ed. 2d 487. The parade’s organizers had “decided to exclude a message [they] did not [****33] like from the communication [they] chose to make,” and that was their decision alone. *Id.*, at 574, 115 S. Ct. 2338, 132 L. Ed. 2d 487.

On two other occasions, the Court distinguished *Tornillo* and its progeny for the flip-side reason—because in those cases the compelled access did *not* affect the complaining party’s own expression. First, in *PruneYard Shopping Center v. Robins*, 447 U. S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980), the Court rejected a shopping mall’s *First Amendment* challenge to a California law requiring it to allow members of the public to distribute handbills on its property. The mall owner did not claim that he (or the mall) was engaged in any expressive activity. Indeed, as the *PG&E* Court later noted, he “did not even allege that he objected to the content of the pamphlets” passed out at the mall. 475 U. S., at 12, 106 S. Ct. 903, 89 L. Ed. 2d 1. Similarly, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, [*731] 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) (*FAIR*), the Court reiterated that a *First Amendment* claim will not succeed when the entity objecting to hosting third-party speech is not itself engaged in expression. The statute at issue required law schools to allow the military to participate in on-campus recruiting. The Court held that the schools had no *First Amendment* right to exclude the military based on its hiring policies, because the schools “are not speaking when they host interviews.” *Id.*, at 64, 126 S. Ct. 1297, 164 L. Ed.

[2d 156](#). Or stated again, with reference to the just-described precedents: Because a “law [****34] school’s recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper,” the required “accommodation of a military recruiter[]” did not “interfere with any message of the school.” *Ibid*.

That is a slew of individual cases, so consider three general points to wrap up. Not coincidentally, they will figure in the upcoming discussion of the [First Amendment](#) problems the statutes at issue here likely present as to Facebook’s News Feed and similar products.

[HN12](#) First, the [First Amendment](#) offers protection when an entity engaging in expressive activity, including compiling and curating others’ speech, is directed to accommodate messages it would prefer to exclude. “[T]he editorial function itself is [**2402] an aspect of speech.” [Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U. S. 727, 737, 116 S. Ct. 2374, 135 L. Ed. 2d 888 \(1996\)](#) (plurality opinion). Or said just a bit differently: An entity “exercis[ing] editorial discretion in the selection and presentation” of content is “engage[d] [***1096] in speech activity.” [Arkansas Ed. Television Comm’n v. Forbes, 523 U. S. 666, 674, 118 S. Ct. 1633, 140 L. Ed. 2d 875 \(1998\)](#). And that is as true when the content comes from third parties as when it does not. (Again, think of a newspaper opinion page or, if you prefer, a parade.) Deciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting [****35] the included items—is expressive activity of its own. And that activity results in a distinctive expressive product. When [*732] the government interferes with such editorial choices—say, by ordering the excluded to be included—it alters the content of the compilation. (It creates a different opinion page or parade, bearing a different message.) And in so doing—in overriding a private party’s expressive choices—the government confronts the [First](#)

[Amendment](#).⁴

Second, none of that changes just because a compiler includes most items and excludes just a few. That was the situation in *Hurley*. The St. Patrick’s Day parade at issue there was “eclectic”: It included a “wide variety of patriotic, commercial, political, moral, artistic, religious, athletic, public service, trade union, and eleemosynary themes, as well as conflicting messages.” [515 U. S., at 562, 115 S. Ct. 2338, 132 L. Ed. 2d 487](#). Or otherwise said, the organizers were “rather lenient in admitting participants.” [Id., at 569, 115 S. Ct. 2338, 132 L. Ed. 2d 487](#). No matter. [HN13](#) A “narrow, succinctly articulable message is not a condition of constitutional protection.” *Ibid*. It “is enough” for a compiler to exclude the handful of messages it most “disfavor[s].” [Id., at 574, 115 S. Ct. 2338, 132 L. Ed. 2d 487](#). Suppose, for example, that the newspaper in *Tornillo* had granted a right of reply to all [****36] but one candidate. It would have made no difference; the Florida statute still could not have altered the paper’s policy. Indeed, that kind of focused editorial choice packs a peculiarly powerful expressive punch.

[HN14](#) Third, the government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas. Of course, it is critically important to have a well-functioning sphere of expression, in which citizens have access to information from many sources. That is the whole project of the [First Amendment](#). And the government can [*733] take varied measures, like enforcing competition laws, to protect that access. Cf., e.g., [Turner I, 512 U. S., at 647, 114 S. Ct. 2445, 129 L. Ed. 2d 497](#) (protecting local broadcasting); [Hurley, 515 U. S., at 577, 115 S. Ct. 2338, 132 L. Ed. 2d 487](#) (discussing *Turner I*). But

⁴Of course, an entity engaged in expressive activity when performing one function may not be when carrying out another. That is one lesson of *FAIR*. The Court ruled as it did because the law schools’ recruiting services were not engaged in expression. See [547 U. S. 47, 64, 126 S. Ct. 1297, 164 L. Ed. 2d 156 \(2006\)](#). The case could not have been resolved on that ground if the regulation had affected what happened in law school classes instead.

in case after case, the Court has barred the government from forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm. The regulations in [Tornillo](#), [PG&E](#), and [Hurley](#) all were thought to promote greater diversity of expression. See *supra*, at 728-730. They also were thought to counteract advantages some private [***1097] parties possessed in controlling “enviable vehicle[s]” for speech. [Hurley](#), 515 U. S., at 577, 115 S. Ct. 2338, 132 L. Ed. 2d 487. Indeed, the *Tornillo* Court devoted six pages of its opinion to recounting [****37] a critique [**2403] of the then-current media environment—in particular, the disproportionate “influen[ce]” of a few speakers—similar to one heard today (except about different entities). [418 U. S., at 249, 94 S. Ct. 2831, 41 L. Ed. 2d 730](#); see *id.*, at 248-254, 94 S. Ct. 2831, 41 L. Ed. 2d 730; *supra*, at 728-729. It made no difference. However imperfect the private marketplace of ideas, here was a worse proposal—the government itself deciding when speech was imbalanced, and then coercing speakers to provide more of some views or less of others.

B

[HN15](#) “[W]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles” of the [First Amendment](#) “do not vary.” [Brown v. Entm’t Merchants Ass’n](#), 564 U. S. 786, 790, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011). New communications media differ from old ones in a host of ways: No one thinks Facebook’s News Feed much resembles an insert put in a billing envelope. And similarly, today’s social media pose dangers not seen earlier: No one ever feared the effects of newspaper opinion pages on adolescents’ mental health. But analogies to old media, even if imperfect, can be useful. And better still as guides to decision are settled principles about freedom of expression, including the ones just described. Those principles have served the Nation well over [*734] many years, even as one communications method has given way to another. And they [****38] have much to say about the

laws at issue here. These cases, to be sure, are at an early stage; the record is incomplete even as to the major social-media platforms’ main feeds, much less the other applications that must now be considered. See *supra*, at 726. But in reviewing the District Court’s preliminary injunction, the Fifth Circuit got its likelihood-of-success finding wrong. Texas is not likely to succeed in enforcing its law against the platforms’ application of their content-moderation policies to the feeds that were the focus of the proceedings below. And that is because of the core teaching elaborated in the above-summarized decisions: [HN16](#) The government may not, in supposed pursuit of better expressive balance, alter a private speaker’s own editorial choices about the mix of speech it wants to convey.

Most readers are likely familiar with Facebook’s News Feed or YouTube’s homepage; assuming so, feel free to skip this paragraph (and maybe a couple more). For the uninitiated, though, each of those feeds presents a user with a continually updating stream of other users’ posts. For Facebook’s News Feed, any user may upload a message, whether verbal or visual, with content running the [****39] gamut from “vacation pictures from friends” to “articles from local or national news outlets.” App. in No. 22-555, at 139a. And whenever a user signs on, Facebook delivers a personalized collection of those stories. Similarly for YouTube. Its users upload all manner of videos. And any person opening the website or mobile app receives an individualized list of video recommendations.

The key to the scheme is prioritization [***1098] of content, achieved through the use of algorithms. Of the billions of posts or videos (plus advertisements) that could wind up on a user’s customized feed or recommendations list, only the tiniest fraction do. The selection and ranking is most often based [*735] on a user’s expressed interests and past activities. But it may also be based on more general features of the communication or its creator. Facebook’s Community Standards and YouTube’s Community Guidelines detail the messages and videos that the

platforms disfavor. The platforms write algorithms to implement those standards—for example, to prefer content deemed particularly trustworthy or to suppress **[**2404]** content viewed as deceptive (like videos promoting “conspiracy theor[ies]”). *Id.*, at 113a.

Beyond rankings lie labels. **[****40]** The platforms may attach “warning[s], disclaimers, or general commentary”—for example, informing users that certain content has “not been verified by official sources.” *Id.*, at 75a. Likewise, they may use “information panels” to give users “context on content relating to topics and news prone to misinformation, as well as context about who submitted the content.” *Id.*, at 114a. So, for example, YouTube identifies content submitted by state-supported media channels, including those funded by the Russian Government. See *id.*, at 76a.

But sometimes, the platforms decide, providing more information is not enough; instead, removing a post is the right course. The platforms’ content-moderation policies also say when that is so. Facebook’s Standards, for example, proscribe posts—with exceptions for “newsworth[iness]” and other “public interest value”—in categories and subcategories including: Violence and Criminal Behavior (*e.g.*, violence and incitement, coordinating harm and publicizing crime, fraud and deception); Safety (*e.g.*, suicide and self-injury, sexual exploitation, bullying and harassment); Objectionable Content (*e.g.*, hate speech, violent and graphic content); Integrity and Authenticity **[****41]** (*e.g.*, false news, manipulated media). *Id.*, at 412a-415a, 441a-442a. YouTube’s Guidelines similarly target videos falling within categories like: hate speech, violent or graphic content, child safety, and misinformation (including about elections and vaccines). See **[*736]** *id.*, at 430a-432a. The platforms thus unabashedly control the content that will appear to users, exercising authority to remove, label or demote messages they disfavor.⁵

Except that Texas’s law limits their power to do so. As noted earlier, the law’s central provision prohibits the large social-media platforms (and maybe other entities⁶) from “censor[ing]” a “user’s expression” based on its “viewpoint.” [§143A.002\(a\)\(2\)](#); see *supra*, at 721. **[***1099]** The law defines “expression” broadly, thus including pretty much anything that might be posted. See [§143A.001\(2\)](#). And it defines “censor” to mean “block, ban, remove, deplatform, demonetize, deboost, restrict, deny equal access or visibility to, or otherwise discriminate against expression.” [§143A.001\(1\)](#).⁷ That is a long list of **[**2405]** verbs, but it comes down to this: The platforms cannot do any of the things they typically do (on their main feeds) to posts they disapprove—cannot demote, label, or remove them—whenever the **[****42]** action is based on the **[*737]** post’s viewpoint.⁸ And what does that “based on

solely to how users act online—giving them the content they appear to want, without any regard to independent content standards. See *post*, at 2 (BARRETT, J., concurring). Like them or loathe them, the Community Standards and Community Guidelines make a wealth of user-agnostic judgments about what kinds of speech, including what viewpoints, are not worthy of promotion. And those judgments show up in Facebook’s and YouTube’s main feeds.

⁶ The scope of the Texas law, a matter crucial to the facial inquiry, is unsettled, as previously discussed. See *supra*, at 724-725. The Texas solicitor general at oral argument stated that he understood the law to cover Facebook and YouTube, but “d[id]n’t know” whether it also covered other platforms and applications. Tr. of Oral Arg. in No. 22-555, pp. 61-62.

⁷ In addition to barring “censor[ship]” of “expression,” the law bars “censor[ship]” of people. More specifically, it prohibits taking the designated “censor[ial]” actions against any “user” based on his “viewpoint,” regardless of whether that “viewpoint is expressed on a social media platform.” [§§143A.002\(a\)\(1\), \(b\)](#); see *supra*, at 721. Because the Fifth Circuit did not focus on that provision, instead confining its analysis to the law’s ban on “censor[ing]” a “user’s expression” on the platform, we do the same.

⁸ The Texas solicitor general explained at oral argument that the Texas law allows the platforms to remove “categories” of speech, so long as they are not based on viewpoint. See Tr. of Oral Arg. in No. 22-555, at 69-70; [§120.052](#) (Acceptable Use Policy). The example he gave was speech about Al-Qaeda. Under the law, a platform could remove all posts about Al-Qaeda, regardless of viewpoint. But it could not stop the “pro-Al-Qaeda” speech alone; it would have to stop the “anti-Al-Qaeda” speech too. Tr. of Oral Arg. in No. 22-555,

⁵ We therefore do not deal here with feeds whose algorithms respond

viewpoint” requirement entail? Doubtless some of the platforms’ content-moderation practices are based on characteristics of speech other than viewpoint (*e.g.*, on subject matter). But if Texas’s law is enforced, the platforms could not—as they in fact do now—disfavor posts because they:

- support Nazi ideology;
- advocate for terrorism;
- espouse racism, Islamophobia, or anti-Semitism;
- glorify rape or other gender-based violence;
- encourage teenage suicide and self-injury;
- discourage the use of vaccines;
- advise phony treatments for diseases;
- advance false claims of election fraud.

The list could continue for a while.⁹ The point of it is not that the speech environment created by Texas’s law is worse than the ones to which the major platforms aspire on their main feeds. The point is just that Texas’s law profoundly alters the platforms’ choices about the views they will, and will not, convey.

[*738] And we have time and again held that type of regulation to interfere with protected speech. Like the editors, cable operators, and parade organizers this Court has previously considered, the major social-media platforms [****43] are in the business, when curating their feeds, of combining “multifarious voices” to create a distinctive expressive offering. *Hurley*, 515 U. S., at 569, 115 S. Ct. 2338, 132 L. Ed. 2d 487. [***1100] The

individual messages may originate with third parties, but the larger offering is the platform’s. It is the product of a wealth of choices about whether—and, if so, how—to convey posts having a certain content or viewpoint. Those choices rest on a set of beliefs about which messages are appropriate and which are not (or which are more appropriate and which less so). And in the aggregate they give the feed a particular expressive quality. Consider again an opinion page editor, as in *Tornillo*, who wants to publish a variety of views, but thinks some things off-limits (or, to change the facts, worth only a couple of column inches). “[HN17](#) The choice of material,” the “decisions made [as to] content,” the “treatment of public issues”—“whether fair or unfair”—all these “constitute the exercise of editorial control and judgment.” *Tornillo*, 418 U. S., at 258, 94 S. Ct. 2831, 41 L. Ed. 2d 730. For a paper, and for a platform too. And the Texas law (like Florida’s earlier right-of-reply statute) targets those expressive choices—in particular, by forcing the major platforms to present [**2406] and promote content on their feeds that they [****44] regard as objectionable.

That those platforms happily convey the lion’s share of posts submitted to them makes no significant *First Amendment* difference. Contra, [49 F. 4th, at 459-461](#) (arguing otherwise). To begin with, Facebook and YouTube exclude (not to mention, label or demote) lots of content from their News Feed and homepage. The Community Standards and Community Guidelines set out in copious detail the varied kinds of speech the platforms want no truck with. And both platforms appear to put those manuals to work. In a single quarter of 2021, Facebook removed from its News Feed more [*739] than 25 million pieces of “hate speech content” and almost 9 million pieces of “bullying and harassment content.” App. in No. 22-555, at 80a. Similarly, YouTube deleted in one quarter more than 6 million videos violating its Guidelines. See *id.*, at 116a. And among those are the removals the Texas law targets. What is more, this Court has already rightly declined to focus on the ratio of rejected to accepted content. Recall that

at 70. So again, the law, as described by the solicitor general, prevents the platforms from disfavoring posts because they express one view of a subject.

⁹Details on both the enumerated examples and similar ones are found in Facebook’s Community Standards and YouTube’s Community Guidelines. See <https://transparency.meta.com/policies/community-standards>; <https://support.google.com/youtube/answer/9288567>.

in *Hurley*, the parade organizers welcomed pretty much everyone, excluding only those who expressed a message of gay pride. See *supra*, at 732. The Court held that the organizers’ “lenient” admissions policy—and their resulting [****45] failure to express a “particularized message”—did “not forfeit” their right to reject the few messages they found harmful or offensive. [515 U. S., at 569, 574, 115 S. Ct. 2338, 132 L. Ed. 2d 487](#). So too here, though the excluded viewpoints differ. That Facebook and YouTube convey a mass of messages does not license Texas to prohibit them from deleting posts with, say, “hate speech” based on “sexual orientation.” App. in No. 22-555, at 126a, 155a; see *id.*, at 431a. It is as much an editorial choice to convey all speech except in select categories as to convey only speech within them.

[HN18](#) Similarly, the major social-media platforms do not lose their [First Amendment](#) protection just because no one will wrongly attribute to them the views in an individual post. Contra, [49 F. 4th, at 462](#) (arguing otherwise). For starters, users may well attribute to the platforms the messages that the posts convey *in toto*. Those messages—communicated by [****1101] the feeds as a whole—derive largely from the platforms’ editorial decisions about which posts to remove, label, or demote. And because that is so, the platforms may indeed “own” the overall speech environment. In any event, this Court has never hinged a compiler’s [First Amendment](#) protection on the risk of misattribution. The Court did not think in *Turner*—and could not have [****46] thought in *Tornillo* or *PG&E*—that anyone would view the entity conveying the third-party speech at issue as endorsing its content. See [*740] [Turner I, 512 U. S., at 655, 114 S. Ct. 2445, 129 L. Ed. 2d 497](#) (“[T]here appears little risk” of such misattribution). Yet all those entities, the Court held, were entitled to [First Amendment](#) protection for refusing to carry the speech. See *supra*, at 728-730. To be sure, the Court noted in *PruneYard* and *FAIR*, when denying such protection, that there was little prospect of misattribution. See [447 U. S., at 87, 100 S. Ct. 2035, 64 L. Ed. 2d 741; 547 U. S., at](#)

[65](#). But the key fact in those cases, as noted above, was that the host of the third-party speech was not itself engaged in expression. See *supra*, at 730-731. The current record suggests the opposite as to Facebook’s News Feed and YouTube’s homepage. When the platforms use their Standards and Guidelines to decide which third-party content those feeds will display, or how the display will be ordered and organized, they are making expressive choices. And because that is true, they receive [First Amendment](#) protection.

[**2407] C

And once that much is decided, the interest Texas relies on cannot sustain its law. In the usual [First Amendment](#) case, we must decide whether to apply strict or intermediate scrutiny. But here we need not. Even assuming that the less stringent form of [First Amendment](#) review applies, [****47] Texas’s law does not pass. [HN19](#) Under that standard, a law must further a “substantial governmental interest” that is “unrelated to the suppression of free expression.” [United States v. O’Brien, 391 U. S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 \(1968\)](#). Many possible interests relating to social media can meet that test; nothing said here puts regulation of NetChoice’s members off-limits as to a whole array of subjects. But the interest Texas has asserted cannot carry the day: It is very much related to the suppression of free expression, and it is not valid, let alone substantial.

Texas has never been shy, and always been consistent, about its interest: The objective is to correct the mix of speech that the major social-media platforms present. In [*741] this Court, Texas described its law as “respond[ing]” to the platforms’ practice of “favoring certain viewpoints.” Brief for Texas 7; see *id.*, at 27 (explaining that the platforms’ “discrimination” among messages “led to [the law’s] enactment”). The large social-media platforms throw out (or encumber) certain messages; Texas wants them kept in (and free from encumbrances), because it

thinks that would create a better speech balance. The current amalgam, the State explained in earlier briefing, was “skewed” to one side. [573 F. Supp. 3d, at 1116](#). And [****48] that assessment mirrored the stated views of those who enacted the law, save that the latter had a bit more color. The law’s main sponsor explained that the “West Coast oligarchs” who [***1102] ran social-media companies were “silenc[ing] conservative viewpoints and ideas.” *Ibid.* The Governor, in signing the legislation, echoed the point: The companies were fomenting a “dangerous movement” to “silence” conservatives. [Id., at 1108](#); see [id., at 1099](#) (“[S]ilencing conservative views is unAmerican, it’s un-Texan and it’s about to be illegal in Texas”).

[HN20](#) But a State may not interfere with private actors’ speech to advance its own vision of ideological balance. States (and their citizens) are of course right to want an expressive realm in which the public has access to a wide range of views. That is, indeed, a fundamental aim of the [First Amendment](#). But the way the [First Amendment](#) achieves that goal is by preventing the government from “tilt[ing] public debate in a preferred direction.” [Sorrell v. IMS Health Inc., 564 U. S. 552, 578-579, 131 S. Ct. 2653, 180 L. Ed. 2d 544 \(2011\)](#). It is not by licensing the government to stop private actors from speaking as they wish and preferring some views over others. And that is so even when those actors possess “enviable vehicle[s]” for expression. [Hurley, 515 U. S., at 577, 115 S. Ct. 2338, 132 L. Ed. 2d 487](#). In a better world, there would be fewer inequities in speech [****49] opportunities; and the government can take many steps to bring that world closer. [HN21](#) But it cannot prohibit speech to improve or better balance the speech market. On the spectrum of dangers to free expression, [*742] there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana. That is why we have said in so many contexts that the government may not “restrict the speech of some elements of our society in order to enhance the

relative voice of others.” [Buckley v. Valeo, 424 U. S. 1, 48-49, 96 S. Ct. 612, 46 L. Ed. 2d 659 \(1976\)](#) (*per curiam*). That unadorned interest is not “unrelated to the suppression of free expression,” [**2408] and the government may not pursue it consistent with the [First Amendment](#).

The Court’s decisions about editorial control, as discussed earlier, make that point repeatedly. See *supra*, at 732-733. Again, the question those cases had in common was whether the government could force a private speaker, including a compiler and curator of third-party speech, to convey views it disapproved. And in most of those cases, the government defended its regulation as yielding greater balance in the marketplace of ideas. But the Court—in *Tornillo*, in [PG&E](#), and again in [Hurley](#)—held that such an interest [****50] could not support the government’s effort to alter the speaker’s own expression. “Our cases establish,” the [PG&E](#) Court wrote, “that the State cannot advance some points of view by burdening the expression of others.” [475 U. S., at 20, 106 S. Ct. 903, 89 L. Ed. 2d 1](#). So the newspaper, the public utility, the parade organizer—whether acting “fair[ly] or unfair[ly]”—could exclude the unwanted message, free from government interference. [Tornillo, 418 U. S., at 258, 94 S. Ct. 2831, 41 L. Ed. 2d 730](#); see [United States Telecom Ass’n v. FCC, 855 F. 3d 381, 432, 428 U.S. App. D.C. 439 \(CADDC 2017\)](#) (Kavanaugh, J., dissenting from denial of rehearing en banc) (“[E]xcept in rare circumstances, the [First Amendment](#) does not allow the Government to regulate the content choices of private editors just so that the Government may enhance [***1103] certain voices and alter the content available to the citizenry”).¹⁰

¹⁰ Texas claims [Turner](#) as a counter-example, but that decision offers no help to speak of. *Turner* did indeed hold that the FCC’s must-carry provisions, requiring cable operators to give some of their channel space to local broadcast stations, passed [First Amendment](#) muster. See *supra*, at 729. But the interest there advanced was not to balance expressive content; rather, the interest was to save the local-broadcast industry, so that it could continue to serve households without cable. That interest, the Court explained, was “unrelated to the content of expression” disseminated by either cable or broadcast

[*743] The case here is no different. The interest Texas asserts is in changing the balance of speech on the major platforms' feeds, so that messages now excluded will be included. To describe that interest, the State borrows language from this Court's [First Amendment](#) cases, maintaining that it is preventing "viewpoint discrimination." Brief for Texas 19; see *supra*, at 740-741. But the Court uses that language to say what governments cannot do: They cannot prohibit private actors from expressing certain views. [****51] When Texas uses that language, it is to say what private actors cannot do: They cannot decide for themselves what views to convey. The innocent-sounding phrase does not redeem the prohibited goal. The reason Texas is regulating the content-moderation policies that the major platforms use for their feeds is to change the speech that will be displayed there. Texas does not like the way those platforms are selecting and moderating content, and wants them to create a different expressive product, communicating different values and priorities. But under the [First Amendment](#), that is a preference Texas may not impose.

IV

These are facial challenges, and that matters. [HN22](#) To succeed on its [First Amendment](#) [**2409] claim, NetChoice must show that [*744] the law at issue (whether from Texas or from Florida) "prohibits a substantial amount of protected speech relative to its plainly legitimate sweep." [Hansen, 599 U. S., at 770, 143 S. Ct. 1932, 216 L. Ed. 2d 692](#). None of the parties below focused on that issue; nor did the Fifth or Eleventh Circuits. But that choice, unanimous as it has been, cannot now

speakers. [Turner I, 512 U. S. 622, 647, 114 S. Ct. 2445, 129 L. Ed. 2d 497 \(1994\)](#). And later, the *Hurley* Court again noted the difference. It understood the Government interest in *Turner* as one relating to competition policy: The FCC needed to limit the cable operators' "monopolistic," gatekeeping position "in order to allow for the survival of broadcasters." [515 U. S., at 577, 115 S. Ct. 2338, 132 L. Ed. 2d 487](#). Unlike in regulating the parade—or here in regulating Facebook's News Feed or YouTube's homepage—the Government's interest was "not the alteration of speech." *Ibid.* And when that is so, the prospects of permissible regulation are entirely different.

control. [HN23](#) Even in the [First Amendment](#) context, facial challenges are disfavored, and neither parties nor courts can disregard the requisite inquiry into how a law works in all of its applications. So on remand, each court [****52] must evaluate the full scope of the law's coverage. It must then decide which of the law's applications are constitutionally permissible and which are not, and finally weigh the one against the other. The need for NetChoice to carry its burden on those issues is the price of its decision to challenge the laws as a whole.

But there has been enough litigation already to know that the Fifth Circuit, if it stayed the course, would get wrong at least one significant input into the facial analysis. The parties [***1104] treated Facebook's News Feed and YouTube's homepage as the heartland applications of the Texas law. At least on the current record, the editorial judgments influencing the content of those feeds are, contrary to the Fifth Circuit's view, protected expressive activity. And Texas may not interfere with those judgments simply because it would prefer a different mix of messages. How that matters for the requisite facial analysis is for the Fifth Circuit to decide. But it should conduct that analysis in keeping with two [First Amendment](#) precepts. [HN24](#) First, presenting a curated and "edited compilation of [third party] speech" is itself protected speech. [Hurley, 515 U. S., at 570, 115 S. Ct. 2338, 132 L. Ed. 2d 487](#). And second, a State "cannot advance some points of view [****53] by burdening the expression of others." [PG&E, 475 U. S., at 20, 106 S. Ct. 903, 89 L. Ed. 2d 1](#). To give government that power is to enable it to control the expression of ideas, promoting those it favors and suppressing those it does not. And that is what the [First Amendment](#) protects all of us from.

[*745] We accordingly vacate the judgments of the Courts of Appeals for the Fifth and Eleventh Circuits and remand the cases for further proceedings consistent with this opinion.

It is so ordered.

Concur by: BARRETT; JACKSON; THOMAS; ALITO

Concur

JUSTICE BARRETT, concurring.

I join the Court’s opinion, which correctly articulates and applies our [First Amendment](#) precedent. In this respect, the Eleventh Circuit’s understanding of the [First Amendment’s](#) protection of editorial discretion was generally correct; the Fifth Circuit’s was not.

But for the reasons the Court gives, these cases illustrate the dangers of bringing a facial challenge. If NetChoice’s members are concerned about preserving their editorial discretion with respect to the services on which they have focused throughout this litigation—*e.g.*, Facebook’s Newsfeed and YouTube’s homepage—they would be better served by bringing a [First Amendment](#) challenge as applied to those functions. Analyzing how the [First Amendment](#) bears on those functions is complicated enough without simultaneously [****54] analyzing how it bears on a platform’s other functions—*e.g.*, Facebook Messenger and Google Search—much less to distinct platforms like Uber and Etsy. In fact, dealing with a broad swath of varied platforms and functions in a facial challenge strikes me as a daunting, if not impossible, task. A function qualifies for [First Amendment](#) protection only if it is inherently expressive. [Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.](#), 515 U. S. 557, 568, 115 S. Ct. 2338, 132 [**2410] L. Ed. 2d 487 (1995). Even for a prototypical social-media feed, making this determination involves more than meets the eye.

Consider, for instance, how platforms use algorithms to prioritize and remove content on their feeds. Assume that human beings decide to remove posts promoting a particular political candidate or advocating some position on a public-health issue. If they create an algorithm to help them identify

[*746] and delete that content, the [First Amendment](#) protects their exercise of editorial judgment—even [***1105] if the algorithm does most of the deleting without a person in the loop. In that event, the algorithm would simply implement human beings’ inherently expressive choice “to exclude a message [they] did not like from” their speech compilation. [Id.](#), at 574, 115 S. Ct. 2338, 132 L. Ed. 2d 487.

But what if a platform’s algorithm just presents automatically to each user whatever the algorithm thinks the [****55] user will like—*e.g.*, content similar to posts with which the user previously engaged? See *ante*, at 736, n. 5. The [First Amendment](#) implications of the Florida and Texas laws might be different for that kind of algorithm. And what about AI, which is rapidly evolving? What if a platform’s owners hand the reins to an AI tool and ask it simply to remove “hateful” content? If the AI relies on large language models to determine what is “hateful” and should be removed, has a human being with [First Amendment](#) rights made an inherently expressive “choice . . . not to propound a particular point of view”? [Hurley](#), 515 U. S., at 575, 115 S. Ct. 2338, 132 L. Ed. 2d 487. In other words, technology may attenuate the connection between content-moderation actions (*e.g.*, removing posts) and human beings’ constitutionally protected right to “decide for [themselves] the ideas and beliefs deserving of expression, consideration, and adherence.” [Turner Broadcasting System, Inc. v. FCC](#), 512 U. S. 622, 641, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) (emphasis added). So the way platforms use this sort of technology might have constitutional significance.

There can be other complexities too. For example, the corporate structure and ownership of some platforms may be relevant to the constitutional analysis. A speaker’s right to “decide ‘what not to say’” is “enjoyed by business corporations generally.” [****56] [Hurley](#), 515 U. S., at 573-574, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (quoting [Pacific Gas & Elec. Co. v. Public Util. Comm’n of](#)

Cal., 475 U. S. 1, 16, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986)). Corporations, which are composed of human beings with [First Amendment](#) rights, possess [First Amendment](#) [*747] rights themselves. See *Citizens United v. Federal Election Comm’n*, 558 U. S. 310, 365, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); cf. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U. S. 682, 706-707, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014). But foreign persons and corporations located abroad do not. *Agency for Int’l Development v. Alliance for Open Society Int’l, Inc.*, 591 U. S. 430, 433-436, 140 S. Ct. 2082, 207 L. Ed. 2d 654 (2020). So a social-media platform’s foreign ownership and control over its content-moderation decisions might affect whether laws overriding those decisions trigger [First Amendment](#) scrutiny. What if the platform’s corporate leadership abroad makes the policy decisions about the viewpoints and content the platform will disseminate? Would it matter that the corporation employs Americans to develop and implement content-moderation algorithms if they do so at the direction of foreign executives? Courts may need to confront such questions when applying the [First Amendment](#) to certain platforms.

These are just a few examples of questions that might arise in litigation that more thoroughly exposes the relevant facts [**2411] about particular social-media platforms and functions. The answers in any given case might cast [***1106] doubt on—or might vindicate—a social-media company’s invocation of its [First Amendment](#) rights. Regardless, the analysis is bound to be fact intensive, and it will surely vary from function to function and platform to platform. And in a facial challenge, answering [****57] all of those questions isn’t even the end of the story: The court must then find a way to measure the unconstitutional relative to the constitutional applications to determine whether the law “prohibits a substantial amount of protected speech relative to its plainly legitimate sweep.” *United States v. Hansen*, 599 U. S. 762, 770, 143 S. Ct. 1932, 216 L. Ed. 2d 692 (2023) (internal quotation marks omitted).

A facial challenge to either of these laws likely forces a court to bite off more than it can chew. An as-applied challenge, by contrast, would enable courts to home in on whether and how specific functions—like feeds versus direct messaging—are inherently expressive and answer platform- [*748] and function-specific questions that might bear on the [First Amendment](#) analysis. While the governing constitutional principles are straightforward, applying them in one fell swoop to the entire social-media universe is not.

JUSTICE JACKSON, concurring in part and concurring in the judgment.

These cases present a complex clash between two novel state laws and the alleged [First Amendment](#) rights of several of the largest social media platforms. Some things are already clear. Not every potential action taken by a social media company will qualify as expression protected under the [First Amendment](#). But not every hypothesized regulation [****58] of such a company’s operations will necessarily be able to withstand the force of the [First Amendment’s](#) protections either. Beyond those broadest of statements, it is difficult to say much more at this time. With these records and lower court decisions, we are not able to adequately evaluate whether the challenged state laws are facially valid.

That is in no small part because, as all Members of the Court acknowledge, plaintiffs bringing a facial challenge must clear a high bar. See *ante*, at 9-10 (majority opinion); *post*, at 723-724 (ALITO, J., concurring in judgment). The Eleventh Circuit failed to appreciate the nature of this challenge, and the Fifth Circuit did not adequately evaluate it. That said, I agree with JUSTICE BARRETT that the Eleventh Circuit at least fairly stated our [First Amendment](#) precedent, whereas the Fifth Circuit did not. See *ante*, at 745 (concurring opinion); see also *ante*, at 727-733 (majority opinion). On remand, then, both courts will have to undertake their legal analyses anew.

In doing so, the lower courts must address these

cases at the right level of specificity. The question is not whether an entire category of corporations (like social media companies) or a particular entity (like Facebook) [****59] is generally engaged in expression. Nor is it enough to say that a given activity [*749] (say, content moderation) for a particular service (the News Feed, for example) seems roughly analogous to a more familiar example from our precedent. Cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969) [***1107] (positing that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them”). Even when evaluating a broad facial challenge, courts must make sure they carefully parse not only what entities are regulated, but how the regulated activities *actually function* before deciding if the activity in question constitutes expression and therefore comes [**2412] within the First Amendment’s ambit. See Brief for Knight First Amendment Institute at Columbia University as *Amicus Curiae* 11-12. Thus, further factual development may be necessary before either of today’s challenges can be fully and fairly addressed.

In light of the high bar for facial challenges and the state of these cases as they come to us, I would not go on to treat either like an as-applied challenge and preview our potential ruling on the merits. Faced with difficult constitutional issues arising in new contexts on undeveloped records, this Court should strive to avoid deciding more than is necessary. See Ashwander v. TVA, 297 U.S. 288, 346-347, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring). In my view, such restraint is warranted [****60] today.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court’s decision to vacate and remand because NetChoice and the Computer and Communications Industry Association (together, the trade associations) have not established that Texas’s H. B. 20 and Florida’s S. B. 7072 are

facially unconstitutional.

I cannot agree, however, with the Court’s decision to opine on certain applications of those statutes. The Court’s discussion is unnecessary to its holding. See Jama v. Immigration and Customs Enforcement, 543 U.S. 335, 351, n. 12, 125 S. Ct. 694, 160 L. Ed. 2d 708 (2005) (“Dictum settles nothing, even in the court that utters [**750] it”). Moreover, the Court engages in the exact type of analysis that it chastises the Courts of Appeals for performing. It faults the Courts of Appeals for focusing on only one subset of applications, rather than determining whether each statute’s “full range of applications” are constitutional. See *ante*, at 724, 726. But, the Court repeats that very same error. Out of the sea of “variegated and complex” functions that platforms perform, *ante*, at 725, the Court plucks out two (Facebook’s News Feed and YouTube’s homepage), and declares that they may be protected by the First Amendment. See *ante*, at 740 (opining on what the “current record suggests”). The Court does so on a record that it itself describes as “incomplete” and [****61] “underdeveloped,” *ante*, at 726, 734, and by sidestepping several pressing factual and legal questions, see *post*, at 29-32 (ALITO, J., concurring in judgment). As JUSTICE ALITO explains, the Court’s approach is both unwarranted and mistaken. See *ibid*.

I agree with JUSTICE ALITO’s analysis and join his opinion in full. I write separately to add two observations on the merits and to highlight a more fundamental jurisdictional problem. The trade associations have brought facial challenges alleging that H. B. 20 and S. B. 7072 are unconstitutional in many or all of their applications. But, Article III of the Constitution [***1108] permits federal courts to exercise judicial power only over “Cases” and “Controversies.” Accordingly, federal courts can decide whether a statute is constitutional only as applied to the parties before them—they lack authority to deem a statute “facially” unconstitutional.

I

As JUSTICE ALITO explains, the trade associations have failed to provide many of the basic facts necessary to evaluate their challenges to H. B. 20 and S. B. 7072. See *post*, at 22-29. I make two additional observations.

First, with respect to certain provisions of H. B. 20 and S. B. 7072, the Court assumes that the framework outlined [*751] in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, [**2413] 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985), applies. See *ante*, at 725. In that case, the Court held that laws [****62] requiring the disclosure of factual information in commercial advertising may satisfy the First Amendment if the disclosures are “reasonably related” to the Government’s interest in preventing consumer deception. 471 U. S., at 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652. Because the trade associations did not contest *Zauderer*’s applicability before the Eleventh Circuit and both lower courts applied its framework, I agree with the Court’s decision to rely upon *Zauderer* at this stage. However, I think we should reconsider *Zauderer* and its progeny. “I am skeptical of the premise on which *Zauderer* rests—that, in the commercial-speech context, the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed.” *Milavetz, Gallop & Milavetz, P. A. v. United States*, 559 U. S. 229, 255, 130 S. Ct. 1324, 176 L. Ed. 2d 79 (2010) (THOMAS, J., concurring in part and concurring in judgment) (internal quotation marks omitted).

Second, the common-carrier doctrine should continue to guide the lower courts’ examination of the trade associations’ claims on remand. See *post*, at 18, and n. 17, 30 (opinion of ALITO, J.). “[O]ur legal system and its British predecessor have long subjected certain businesses, known as common carriers, to special regulations, including a general requirement to serve all comers.” *Biden v. Knight First Amendment Institute at Columbia Univ.*, 593 U. S. ___, ___, 141 S. Ct. 1220, 209 L. Ed. 2d 519, 520 (2021) (THOMAS, J. [****63], concurring in

grant of certiorari) (slip op., at 3). Moreover, “there is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers” given their many similarities. *Id.*, at ___, 141 S. Ct. 1220, 209 L. Ed. 2d 519 (slip op., at 5). Though they reached different conclusions, both the Fifth Circuit and the Eleventh Circuit appropriately strove to apply the common-carrier doctrine in assessing the constitutionality of H. B. 20 and S. B. 7072 respectively. See 49 F. 4th 439, 469-480 (CA5 2022); *NetChoice [**752] v. Attorney Gen., Fla.*, 34 F. 4th 1196, 1219-1222 (CA11 2022).

The common-carrier doctrine may have weighty implications for the trade associations’ claims. But, the same factual barriers that preclude the Court from assessing the trade associations’ claims under our First Amendment precedents also prevent [***1109] us from applying the common-carrier doctrine in this posture. At a minimum, we would need to pinpoint the regulated parties and specific conduct being regulated. On remand, however, both lower courts should continue to consider the common-carrier doctrine.

II

The opinions in these cases detail many of the considerable hurdles that currently preclude resolution of the trade associations’ claims. See *ante*, at 723-724; *ante*, at 745-747 (BARRETT, J., concurring); *post*, at 22-32 (opinion of ALITO, [****64] J.). The most significant problem of all, however, has yet to be addressed: Federal courts lack authority to adjudicate the trade associations’ facial challenges.

Rather than allege that the statutes impermissibly regulate them, the trade associations assert that H. B. 20 and S. B. 7072 are actually unconstitutional in most or all of their applications. This type of challenge, called a facial challenge, is “an attack on a statute itself as opposed to a particular application.” *Los Angeles v. Patel*, 576 U. S. 409, 415, 135 S. Ct. 2443, 192 L. Ed. 2d 435 (2015).

Facial challenges are fundamentally at odds with Article III. Because Article III **[**2414]** limits federal courts' judicial power to cases or controversies, federal courts "lac[k] the power to pronounce that [a] statute is unconstitutional" as applied to nonparties. Americans for Prosperity Foundation v. Bonta, 594 U. S. 595, 621, 141 S. Ct. 2373, 210 L. Ed. 2d 716 (2021) (THOMAS, J., concurring in part and concurring in judgment) (internal quotation marks omitted). Entertaining facial challenges in spite of that limitation arrogates powers reserved to the political branches **[*753]** and disturbs the relationship between the Federal Government and the States. The practice of adjudicating facial challenges creates practical concerns as well. Facial challenges' dubious historical roots further confirm that the doctrine should have no place in our jurisprudence.

A

1

Article III empowers federal **[****65]** courts to exercise "judicial Power" only over "Cases" and "Controversies." This Court has long recognized that those terms impose substantive constraints on the authority of federal courts. See Muskrat v. United States, 219 U. S. 346, 356-358, 31 S. Ct. 250, 55 L. Ed. 246, 46 Ct. Cl. 656 (1911); see also Steel Co. v. Citizens for Better Environment, 523 U. S. 83, 102, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). One corollary of the case-or-controversy requirement is that while federal courts can judge the constitutionality of statutes, they may do so only to the extent necessary to resolve the case at hand. "It is emphatically the province and duty of the judicial department to say what the law is," but only because "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule." Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803); see Liverpool, New York & Philadelphia S. S. Co. v. Commissioners of Emigration, 113 U. S. 33, 39, 5 S. Ct. 352, 28 L. Ed. 899 (1885) ("[The Court] has no jurisdiction to pronounce any statute . . . irreconcilable with the Constitution, except as it is

[*1110]** called upon to adjudge the legal rights of litigants in actual controversies"). Accordingly, "[e]xcept when necessary" to resolve a case or controversy, "courts have no charter to review and revise legislative and executive action." Summers v. Earth Island Institute, 555 U. S. 488, 492, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009); see United States v. Raines, 362 U. S. 17, 20-21, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

These limitations on the power of judicial review play an essential role in preserving our constitutional structure. Our Constitution sets forth a "tripartite allocation of power," separating different types of powers **[****66]** across three co-equal **[*754]** branches. DaimlerChrysler Corp. v. Cuno, 547 U. S. 332, 341, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006) (internal quotation marks omitted). "[E]ach branch [is vested] with an exclusive form of power," and "no branch can encroach upon the powers confided to the others." Patchak v. Zinke, 583 U. S. 244, 250, 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018) (plurality opinion) (internal quotation marks omitted). In the Judicial Branch's case, it is vested with the "ultimate and supreme" power of judicial review. Chicago & Grand Trunk R. Co. v. Wellman, 143 U. S. 339, 345, 12 S. Ct. 400, 36 L. Ed. 176 (1892). That power includes the authority to refuse to apply a statute enacted and approved by the other two branches of the Federal Government. But, the power of judicial review can be wielded only in specific circumstances and to limited ends—to resolve cases and controversies. Without that limitation, the Judiciary would have an unchecked ability to enjoin duly enacted statutes. Respecting the case-or-controversy requirement is therefore necessary to "preven[t] the Federal Judiciary from intruding **[**2415]** upon the powers given to the other branches, and confin[e] the federal courts to a properly judicial role." Town of Chester v. Laroe Estates, Inc., 581 U. S. 433, 438, 137 S. Ct. 1645, 198 L. Ed. 2d 64 (2017) (internal quotation marks and alteration omitted).

2

Facial challenges conflict with Article III’s case-or-controversy requirement because they ask a federal court to decide whether a statute might conflict with the Constitution in cases [****67] that are not before the court.

To bring a facial challenge under our precedents, a plaintiff must ordinarily “establish that no set of circumstances exists under which the Act would be valid.” [*United States v. Salerno*, 481 U. S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 \(1987\)](#). In the [*First Amendment*](#) context, we have sometimes applied an even looser standard, called the overbreadth doctrine. The overbreadth doctrine requires a plaintiff to establish only that a statute “prohibits a substantial amount of protected speech,” “relative to [its] [*755] plainly legitimate sweep.” [*United States v. Williams*, 553 U. S. 285, 292, 128 S. Ct. 1830, 170 L. Ed. 2d 650 \(2008\)](#).

Facial challenges ask courts to issue holdings that are rarely, if ever, required to resolve a single case or controversy. The only way a plaintiff gets into a federal court is by showing that he “personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.” [*Blum v. Yaretsky*, 457 U. S. 991, 999, 102 S. Ct. 2777, 73 L. Ed. 2d 534 \[***1111\] \(1982\)](#) (internal quotation marks omitted). And, the only remedy a plaintiff should leave a federal court with is one “limited to the inadequacy that produced the injury in fact that the plaintiff has established.” [*Lewis v. Casey*, 518 U. S. 343, 357, 116 S. Ct. 2174, 135 L. Ed. 2d 606 \(1996\)](#). Accordingly, once a court decides whether a statute can be validly enforced against the plaintiff who challenges it, that case or controversy is resolved. Either the court remedies the plaintiff’s [****68] injury, or it determines that the statute may be constitutionally applied to the plaintiff.

Proceeding to decide the merits of possible constitutional challenges that could be brought by *other* plaintiffs is not necessary to resolve that case. Instead, any holding with respect to potential future plaintiffs would be “no more than an advisory

opinion—which a federal court should never issue at all, and *especially* should not issue with regard to a constitutional question, as to which we seek to avoid even *nonadvisory* opinions.” [*Chicago v. Morales*, 527 U. S. 41, 77, 119 S. Ct. 1849, 144 L. Ed. 2d 67 \(1999\)](#) (Scalia, J., dissenting) (citation omitted).

Unsurprisingly, facial challenges are at odds with doctrines enforcing the case-or-controversy requirement. Pursuant to standing doctrine, for example, a plaintiff can maintain a suit in a federal court—and thus invoke judicial power—only if he has suffered an “injury” with a “traceable connection” to the “complained-of conduct of the defendant.” [*Steel Co.*, 523 U. S., at 103, 118 S. Ct. 1003, 140 L. Ed. 2d 210](#). Facial challenges significantly relax those rules. Start with the injury requirement. Facial challenges allow a plaintiff to challenge applications of a [*756] statute that have not injured him. But see [*Acheson Hotels, LLC v. Laufer*, 601 U. S. 1, 10, 144 S. Ct. 18, 217 L. Ed. 2d 155 \(2023\)](#) (THOMAS, J., concurring in judgment) (“To have standing, a plaintiff must assert [****69] a violation of his [own] rights”). In fact, under our [*First Amendment*](#) overbreadth doctrine, a plaintiff need not be injured at all; he can challenge a statute that *lawfully* applies to him so long as it would be unlawful to enforce it against others. See [**2416] [*United States v. Hansen*, 599 U. S. 762, 769, 143 S. Ct. 1932, 216 L. Ed. 2d 692 \(2023\)](#).

Facial challenges also distort standing doctrine’s redressability requirement. The Court has held that a plaintiff has standing to sue only when his “requested relief will redress the alleged injury.” [*Steel Co.*, 523 U. S., at 103, 118 S. Ct. 1003, 140 L. Ed. 2d 210](#). With a facial challenge, however, a plaintiff seeks to enjoin every application of a statute—including ones that have nothing to do with his injury. A plaintiff can ask, “Do [I] just want [the court] to say that this statute cannot constitutionally be applied to [me] in this case, or do [I] want to go for broke and try to get the statute pronounced void in all its applications?” [*Morales*](#),

[527 U. S., at 77, 119 S. Ct. 1849, 144 L. Ed. 2d 67](#) (opinion of Scalia, J.). In this sense, the remedy sought by a facial challenge is akin to a universal injunction—a practice that is itself “inconsistent with longstanding limits on equitable relief and the power of Article III courts.” [Trump v. Hawaii, 585 U. S. 667, 713, 138 S. Ct. 2392, 201 L. Ed. 2d 775 \(2018\)](#) (THOMAS, J., concurring); see [Department of Homeland Security v. New York, 589 U. S. ____ - ____, 140 S. Ct. 599, 206 L. Ed. 2d 115 \[***1112\] \(2020\)](#) (GORSUCH, J., concurring in grant of stay) (slip op., at 2-3); [FDA v. Alliance for Hippocratic Medicine, 602 U. S. 367, 402, 144 S. Ct. 1540, 219 L. Ed. 2d 121 \(2024\)](#) (THOMAS, J., concurring).

Because deciding [****70] the constitutionality of a statute as applied to nonparties is not necessary to resolve a case or controversy, it is beyond a federal court’s constitutional authority. Federal courts have “no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, [*757] presenting a justiciable issue, is made to rest upon such an act.” [Massachusetts v. Mellon, 262 U. S. 447, 488, 43 S. Ct. 597, 67 L. Ed. 1078 \(1923\)](#). Resolving facial challenges thus violates Article III.¹

3

Adjudicating facial challenges also intrudes upon powers reserved to the Legislative and Executive Branches and the States. When a federal court decides an issue unnecessary for resolving a case or controversy, the Judiciary assumes authority

beyond what the Constitution granted. *Supra*, at 753-754. That necessarily alters the balance of powers: When one branch exceeds its vested power, it becomes stronger relative to the other branches. See [Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U. S. 477, 500, 130 S. Ct. 3138, 177 L. Ed. 2d 706 \(2010\)](#).

Moreover, by exceeding their Article III powers, federal courts risk interfering with the executive and legislative functions. Facial challenges enable federal courts to review the constitutionality of a statute in many or all of its applications—often [****71] before the statute has even been enforced. In practice, this provides federal courts a “general veto power . . . upon the legislation of Congress.” [Muskraat, 219 U. S., at 357, 31 S. Ct. 250, 55 L. Ed. 246](#). But, the Judicial Branch [**2417] has no such constitutional role in lawmaking. When courts take on the supervisory role of judging statutes in the abstract, they thus “assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly [they] do not possess.” [Mellon, 262 U. S., at 489, 43 S. Ct. 597, 67 L. Ed. 1078](#).

[*758] Comparing the effects of as-applied challenges and facial challenges makes this point clear. With an as-applied challenge, the Judiciary intrudes only as much as necessary on the will “of the elected representatives of the people.” [Washington State Grange v. Washington State Republican Party, 552 U. S. 442, 451, 128 S. Ct. 1184, 170 L. Ed. 2d 151 \(2008\)](#). Assuming a court adheres to traditional remedial limits, a successful as-applied challenge only prevents application of the statute against that [***1113] plaintiff. The Executive Branch remains free to enforce the statute in all of its other applications. And, the court’s decision provides some notice to the political branches, enabling the Executive Branch to tailor future enforcement of the statute to avoid violating the Constitution or Congress to amend the statute.

¹This is not to say that federal courts can never adjudicate a constitutional claim if a plaintiff styles it as a facial challenge. Whenever a plaintiff alleges a statute is unconstitutional in many or all of its applications, that argument nearly always includes an allegation that the statute is unconstitutional as applied to the plaintiff. Federal courts are free to consider challenged statutes as applied to the plaintiff before them and limit any relief accordingly. See generally [Americans for Prosperity Foundation v. Bonta, 594 U. S. 595, 618-619, 141 S. Ct. 2373, 210 L. Ed. 2d 716 \(2021\)](#); *id.*, at 621 (THOMAS, J., concurring in part and concurring in judgment).

Facial challenges, however, force the Judiciary [****72] to take a maximalist approach. A single plaintiff can immediately call upon a federal court to declare an entire statute unconstitutional, even before it has been applied to him. The political branches have no opportunity to correct course, making legislation an all-or-nothing proposition. The end result is that “the democratic process” is “short circuit[ed]” and “laws embodying the will of the people [are prevented] from being implemented in a manner consistent with the Constitution.” *Ibid.*

In a similar vein, facial challenges distort the relationship between the Federal Government and the States. The Constitution “establishes a system of dual sovereignty between the States and the Federal Government.” [*Gregory v. Ashcroft*, 501 U. S. 452, 457, 111 S. Ct. 2395, 115 L. Ed. 2d 410 \(1991\)](#). The States retain all powers “not delegated” to the Federal Government and not “prohibited by [the Constitution] to the States.” [*Amdt. 10*](#). Facial challenges can upset this division by shifting power from the States to the Federal Judiciary. Most obviously, when a state law is challenged, a facial challenge prevents that State from applying its own statute in a constitutional manner. But, facial challenges can also force federal courts to appropriate [*759] the role of state courts. To analyze [****73] whether a statute is valid on its face, a court must determine the statute’s scope. If a state court has yet to determine the scope of its statute (a common occurrence with facial challenges), the federal court must do so in the first instance. Facial challenges thus increase the likelihood that federal courts must interpret novel state-law questions—a role typically and appropriately reserved for state courts.

B

In addition to their constitutional infirmities, facial challenges also create practical problems. The case-or-controversy requirement serves as the foundation of our adversarial system. Rather than “sit[ting] as self-directed boards of legal inquiry and research,” federal courts serve as “arbiters of

legal questions presented and argued by the parties before them.” [*NASA v. Nelson*, 562 U. S. 134, 147, n. 10, 131 S. Ct. 746, 178 L. Ed. 2d 667 \(2011\)](#) (quoting [*Carducci v. Regan*, 714 F. 2d 171, 177, 230 U.S. App. D.C. 80 \(CADDC 1983\)](#) (opinion for the court by Scalia, J.)). This system “assure[s] that the legal questions presented to the court will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” [*Valley Forge Christian College v. Americans \[**2418\] United for Separation of Church and State, Inc.*, 454 U. S. 464, 472, 102 S. Ct. 752, 70 L. Ed. 2d 700 \(1982\)](#).

Facial challenges disrupt the adversarial system and increase the risk of judicial error as a result. A plaintiff raising a facial challenge need not have any [****74] direct knowledge of how the statute applies to others. In fact, since a facial challenge may be brought before a statute has been enforced against anyone, a plaintiff often can [***1114] only guess how the statute operates—even in his own case. For this reason, “[c]laims of facial invalidity often rest on speculation,” [*Washington State Grange*, 552 U. S., at 450, 128 S. Ct. 1184, 170 L. Ed. 2d 151](#), and “factually barebones records,” [*Sabri v. United States*, 541 U. S. 600, 609, 124 S. Ct. 1941, 158 L. Ed. 2d 891 \(2004\)](#). Federal courts are often called to give “premature [*760] interpretations of statutes in areas where their constitutional application might be cloudy.” [*Raines*, 362 U. S., at 22, 80 S. Ct. 519, 4 L. Ed. 2d 524](#). In short, facial challenges ask courts to resolve potentially thorny constitutional questions with little factual background and briefing by a party who may not be affected by the outcome.

C

The problems with facial challenges are particularly evident in the two cases before us. Even though the trade associations challenge two state laws, the state actors have been left out of the picture. State officials had no opportunity to tailor the laws’ enforcement. Nor could the legislatures amend the statutes before they were preliminarily enjoined. In addition, neither set of state courts had a chance to

interpret their own State’s law or “accord [that] law a limiting construction to avoid constitutional [****75] questions.” [Washington State Grange](#), 552 U. S., at 450, 128 S. Ct. 1184, 170 L. Ed. 2d 151. Instead, federal courts construed these novel state laws in the first instance. And, they did so with little factual record to assist them. The trade associations’ reliance on our questionable associational-standing doctrine is partially to blame.² But, the fact that the trade associations raise facial challenges has undeniably played a significant role. With [*761] even simple fact patterns, a court has little chance of determining whether a novel, never-before-enforced state law can be constitutionally enforced against nonparties without resorting to mere speculation. For cases such as these, where the constitutional analysis depends on complex, fact-specific questions, the task becomes impossible.

D

Facial challenges are particularly suspect given their origins. They appear to be the product of two doctrines that are themselves constitutionally questionable, vagueness and overbreadth.

At the time of the founding, it was well understood that federal courts could hold a statute unconstitutional only insofar as necessary to resolve a particular case or [**2419] controversy. See *supra*, at 753-754. The Founders were certainly

familiar with alternative systems that provided for the free-floating [***1115] [****76] review of duly enacted statutes. For example, the New York Constitution of 1777 created a Council of Revision, composed of the Governor, Chancellor, and New York Supreme Court. See [Hansen](#), 599 U. S., at 786, 143 S. Ct. 1932, 216 L. Ed. 2d 692 (THOMAS, J., concurring). The Council of Revision could object to “any measure of a [prospective] bill” based on “not only [its] constitutionality . . . but also [its] policy.” *Id.*, at 787, 143 S. Ct. 1932, 216 L. Ed. 2d 692. If the Council lodged an objection, the Legislature’s only options were to “conform to [the Council’s] objections, override them by a two-thirds vote of both Houses, or simply let the bill die.” *Ibid.* (internal quotation marks omitted).

In our Constitution, the Founders refused to create a council of revision or involve the Federal Judiciary in the business of reviewing statutes in the abstract. “Despite the support of respected delegates . . . the Convention voted against creating a federal council of revision on four different occasions. No other proposal was considered and rejected so many times.” *Id.*, at 789, 143 S. Ct. 1932, 216 L. Ed. 2d 692 (citation omitted). Instead, the Founders created a Judiciary with “only the authority to resolve [*762] private disputes between particular parties, rather than matters affecting the general public.” *Ibid.* (internal quotation marks omitted). [****77] They considered judges “of all men the most unfit to have a veto on laws before their enactment.” *Ibid.* (internal quotation marks omitted). Therefore, they refused to enlist judges in the business of reviewing statutes other than “as an issue for decision in a concrete case or controversy.”³ *Ibid.*

² The trade associations do not allege that they are subject to H. B. 20 and S. B. 7072, but have brought suit to vindicate the rights of their members. There is thus not a single party in these suits that is actually regulated by the challenged statutes and can explain how specific provisions will infringe on their [First Amendment](#) rights. Instead, the trade associations assert their understanding of how the challenged statutes will regulate nonparties.

As I have recently explained, “[a]ssociational standing raises constitutional concerns.” See [FDA v. Alliance for Hippocratic Medicine](#), 602 U. S. 367, 399, 144 S. Ct. 1540, 219 L. Ed. 2d 121 (2024) (concurring opinion). Associational standing appears to conflict with Article III’s injury and redressability requirements in many of the same ways as facial challenges. I have serious doubts that either trade association has standing to vicariously assert a member’s injury. See *id.*, at 400, 144 S. Ct. 1540, 219 L. Ed. 2d 121.

³ “The later history of the New York Council of Revision demonstrates the wisdom of the Framers’ decision.” [United States v. Hansen](#), 599 U. S. 762, 790, 143 S. Ct. 1932, 216 L. Ed. 2d 692 (2023) (THOMAS, J., concurring). The Council’s ability to lodge objections proved significant: “Over the course of its existence, [the Council] returned 169 bills to the legislature; the legislature, in turn, overrode only 51 of those vetoes and reenacted at least 26 bills with modifications.” *Ibid.* The Council did not shy away from controversial or weighty matters either. It vetoed, among other

For more than a century following the founding, the Court generally adhered to the original understanding of the narrow scope of judicial review. When the Court first discussed the concept of judicial review in *Marbury v. Madison*, it made clear that such review is limited to what is necessary for resolving “a particular cas[e]” before a court. [5 U.S. 137, 2 L. Ed. 60, 1 Cranch, at 177](#); see also *supra*, at 753-754. And, in case after case that followed *Marbury*, the Court reiterated that federal courts have no authority to reach beyond the parties before them to facially invalidate a statute.⁴

[*763] [**2420] As best I can tell, the Court’s

things, “a bill barring those convicted of adultery from remarrying” and a bill “declar[ing] Loyalists aliens.” *Ibid.* In fact, the bill authorizing the Erie Canal’s construction—“one of the most important measures in the Nation’s history—survived the Council’s review only because Chancellor James Kent changed his deciding vote at the last minute, seemingly on a whim.” *Ibid.* Concerns over the Council’s “intrusive involvement in the legislative process” eventually led to its abolition in 1820. *Ibid.*

⁴ See, e.g., *Austin v. Aldermen*, 74 U.S. 694, 7 Wall. 694, 699, 19 L. Ed. 224 (1869) (holding that the Court could “only consider the statute in connection with the case before” it and thus “our jurisdiction [wa]s at an end” once it “ascertained that [the case] wrought no effect which the act forbids”); *Liverpool, New York & Philadelphia S. S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S. Ct. 352, 28 L. Ed. 899 (1885) (the Court “has no jurisdiction to pronounce any statute . . . irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies”); *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345, 12 S. Ct. 400, 36 L. Ed. 176 (1892) (explaining that judicial review of a statute’s constitutionality “is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals”); *Muskrat v. United States*, 219 U.S. 346, 357, 31 S. Ct. 250, 55 L. Ed. 246, 46 Ct. Cl. 656 (1911) (“[T]here [i]s no general veto power in the court upon the legislation of Congress”); *Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219, 33 S. Ct. 40, 57 L. Ed. 193 (1912) (rejecting argument that statute was “void in toto,” because the Court “must deal with the case in hand and not with imaginary ones”); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289, 42 S. Ct. 106, 66 L. Ed. 239 (1921) (“[A] litigant can be heard to question a statute’s validity only when and so far as it is being or is about to be applied to his disadvantage”); *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S. Ct. 597, 67 L. Ed. 1078 (1923) (Federal courts “have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act”).

first [***1116] departure from those principles was the development of the vagueness doctrine. See *Johnson v. United States*, 576 U.S. 591, 616-620, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (THOMAS, J., concurring in judgment) (describing history of vagueness doctrine). Before and at the time of the founding, American and English courts dealt with vague laws by “simply refus[ing] to apply [****78] them in individual cases.” *Id.*, at 615, 135 S. Ct. 2551, 192 L. Ed. 2d 569. After the unfortunate rise of “substantive” due process, however, American courts began striking down statutes wholesale as “unconstitutionally indefinite.” *Id.*, at 617, 135 S. Ct. 2551, 192 L. Ed. 2d 569. This Court first adopted that approach in 1914, see *International Harvester Co. of America v. Kentucky*, 234 U.S. 216, 34 S. Ct. 853, 58 L. Ed. 1284, and has since repeatedly used the vagueness doctrine “to strike down democratically enacted laws” in the name of substantive due process, *Sessions v. Dimaya*, 584 U.S. 148, 210, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018) (THOMAS, J., dissenting); see *Johnson*, 576 U.S., at 618-621, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (opinion of THOMAS, J.). As I have explained, I doubt that “our practice of striking down statutes as unconstitutionally vague is consistent with the original meaning of the *Due Process Clause*.” *Dimaya*, 584 U.S., at 206, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (opinion of THOMAS, J.); see *Johnson*, 576 U.S., at 622, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (opinion of THOMAS, J.).

[*764] The vagueness doctrine was the direct ancestor of one subset of modern facial challenges, the overbreadth doctrine. See *United States v. Sineneng-Smith*, 590 U.S. 371, 385, 140 S. Ct. 1575, 206 L. Ed. 2d 866 (2020) (THOMAS, J., concurring) (noting that the overbreadth doctrine “developed as a result of the vagueness doctrine’s application in the *First Amendment* context”). In *Thornhill v. Alabama*, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940), the Court deemed an antipicketing statute “invalid on its face” due to its “sweeping proscription of freedom of discussion.” *Id.*, at 101-106, 60 S. Ct. 736, 84 L. Ed. 1093. The

Thornhill Court did so “[w]ithout considering whether the defendant’s actual conduct was entitled to *First Amendment* protection,” instead invalidating the law because it “‘swept [****79] within its ambit . . . activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press.’” *Sineneng-Smith*, [***1117] 590 U. S., at 383, 140 S. Ct. 1575, 206 L. Ed. 2d 866 (opinion of THOMAS, J.) (quoting *Thornhill*, 310 U. S., at 97, 60 S. Ct. 736, 84 L. Ed. 1093; alteration omitted).

Thornhill’s approach quickly gained traction in the *First Amendment* context. In the years to follow, the Court “invoked [its] rationale to facially invalidate a wide range of laws” concerning *First Amendment* rights—a practice that became known as the overbreadth doctrine. *Sineneng-Smith*, [**2421] 590 U. S., at 383, 140 S. Ct. 1575, 206 L. Ed. 2d 866. Under that doctrine, a court can invalidate a statute if it “prohibits a substantial amount of protected speech,” “relative to the statute’s plainly legitimate sweep.”⁵ *Williams*, 553 U. S., at 292, 128 S. Ct. 1830, 170 L. Ed. 2d 650. The Court has never attempted to ground the overbreadth doctrine “in the text or history of the *First Amendment*.” *Sineneng-Smith*, 590 U. S., at 384, 140 S. Ct. 1575, 206 L. Ed. 2d 866 (opinion of THOMAS, J.). Instead, the Court has supplied only “policy considerations and value judgments.” *Ibid*.

[*765] The overbreadth and vagueness doctrines’ method of facial invalidation eventually spread to other areas of law, setting in motion our modern facial challenge doctrine. For several decades after *Thornhill*, the Court continued to resist the broad use of facial challenges. For example, in *Broadrick v. Oklahoma*, 413 U. S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), the Court emphasized that “[c]onstitutional judgments, as Mr. Chief Justice

Marshall recognized, are justified [****80] only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court.” *Id.*, at 611, 93 S. Ct. 2908, 37 L. Ed. 2d 830. In that vein, the Court characterized “facial overbreadth adjudication [as] an exception to our traditional rules of practice.” *Id.*, at 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830. But, the Court eventually entertained facial challenges more broadly where a plaintiff established that “no set of circumstances exists under which the Act would be valid.”⁶ *Salerno*, 481 U. S., at 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697. Just as with the overbreadth doctrine, the Court has yet to explain how facial challenges are consistent with the Constitution’s text or history.

Given how our facial challenge doctrine seems to have developed—with one doctrinal mistake leading to another—it is no wonder that facial challenges create a host of constitutional and practical issues. See *supra*, at 754-761. Rather than perpetuate our mistakes, the Court should end them. “No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal- [***1118] court jurisdiction to actual cases or controversies.” *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 37, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976). Because that requirement precludes courts from judging and enjoining statutes as applied [*766] to nonparties, the Court should discontinue the practice [****81] of facial challenges.

The Court has recognized the problems that facial challenges pose, emphasizing that they are

⁵ Although the Court’s precedents describe an unconstitutionally overbroad statute as facially “invalid,” “federal courts have no authority to erase a duly enacted law from the statute books.” *J. Mitchell, The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 936 (2018); see *Sineneng-Smith*, 590 U. S., at 387, 140 S. Ct. 1575, 206 L. Ed. 2d 866 (opinion of THOMAS, J.).

⁶ Some Members of the Court subsequently sought to apply a more lenient standard to all facial challenges. See *Washington State Grange v. Washington State Republican Party*, 552 U. S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (noting that “some Members of the Court have criticized the *Salerno* formulation”); *United States v. Stevens*, 559 U. S. 460, 472, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) (reserving the question of which standard applies to “a typical facial attack”).

“disfavored,” Washington State Grange, 552 U. S., at 450, 128 S. Ct. 1184, 170 L. Ed. 2d 151, and “best when infrequent,” Sabri, 541 U. S., at 608, 124 S. Ct. 1941, 158 L. Ed. 2d 891. The Court reiterates those sentiments today. *Ante*, at 723-724, 743-744. But, while sidelining facial challenges provides some measure of relief, it ignores the real problem. Because federal courts are bound by Article III’s case-or-controversy requirement, holding a [**2422] statute unconstitutional as applied to nonparties is not simply disfavored—it exceeds the authority granted to federal courts. It is high time the Court reconsiders its facial challenge doctrine.

JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, concurring in the judgment.

The holding in these cases is narrow: NetChoice failed to prove that the Florida and Texas laws they challenged are facially unconstitutional. Everything else in the opinion of the Court is nonbinding dicta.

I agree with the bottom line of the majority’s central holding. But its description of the Florida and Texas laws, as well as the litigation that shaped the question before us, leaves much to be desired. Its summary of our legal precedents is incomplete. And its broader ambition of providing [****82] guidance on whether one part of the Texas law is unconstitutional as applied to two features of two of the many platforms that it reaches—namely, Facebook’s News Feed and YouTube’s homepage—is unnecessary and unjustified.

But given the incompleteness of this record, there is no need and no good reason to decide anything other than the facial unconstitutionality question actually before us. After all, we do not know how the platforms “moderate” their users’ content, much less whether they do so in an inherently [*767] expressive way under the First Amendment. Nevertheless, the majority is undeterred. It inexplicably singles out a few provisions and a couple of platforms for special treatment. And it unreflectively assumes the truth of NetChoice’s unsupported assertion that social-media

platforms—which use secret algorithms to review and moderate an almost unimaginable quantity of data today—are just as expressive as the newspaper editors who marked up typescripts in blue pencil 50 years ago.

These as-applied issues are important, and we may have to decide them before too long. But these cases do not provide the proper occasion to do so. For these reasons, I am therefore compelled to provide a more complete [****83] discussion of those matters than is customary in an opinion that concurs only in the judgment.

I

As the Court has recognized, social-media platforms have become the [***1119] “modern public square.” Packingham v. North Carolina, 582 U. S. 98, 107, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017). In just a few years, they have transformed the way in which millions of Americans communicate with family and friends, perform daily chores, conduct business, and learn about and comment on current events. The vast majority of Americans use social media,¹ and the average person spends more than two hours a day on various platforms.² Young people now turn primarily to social media to get the news,³ and for many of them, life [*768] without social media is unimaginable.⁴ [**2423] Social media may

¹ J. Gottfried, Pew Research Center, Americans’ Social Media Use 3 (2024). As platforms incorporate new features and technology, the number of Americans who use social media is expected to grow. S. Dixon, Statista, Social Media Users in the United States 2020-2029 (Jan. 30, 2024), <https://www.statista.com/statistics/278409/number-of-social-network-users-in-the-united-states>.

² V. Filak, Exploring Mass Communication: Connecting With the World of Media 210 (2024).

³ Social Media and News Platform Fact Sheet, Pew Research Center (Nov. 15, 2023), <https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet>.

⁴ M. Anderson, M. Faverio, & J. Gottfried, Pew Research Center, Teens, Social Media and Technology 2023 (Dec. 11, 2023), <https://www.pewresearch.org/internet/2023/12/11/teens-social-media-and-technology-2023>.

provide many benefits—but not without drawbacks. For example, some research suggests that social media are having a devastating effect on many young people, leading to depression, isolation, bullying, and intense pressure to endorse the trend or cause of the day.⁵

In light of these trends, platforms and governments have implemented measures to minimize the harms unique to the social-media context. Social-media companies have created user guidelines establishing the kinds of content that users may post and the consequences [****84] of violating those guidelines, which often include removing nonconforming posts or restricting noncompliant users' access to a platform.

Such enforcement decisions can sometimes have serious consequences. Restricting access to social media can impair users' ability to speak to, learn from, and do business with others. Deleting the account of an elected official or candidate for public office may seriously impair that individual's efforts to reach constituents or voters, as well as the ability of voters to make a fully informed electoral choice. And what platforms call "content moderation" of the news or user comments on public affairs can have a substantial effect on popular views.

Concerned that social-media platforms could abuse their enormous power, Florida and Texas enacted laws that prohibit them from disfavoring particular viewpoints and speakers. See S. B. 7072, 2021 Reg. Sess., §1(9) (Fla. 2021) (finding that "[s]ocial media platforms have unfairly censored . . . Floridians"); H. B. 20, 87th Leg., Called Sess. (Tex. 2021) [*769] (prohibiting the "censorship of . . . expression on social media platforms" in Texas). Both statutes have a broad reach, and it is impossible to determine [***1120] whether they are unconstitutional in [****85] all their

applications without surveying those applications. The majority, however, provides only a cursory outline of the relevant provisions of these laws and the litigation challenging their constitutionality. To remedy this deficiency, I will begin with a more complete summary.

A

1

I start with Florida's law, S. B. 7072, which regulates any internet platform that does "business in the state" and has either "annual gross revenues in excess of \$100 million" or "at least 100 million monthly individual platform participants globally." [*Fla. Stat. §501.2041\(1\)\(g\)*](#) (2023). This definition is broad. There is no dispute that it covers large social-networking websites like Facebook, X, YouTube, and Instagram, but it may also reach e-commerce and other non-social-networking websites that allow users to leave reviews, ask and answer questions, or communicate with others online. These may include Uber, Etsy, PayPal, Yelp, Wikipedia, and Gmail. See, e.g., Tr. of Oral Arg. in No. 22-555, pp. 54-56, 69, 76-79, 155; Brief for Wikimedia Foundation as *Amicus Curiae* 6; Brief for Yelp Inc. as *Amicus Curiae* 4, n. 4.

To prevent covered platforms from unfairly treating Floridians, S. B. 7072 imposes the following "content moderation" and disclosure requirements: [****86]

Content-moderation provisions. "Content moderation" is the gentle-sounding [**2424] term used by internet platforms to denote actions they take purportedly to ensure that userprovided content complies with their terms of service and "community standards." The Florida law eschews this neologism and instead uses the old-fashioned term "censorship." To prevent platforms from discriminating against certain views or speakers, that law requires each regulated platform [*770] to enforce its "censorship . . . standards in a consistent manner among its users on the platform." [*Fla. Stat. §501.2041\(2\)\(b\)*](#). The law defines "censorship" as any action taken to: "delete,

⁵ *Ibid.*; see also J. Twenge, J. Haidt, J. Lozano, & K. Cummins, Specification Curve Analysis Shows That Social Media Use Is Linked to Poor Mental Health, Especially Among Girls, 224 *Acta Psychologica* 1, 8-12 (2022).

regulate, restrict, edit, alter, [or] inhibit” users from posting their own content; “post an addendum to any content or material posted by a user”; or “inhibit the ability of a user to be viewable by or to interact with another user.” [§501.2041\(1\)\(b\)](#).

To prevent platforms from attempting to evade this restriction by regularly modifying their practices, the law prohibits platforms from changing their censorship “rules, terms, and agreements . . . more than once every 30 days.” [§501.2041\(2\)\(c\)](#). And to give Floridians more control over how they view content on social-media websites, the law requires each [****87] platform to give its users the ability to “opt out” of its content-sorting “algorithms” and instead view posts sequentially or chronologically. [§501.2041\(2\)\(f\)](#).⁶

Although some platforms still have employees who monitor and organize social-media feeds, for most platforms, “the incredible volume of content shared each day makes human [***1121] review of each new post impossible.” Brief for Developers Alliance et al. as *Amici Curiae* 4. Consequently, platforms rely heavily on algorithms to organize and censor content. *Ibid.* And it is likely that they will increasingly rely on artificial intelligence (AI), a machine learning tool that arranges, deletes, and modifies content and learns from its own choices.

In addition to barring censorship, the Florida law attempts to prevent platforms from unfairly influencing elections or distorting public discourse. To do this, it requires platforms to host candidates for public office and journalistic enterprises.⁷

⁶ As relevant here, an “algorithm” is a program that platforms use to automatically “censor” or “moderate” content that violates their terms or conditions, to organize the results of a search query, or to display posts in a feed.

⁷ A “journalistic enterprise” is defined as any entity doing business in Florida that: (1) has published more than 100,000 words online and has at least 50,000 paid subscribers or 100,000 monthly users; (2) has published at least 100 hours of audio or video online and has at least 100 million annual viewers; (3) operates a cable channel that produces more than 40 hours of content per week to at least 100,000 subscribers; or (4) operates under a Federal Communications Commission broadcast license. [Fla. Stat. §501.2041\(1\)\(d\)](#).

[*771] [§§501.2041\(2\)\(h\), \(j\)](#). For the same reasons, the law also prohibits platforms from censoring posts made by or about candidates for public office. [§501.2041\(2\)\(h\)](#).

Disclosure provisions. S. B. 7072 requires platforms to make both general and individual disclosures about how and when they censor the speech of Floridians. [****88] The law requires platforms to publish their content-moderation standards and to inform users of any changes. [§§501.2041\(2\)\(a\), \(c\)](#). And whenever a platform censors a user, S. B. 7072 requires it to: (1) notify the user of the censorship decision in writing within seven days; (2) provide “a thorough” explanation of the action and how the platform became aware of the affected content; and (3) allow the user “to access or retrieve all of the user’s information, content, material, and [**2425] data for at least 60 days.” [§§501.2041\(2\)\(d\), \(i\), \(3\)](#).

To ensure compliance with these provisions, S. B. 7072 authorizes the Florida attorney general to bring civil and administrative actions against noncomplying platforms. [§501.2041\(5\)](#). The law allows the Florida Elections Commission to fine platforms that fail to host candidates for public office. [Fla. Stat. §106.072\(3\)](#) (2023). And the law permits aggrieved users to sue and recover up to \$100,000 for each violation of the content-moderation and disclosure provisions, along with actual damages, equitable relief, punitive damages, and attorney’s fees. [§501.2041\(6\)](#).

To protect platforms, the law provides that it “may only be enforced to the extent not inconsistent with federal law,” including [§230 of the Communications Decency Act of 1996](#). [§501.2041\(9\)](#). [Section 230\(c\)\(2\)\(A\)](#) of that Act shields internet platforms from liability for voluntary, [****89] good-faith efforts to restrict or remove content that is “obscene, lewd, [*772] lascivious, filthy, excessively violent, harassing, or otherwise objectionable.” [47 U. S. C. §230\(c\)\(2\)\(A\)](#).

Days after S. B. 7072’s enactment, NetChoice filed suit in federal court, alleging that the new law violates the [First Amendment](#) in all its applications.⁸ [***1122] As a result, NetChoice asked the District Court to enter a preliminary injunction against any enforcement of any of its provisions before the law took effect.

Florida defended the constitutionality of S. B. 7072. It argued that the law’s prohibition of censorship does not violate the freedom of speech because the [First Amendment](#) permits the regulation of the conduct of entities that do not express their own views but simply provide the means for others to communicate. See Record in No. 4:21-CV-00220 (ND Fla.), Doc. 106, p. 22 (citing [Rumsfeld v. Forum for Academic and Institutional Rights, Inc.](#), 547 U. S. 47, 64, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) (FAIR)). And, in any event, Florida argued that NetChoice’s facial challenge was likely to fail at the threshold because NetChoice had not identified which of its members were required to comply with the new law or how each of its members’ presentation of third-party speech expressed that platform’s own message. Record, Doc. 106, at 30, 58-59; *id.*, Doc. 118, pp. 5, 24-25. Without this information, Florida [****90] said, it could not properly respond to NetChoice’s facial claim. *Id.*, Doc. 122, pp. 4-5. Florida requested a “meaningful opportunity to take discovery.” Tr. of Oral Arg. in No. 22-277, p. 154. NetChoice objected. Record, Doc. 122.

[*773] Despite these arguments, the District Court enjoined S. B. 7072 in its entirety before the law could go into effect. Florida appealed, maintaining, among other things, that NetChoice was “unlikely to prevail on the merits of [its] facial [First Amendment](#) challenge.” Brief for Appellants in No. 21-12355 (CA11), p. 20; Reply Brief in No. 21-

12355 (CA11), p. 15.

With just one exception, the Eleventh Circuit affirmed. It first held that *all* the regulated platforms’ decisions about “whether, to what extent, and in what manner to disseminate third-party created content to the public” were constitutionally protected expression. [NetChoice v. Attorney \[**2426\] Gen., Fla., 34 F. 4th 1196, 1212 \(2022\)](#). Under that framing, the court found that the moderation and individual-disclosure provisions likely failed intermediate scrutiny, obviating the need to determine whether strict scrutiny applied. *Id.*, at 1227.⁹ But the court held that the general-disclosure provisions, which require only that platforms publish their censorship policies, met the intermediate-scrutiny standard set [****91] forth in [Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio](#), 471 U. S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985). 34 F. 4th, at 1230. The Eleventh Circuit therefore vacated the portion of the District Court’s order that enjoined the enforcement of those general-disclosure provisions, while affirming all the rest of the injunction. *Id.*, at 1231.

[***1123] B

1

Around the same time as the enactment of the Florida law, Texas adopted a similar measure, H. B. 20, which covers “social media platform[s]” with more than 50 million monthly [*774] users in the United States. [Tex. Bus. & Com. Code Ann. §120.002\(b\)](#) (West 2023). The statute defines a “[s]ocial media platform” as an “[i]nternet website or application that is open to the public, allows a user to create an account, and enables

⁸ NetChoice also argued that S. B. 7072 is preempted by 47 U. S. C. §230(c) and is unconstitutionally vague. Those arguments are not before us because the District Court did not rule on the vagueness issue, 546 F. Supp. 3d 1082, 1095 (ND Fla. 2021), and the Eleventh Circuit declined to reach the preemption issue, [NetChoice v. Attorney Gen., Fla., 34 F. 4th 1196, 1209 \(2022\)](#).

⁹ See also *id.*, at 1214 (“unless posts and users are removed randomly, those sorts of actions necessarily convey some sort of message—most obviously, the platforms’ disagreement with . . . certain content”); *id.*, at 1223 (“S.B. 7072’s disclosure provisions implicate the [First Amendment](#)”).

users to communicate with other users for the primary purpose of posting information, comments, messages, or images.” [§120.001\(1\)](#). Unlike Florida’s broader law, however, Texas’s statute does not cover internet-service providers, email providers, and websites that “consis[t] primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider.” [§120.001\(1\)\(C\)\(i\)](#).

To ensure “the free exchange of ideas and information,” H. B. 20 requires regulated platforms to abide by the following content-moderation and disclosure requirements. [Act of Sept. 2, 2021, 87th Leg., 2d Called Sess., ch. 3](#).

*Content-moderation [***92] provisions.* H. B. 20 prevents social-media companies from “censoring” users—that is, acting to “block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against”—based on their viewpoint or geographic location within Texas.^{10, 11, 12} [Tex. Civ. Prac. & Rem. Code Ann. §§143A.001\(1\), 143A.002\(a\)\(1\)-\(3\)](#) (West Cum. Supp. [*775] 2023). However, the law allows platforms to censor speech that: federal [**2427] law “specifically authorize[s]” them to censor; speech that the platform is told sexually exploits children or

survivors of sexual abuse; speech that “directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of race, color, disability, religion, national origin or ancestry, age, sex or status as peace officer or judge”; and speech that is otherwise unlawful or has been the subject of a user’s request for removal from his or her feed or profile. [§§143A.006\(a\)-\(b\)](#).

Disclosure provisions. Like the Florida law, H. B. 20 also requires platforms to make general and individual disclosures about their censorship practices. Specifically, the law obligates each platform to tell the public how it “targets,” “promotes,” and “moderates” content. [§§120.051\(a\)\(1\)-\(3\)](#). And whenever a [***1124] platform [***93] censors a user, the law requires it to inform the user why that was done. [§120.103\(a\)\(1\)](#).¹³ Platforms must allow users to appeal removal decisions through “an easily accessible complaint system;” resolve such appeals within 14 business days (unless an enumerated exception applies); and, if the appeal is successful, provide “the reason for the reversal.” [§§120.101, 120.103\(a\)\(2\), \(a\)\(3\)\(B\)-\(b\), 120.104](#).

Users may sue any platform that violates these provisions, as may the Texas attorney general. [§143A.007\(d\)](#). But unlike the Florida law, H. B. 20 authorizes only injunctive relief. [§§143A.007\(a\), 143A.008](#). It contains a strong severability provision, §8(a), which reaches “every provision, section, subsection, sentence, clause, phrase, or word in th[e] Act, and every application of [its] provisions.”

2

As it did in the Florida case, NetChoice sought a preliminary injunction in federal court, claiming that H. B. 20 violates [**776] the [First Amendment](#) in its entirety. In response, Texas argued that

¹⁰ In general, to “deplatform” means “to remove and ban a registered user from a mass communication medium (such as a social networking or blogging website).” Merriam-Webster’s Collegiate Dictionary (10th ed. 2024), (defining “deplatform”; some punctuation omitted), <https://unabridged.merriam-webster.com/collegiate/deplatform> (unless otherwise noted, all internet sites last accessed May 22, 2024).

¹¹ “[D]emonetization” often refers to the act of preventing “online content from earning revenue (as from advertisements).” *Ibid.* (defining “demonetize”; some punctuation omitted), <https://unabridged.merriamwebster.com/collegiate/demonetize>.

¹² “Boosting on social media means [paying] a platform to amplify . . . posts for more reach.” C. Williams, HubSpot, Social Media Definitions: The Ultimate Glossary of Terms You Should Know (June 23, 2023), <https://blog.hubspot.com/marketing/social-media-terms>. De-boosting thus usually refers to when platforms refuse to continue increasing a post’s or user’s visibility to other users.

¹³ Texas has represented that a brief computer-generated notification to an affected user would satisfy the provision’s notification requirement. Brief for Respondent in No. 22-555, p. 44.

because H. B. 20 regulates NetChoice’s members “in their operation as publicly accessible conduits for the speech of others” rather than “as authors or editors” of their own speech, NetChoice could not prevail. Record in No. 1:21-CV-00840 (WD Tex.), Doc. 39, p. 23. But even if the platforms might have the right to use algorithms [****94] to censor their users’ speech, the State argued, the question of “*what* these algorithms are doing is a critical, and so far, unexplained, aspect of this case.” *Id.*, at 24. This deficiency mattered, Texas contended, because the platforms could succeed on their facial challenge only by showing that “*all* algorithms used by the Platforms are for the purposes of expressing viewpoints of those Platforms.” *Id.*, at 27. And because NetChoice had not even explained what its members’ algorithms did, much less whether they did so in an expressive way, Texas argued that NetChoice had not shown that “all applications of H.B. 20 are unconstitutional.” *Ibid.*; see also *id.*, Doc. 53, at 13 (arguing that NetChoice had failed to show that “H. B. 20 is . . . unconstitutional in all its applications” because “a number” of NetChoice’s members had conceded that the law did “*not* burden or chill their speech”).

To clarify these and other “threshold issues,” Texas moved for expedited discovery. *Id.*, Doc. 20, at 1. The District Court granted Texas’s motion in part, but after one month of discovery, it sided with NetChoice and enjoined H. B. 20 in its entirety [**2428] before it could go into effect. Texas appealed, arguing [****95] that despite the District Court’s judgment to the contrary, “[l]aws requiring commercial entities to neutrally host speakers generally do not even implicate the [First Amendment](#) because they do not regulate the host’s speech at all—they regulate its conduct.” Brief for Appellant in No. 21-51178 (CA5), p. 16. The State also emphasized NetChoice’s alleged failure to show that H. B. 20 was unconstitutional in even a “substantial number of its applications,” the “bare minimum” showing that NetChoice [***1125] needed to [*777] make to prevail on its facial challenge. *E.g.*, Reply Brief in No. 21-51178 (CA5), p. 8 (quoting [Americans for Prosperity](#)

[Foundation v. Bonta](#), 594 U. S. 595, 615, 141 S. Ct. 2373, 210 L. Ed. 2d 716 (2021)).

A divided Fifth Circuit panel reversed, focusing primarily on NetChoice’s failure to “even try to show that HB 20 is ‘unconstitutional in all of its applications.’” 49 F. 4th 439, 449 (2022) (quoting [Washington State Grange v. Washington State Republican Party](#), 552 U. S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008)). The court also accepted Texas’s argument that H. B. 20 “does not regulate the Platforms’ speech at all” because “the Platforms are not ‘speaking’ when they host other people’s speech.” 49 F. 4th, at 448. Finally, the court upheld the law’s disclosure requirements on the ground that they involve the disclosure of the type of purely factual and uncontroversial information that may be compelled under [Zauderer](#). 49 F. 4th, at 485.

II

NetChoice contends that the Florida and [****96] Texas statutes facially violate the [First Amendment](#), meaning that they cannot be applied to anyone at any time under any circumstances without violating the Constitution. Such challenges are strongly disfavored. See [Washington State Grange](#), 552 U. S., at 452, 128 S. Ct. 1184, 170 L. Ed. 2d 151. They often raise the risk of “‘premature interpretatio[n] of statutes’ on the basis of factually barebones records.” [Sabri v. United States](#), 541 U. S. 600, 609, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004). They clash with the principle that courts should neither “‘anticipate a question of constitutional law in advance of the necessity of deciding it’” nor “‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’” [Ashwander v. TVA](#), 297 U. S. 288, 346-347, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring). And they “threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.” [Washington State Grange](#), 552 U. S., at 451, 128 S. Ct. 1184, 170 L. Ed. 2d 151.

[*778] Facial challenges also strain the limits of the federal courts’ constitutional authority to decide only actual “Cases” and “Controversies.” [Art. III, §2](#). “[L]itigants typically lack standing to assert the constitutional rights of third parties.” [United States v. Hansen, 599 U. S. 762, 769, 143 S. Ct. 1932, 216 L. Ed. 2d 692 \(2023\)](#). But when a court holds that a law cannot be enforced against anyone under any circumstances, it effectively grants relief with respect to unknown parties in disputes [****97] that have not yet materialized.

For these reasons, we have insisted that parties mounting facial attacks satisfy demanding requirements. In [United States v. Salerno, 481 U. S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 \(1987\)](#), we held that a facial challenger must “establish that no set of circumstances exists under which the [law] would be valid.” “While some Members of the Court have criticized the *Salerno* formulation,” all have agreed “that a facial challenge must fail where the statute has a [**2429] “‘plainly legitimate sweep.’” [Washington State Grange, 552 U. S., at 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151](#). In [First Amendment](#) cases, we have sometimes [***1126] phrased the requirement as an obligation to show that a law “‘prohibits a substantial amount of protected speech’” relative to its ‘‘plainly legitimate sweep.’’ [Hansen, 599 U. S., at 770, 143 S. Ct. 1932, 216 L. Ed. 2d 692](#); [Bonta, 594 U. S., at 615, 141 S. Ct. 2373, 210 L. Ed. 2d 716](#); [United States v. Williams, 553 U. S. 285, 292-293, 128 S. Ct. 1830, 170 L. Ed. 2d 650 \(2008\)](#).¹⁴

NetChoice and the Federal Government urge us not

¹⁴ At oral argument, NetChoice represented that “it’s the plainly legitimate sweep test, which is not synonymous with overbreadth,” that governs these cases. See Tr. of Oral Arg. in No. 22-277, p. 70; contra, *ante*, at 723 (suggesting that the overbreadth doctrine applies to all facial challenges brought under the [First Amendment](#), including these cases). This representation makes sense given that the overbreadth doctrine applies only when there is “a realistic danger that the statute itself will significantly compromise recognized [First Amendment](#) protections of parties not before the Court.” [Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U. S. 789, 801, 104 S. Ct. 2118, 80 L. Ed. 2d 772 \(1984\)](#). And here, NetChoice appears to represent all—or nearly all—regulated parties.

to apply any of these demanding tests because, they say, the States disputed only the “threshold question” whether their [*779] laws “cover expressive activity at all.” Tr. of Oral Arg. in No. 22-277, at 76; see also *id.*, at 84, 125; Tr. of Oral Arg. in No. 22-555, at 92. The Court unanimously rejects that argument—and for good reason.

First, the States did *not* “put all their eggs in [one] basket.” Tr. of Oral Arg. in No. 22-277, at 76. To be sure, they argued that their newly enacted laws were valid in all their applications. [****98] *Ibid.* Both the Federal Government and the States almost always defend the constitutionality of all provisions of their laws. But Florida and Texas did not stop there. Rather, as noted above, they went on to argue that NetChoice had failed to make the showing required for a facial challenge.¹⁵ Therefore, the record does not support NetChoice’s attempt to use “the party presentation rules” as grounds for blocking our consideration of the question whether it satisfied the facial constitutionality test. Tr. of Oral Arg. in No. 22-555, at 92.

Second, even if the States had not asked the lower courts to reject NetChoice’s request for blanket relief, it would have been improper for those courts to enjoin all applications of the challenged laws unless that test was met. “It is one thing to allow parties to forfeit claims, defenses, or lines of argument; it would be quite another to allow parties

¹⁵ See Reply Brief in No. 21-12355 (CA11), p. 15 (“Plaintiffs—in their facial challenge—have failed to demonstrate that even a significant subset of covered social media platforms engages in [expressive] conduct.” See also Brief for Appellants in No. 21-12355 (CA11), p. 20 (NetChoice is “unlikely to prevail on the merits of [its] facial [First Amendment](#) challenge”); Record in No. 4:21-CV-00220 (ND Fla.), Doc. 106, p. 30 (“Plaintiffs have not demonstrated that their members actually [express a message],” so there is “not a basis for sustaining Plaintiffs’ facial constitutional challenge”); Reply Brief in No. 21-51178 (CA5), p. 8 (arguing that NetChoice failed “to show at a bare minimum that [S. B. 20] is unconstitutional in a ‘substantial number of its applications’” (quoting [Americans for Prosperity Foundation v. Bonta, 594 U. S. 595, 615, 141 S. Ct. 2373, 210 L. Ed. 2d 716 \(2021\)](#))); Record in No. 1:21-CV-00840 (WD Tex.), Doc. 39, p. 27 (because “not all applications of H.B. 20 are unconstitutional,” “Plaintiffs’ delayed facial challenge [can] not succeed”).

to stipulate **[*780]** or bind [a court] to the application of an incorrect legal standard.” *Gardner v. Galetka*, 568 F. 3d 862, 879 (CA10 2009); see also *Kairys v. Southern Pines Trucking, Inc.*, 75 F. 4th 153, 160 **[***1127]** (CA3 2023) (“But parties cannot forfeit the application of ‘controlling **[**2430]** law’”); *United States v. Escobar*, 866 F. 3d 333, 339, n. 13 (CA5 2017) (*per curiam*) (“A party cannot waive, concede, or abandon the applicable standard of review” (quoting *Ward v. Stephens*, 777 F. 3d 250, 257, n. 3 (CA5 2015))).

Represented by sophisticated counsel, **[****99]** NetChoice made the deliberate choice to mount a facial challenge to both laws, and in doing so, it obviously knew what it would have to show in order to prevail. NetChoice decided to fight these laws on these terms, and the Court properly holds it to that decision.

III

I therefore turn to the question whether NetChoice established facial unconstitutionality, and I begin with the States’ content-moderation requirements. To show that these provisions are facially invalid, NetChoice had to demonstrate that they lack a plainly legitimate sweep under the *First Amendment*. Our precedents interpreting that Amendment provide the numerator (the number of unconstitutional applications) and denominator (the total number of possible applications) that NetChoice was required to identify in order to make that showing. Estimating the numerator requires an understanding of the *First Amendment* principles that must be applied here, and I therefore provide a brief review of those principles.

A

The *First Amendment* protects “the freedom of speech,” and most of our cases interpreting this right have involved government efforts to forbid, restrict, or compel a party’s own oral or written expression. *Agency for Int’l Development v. Alliance for Open Society Int’l, Inc.*, 570 U. S. 205, 213, **[*781]** 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013); *Wooley v. Maynard*, 430 U. S. 705, 714, 97

S. Ct. 1428, 51 L. Ed. 2d 752 (1977); *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). Some cases, however, have involved another aspect **[****100]** of the free speech right, namely, the right to “presen[t] . . . an edited compilation of speech generated by other persons” for the purpose of expressing a particular message. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 570, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). As used in this context, the term “compilation” means any effort to present the expression of others in some sort of organized package. See *ibid.*

An example such as the famous Oxford Book of English Poetry illustrates why a compilation may constitute expression on the part of the compiler. The editors’ selection of the poems included in this volume expresses their view about the poets and poems that most deserve the attention of their anticipated readers. Forcing the editors to exclude or include a poem could alter the expression that the editors wish to convey.

Not all compilations, however, have this expressive characteristic. Suppose that the head of a neighborhood group prepares a directory consisting of contact information submitted by all the residents who want to be listed. This directory would not include any meaningful expression on the part of the compiler.

Because not all compilers express a message of their own, not all compilations **[***1128]** are protected by the *First Amendment*. Instead, the *First Amendment* protects only those compilations **[****101]** that are “inherently expressive” in their own right, meaning that they select and present speech created by other persons in order “to spread [the compiler’s] own message.” *FAIR*, 547 U. S., at 66, 126 S. Ct. 1297, 164 L. Ed. 2d 156; *Pacific Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U. S. 1, 10, **[**2431]** 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986) (PG&E) (plurality opinion). If a compilation is inherently expressive,

then the compiler may have the right to refuse to accommodate a particular speaker or message. See [Hurley](#), [***782**] [515 U. S.](#), at 573, [115 S. Ct. 2338](#), [132 L. Ed. 2d 487](#). But if a compilation is not inherently expressive, then the government can require the compiler to host a message or speaker because the accommodation does not amount to compelled speech. [Id.](#), at 578-581, [115 S. Ct. 2338](#), [132 L. Ed. 2d 487](#).

To show that a hosting requirement would compel speech and thereby trigger [First Amendment](#) scrutiny, a claimant must generally show three things.

1

First, a claimant must establish that its practice is to exercise “editorial discretion in the selection and presentation” of the content it hosts. [Arkansas Ed. Television Comm’n v. Forbes](#), [523 U. S. 666](#), [674](#), [118 S. Ct. 1633](#), [140 L. Ed. 2d 875](#) (1998); [Hurley](#), [515 U. S.](#), at 574, [115 S. Ct. 2338](#), [132 L. Ed. 2d 487](#); *ante*, at 728. NetChoice describes this process as content “curation.” But whatever you call it, not all compilers do this, at least in a way that is inherently expressive. Some may serve as “passive receptacle[s]” of third-party speech or as “dumb pipes”¹⁶ that merely emit what they are fed. Such entities communicate no message of their own, and accordingly, their conduct does not [******102**] merit [First Amendment](#) protection.¹⁷ [Miami Herald](#)

¹⁶ [American Broadcasting Cos. v. Aereo, Inc.](#), [573 U. S. 431](#), [458](#), [134 S. Ct. 2498](#), [189 L. Ed. 2d 476](#) (2014) (Scalia, J., dissenting).

¹⁷ The majority states that it is irrelevant whether “a compiler includes most items and excludes just a few.” *Ante*, at 732. That may be true if the compiler carefully reviews, edits, and selects a large proportion of the items it receives. But if an entity, like some “sort of community billboard, regularly carr[ies] the messages of third parties” instead of selecting only those that contribute to a common theme, then this information becomes highly relevant. [PG&E](#), [475 U. S. 1](#), [23](#), [106 S. Ct. 903](#), [89 L. Ed. 2d 1](#) (1986) (Marshall, J., concurring in judgment). Entities that have assumed the role of common carriers fall into this category, for example. And the States defend portions of their laws on the ground that at least some social-media platforms have taken on that role. The majority brushes aside that argument without adequate consideration.

[Publishing Co. v. Tornillo](#), [418 U. S. 241](#), [258](#), [94 S. Ct. 2831](#), [41 L. Ed. 2d 730](#) (1974).

Determining whether an entity should be viewed as a “curator” or a “dumb pipe” may not always be easy because [***783**] different aspects of an entity’s operations may take different approaches with respect to hosting third-party speech. The typical newspaper regulates the content and presentation of articles authored by its employees or others, [PG&E](#), [475 U. S.](#), at 8, [106 S. Ct. 903](#), [89 L. Ed. 2d 1](#), but that same paper might also run nearly all the classified advertisements it receives, regardless of their content and without adding any expression of its own. Compare [Tornillo](#), [418 U. S. 241](#), [94 S. Ct. 2831](#), [41 L. Ed. 2d 730](#), with [Pittsburgh \[****1129\] Press Co. v. Pittsburgh Comm’n on Human Relations](#), [413 U. S. 376](#), [93 S. Ct. 2553](#), [37 L. Ed. 2d 669](#) (1973). These differences may be significant for [First Amendment](#) purposes.

The same may be true for a parade organizer. For example, the practice of a parade organizer may be to select the *groups* that are admitted, but not the *individuals* who are allowed to march as members of admitted groups. [Hurley](#), [515 U. S.](#), at 572-574, [115 S. Ct. 2338](#), [132 L. Ed. 2d 487](#). In such a case, each of these practices would have to be analyzed separately.

2

Second, the host must use the compilation of speech to express “some sort of [****2432**] collective point”—even if only at a fairly abstract level. [Id.](#), at 568, [115 S. Ct. 2338](#), [132 L. Ed. 2d 487](#). Thus, a parade organizer who claims a [First Amendment](#) right to exclude certain groups or individuals would need to show at least that the message conveyed by the groups or individuals [******103**] who are allowed to march comport with the parade’s theme. [Id.](#), at 560, [574](#), [115 S. Ct. 2338](#), [132 L. Ed. 2d 487](#). A parade comprising “unrelated segments” that lumber along together willy-nilly would likely not express anything at all. [Id.](#), at 576, [115 S. Ct. 2338](#), [132 L.](#)

[Ed. 2d 487](#). And although “a narrow, succinctly articulable message is not a condition of constitutional protection,” compilations that organize the speech of others in a non-expressive way (e.g., chronologically) fall “beyond the realm of expressi[on].” [Id., at 569, 115 S. Ct. 2338, 132 L. Ed. 2d 487](#); contra, *ante*, at 731-732.

Our decision in *PruneYard* illustrates this point. In that case, the Court held that a mall could be required to host third-party speech (i.e., to admit individuals who wanted to [*784] distribute handbills or solicit signatures on petitions) because the mall’s admission policy did not express any message, and because the mall was “open to the public at large.” [PruneYard Shopping Center v. Robins, 447 U. S. 74, 83, 87-88, 100 S. Ct. 2035, 64 L. Ed. 2d 741 \(1980\); 303 Creative LLC v. Elenis, 600 U. S. 570, 590, 143 S. Ct. 2298, 216 L. Ed. 2d 1131 \(2023\)](#). In such circumstances, we held that the [First Amendment](#) is not implicated merely because a host objects to a particular message or viewpoint. See [PG&E, 475 U. S., at 12, 106 S. Ct. 903, 89 L. Ed. 2d 1](#).

3

Finally, a compiler must show that its “own message [is] affected by the speech it [is] forced to accommodate.” [FAIR, 547 U. S., at 63, 126 S. Ct. 1297, 164 L. Ed. 2d 156](#). In core examples of expressive compilations, such as a book containing selected articles, chapters, stories, or poems, this requirement is easily [****104] satisfied. But in other situations, it may be hard to identify any message that would be affected by the inclusion of particular third-party speech.

Two precedents that the majority tries to downplay, if not forget, are illustrative. The first is *PruneYard*, which I have already discussed. The *PruneYard* Court rejected the mall’s [First Amendment](#) claim because “[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition [were] not likely [to] be identified with those of the owner.” [447 U. S., at 87, 100 S. Ct. 2035, 64 L. Ed. 2d 741](#). And if those

who perused the handbills or [***1130] petitions were not likely to make that connection, any message that the mall owner intended to convey would not be affected.

The decision in *FAIR* rested on similar reasoning. In that case, the Court did not dispute the proposition that the law schools’ refusal to host military recruiters expressed the message that the military should admit and retain gays and lesbians. But the Court found no [First Amendment](#) violation because, as in *PruneYard*, it was unlikely that the views of the military recruiters “would be identified with” those of the schools themselves, and consequently, hosting the military [*785] recruiters did not “sufficiently interfere with any [****105] message of the school.” [547 U. S., at 64-65, 126 S. Ct. 1297, 164 L. Ed. 2d 156](#); contra, *ante*, at 739 (“[T]his Court has never hinged a compiler’s [First Amendment](#) protection on the risk of misattribution.”).¹⁸

[**2433] B

A party that challenges government interference with its curation of content cannot win without making the three-part showing just outlined, but such a showing does not guarantee victory. To prevail, the party must go on and show that the challenged regulation of its curation practices violates the applicable level of [First Amendment](#) scrutiny.

Our decision in *Turner* makes that clear. Although

¹⁸ To be sure, in [Turner Broadcasting System, Inc. v. FCC, 512 U. S. 622, 655, 114 S. Ct. 2445, 129 L. Ed. 2d 497 \(1994\)](#), we held that the [First Amendment](#) applied even though there was “little risk” of misattribution in that case. But that is only because the claimants in that case had already shown that the Cable Act affected the quantity or reach of the messages that they communicated through “original programming” or television programs produced by others. [Id., at 636, 114 S. Ct. 2445, 129 L. Ed. 2d 497](#) (internal quotation marks omitted). In cases not involving core examples of expressive compilations, such as in *PruneYard* and *FAIR*, a compiler’s [First Amendment](#) protection has very much turned on the risk of misattribution.

the television cable operators in that case made the showing needed to trigger [First Amendment](#) scrutiny, they did not ultimately prevail on their facial challenge to the Cable Act. After a remand and more than 18 months of additional factual development, the Court held that the law was adequately tailored to serve legitimate and important government interests, including “promoting the widespread dissemination of information from a multiplicity of sources.” [Turner Broadcasting System, Inc. v. FCC](#), 520 U. S. 180, 189, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997). Here, the States assert a similar interest in fostering a free and open marketplace of ideas.¹⁹

C

[*786] With these standards in mind, I proceed to the question whether the content-moderation provisions are facially [***1131] valid. For the following [****106] three reasons, NetChoice failed to meet its burden.

1

First, NetChoice did not establish *which entities* the statutes cover. This failure is critical because it is “impossible to determine whether a statute reaches too far without first knowing what the statute covers.” [Williams](#), 553 U. S., at 293, 128 S. Ct. 1830, 170 L. Ed. 2d 650. When it sued Florida, NetChoice was reluctant to disclose which of its members were covered by S. B. 7072. Instead, it filed declarations revealing only that the law reached “Etsy, Facebook, and YouTube.” Tr. of Oral Arg. in No. 22-277, at 32. In this Court,

¹⁹ Contrary to the majority’s suggestion, *ante*, at 740-741, this is not the only interest that Texas asserted. Texas has also invoked its interest in preventing platforms from discriminating against speakers who reside in Texas or engage in certain forms of off-platform speech. Brief for Respondent in No. 22-555, at 15. The majority opinion does not mention these features, much less the interests that Texas claims they serve. Texas also asserts an interest in preventing common carriers from engaging in “invidious discrimination in the distribution of publicly available goods, services, and other advantages.” *Id.*, at 18. These are “compelling state interests of the highest order” too. [Roberts v. United States Jaycees](#), 468 U. S. 609, 624, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

NetChoice was a bit more forthcoming, representing that S. B. 7072 also covers Instagram, X, Pinterest, Reddit, Gmail, Uber, and other e-commerce websites. *Id.*, at 69, 76; Brief for Respondents in No. 22-277, at 7, 38, 49.²⁰ But NetChoice has still not provided a complete list.

NetChoice was similarly reluctant to identify its affected members in the Texas case. At first, NetChoice “represented . . . that only Facebook, YouTube, and [X] are affected by the Texas law.” Brief for Appellant in No. 21-51178 (CA5), at 1, n. 1. [**2434] But in its brief in this Court, NetChoice told us that H. B. 20 also regulates “some of the Internet’s most popular websites, including Facebook, Instagram, Pinterest, [*787] TikTok, Vimeo, X (formerly known as Twitter), and YouTube.” [****107] Brief for Petitioners in No. 22-555, p. 1. And websites such as Discord,²¹ Reddit,²² Wikipedia,²³ and Yelp²⁴ have filed *amicus* briefs claiming that they may be covered by both the Texas and Florida laws.

It is a mystery how NetChoice could expect to prevail on a facial challenge without candidly disclosing the platforms that it thinks the challenged laws reach or the nature of the content moderation they practice. Without such information, we have no way of knowing whether the laws at issue here “cover websites that engage in primarily nonexpressive conduct.” Tr. of Oral

²⁰ This concession suggests that S. B. 7072 may “cover websites that engage in primarily non-expressive conduct.” Tr. of Oral Arg. in No. 22-277, at 34.

²¹ Brief for Discord Inc. as *Amicus Curiae* 2, 21-27. “Discord is a real time messaging service with over 150 million active monthly users who communicate within a huge variety of interest-based communities, or ‘servers.’” *Id.*, at 1.

²² Brief for Reddit, Inc., as *Amicus Curiae* 2. Reddit is an online forum that allows its “users to establish and enforce their own rules governing what topics are acceptable and how those topics may be discussed The display of content on Reddit is thus primarily driven by humans—not by centralized algorithms.” *Ibid.*

²³ Brief for Wikimedia Foundation as *Amicus Curiae* 2.

²⁴ Brief for Yelp Inc. as *Amicus Curiae* 3-4.

Arg. in No. 22-277, at 34; see also *id.*, at 126. For example, among other things, NetChoice has not stated whether the challenged laws reach websites like WhatsApp²⁵ and Gmail,²⁶ which carry messages instead of *curating* them to create an independent speech product. Both [***1132] laws also appear to cover Reddit²⁷ and BeReal,²⁸ and [*788] websites like Parler,²⁹ which claim to engage in little or no content moderation at all. And Florida’s law, which is even broader than Texas’s, plainly applies to e-commerce platforms like Etsy that make clear in their terms of service that they are “not a curated marketplace.” [****108]³⁰

In [First Amendment](#) terms, this means that these laws—in at least some of their applications—appear to regulate the kind of “passive receptacle[s]” of third-party speech that receive no [First Amendment](#) [**2435] protection. [Tornillo](#),

²⁵ About WhatsApp, WhatsApp, <https://whatsapp.com/about> (last accessed Apr. 23, 2024).

²⁶ Secure, Smart, and Easy To Use Email, Gmail, <https://google.com/gmail/about> (last accessed Apr. 23, 2024).

²⁷ Reddit Content Policy, Reddit, <https://www.redditinc.com/policies/content-policy> (last accessed Apr. 23, 2024) (describing Reddit as a platform that is run and moderated by its users).

²⁸ BeReal, which appears to have enough monthly users to be covered by the Texas law, allows users to share a photo with their friends once during a randomly selected 2-minute window each day. Time To BeReal, <https://help.bereal.com/hc/en-us/articles/7350386715165--Time-to-BeReal> (last accessed Apr. 23, 2024). Twenty-four hours later, those photos disappear. Because BeReal posts thus appear and disappear “randomly,” even the Eleventh Circuit would agree that BeReal likely is not an expressive compilation. [34 F. 4th, at 1214](#).

²⁹ Community Guidelines, Parler, <https://www.parler.com/community-guidelines> (May 31, 2024) (“We honor the ability of all users to freely express themselves without interference from oppressive censorship or manipulation”). Parler probably does not have a sufficient number of monthly users to be covered by these statutes. But it is possible that other covered websites use a similar business model.

³⁰ Our House Rules, Etsy, <https://etsy.com/legal/prohibited> (last accessed Apr. 23, 2024).

[418 U. S., at 258, 94 S. Ct. 2831, 41 L. Ed. 2d 730](#). Given such uncertainty, it is impossible for us to determine whether these laws have a “plainly legitimate sweep.” [Williams, 553 U. S., at 292, 128 S. Ct. 1830 ** | 170 L. Ed. 2d 650; Washington State Grange, 552 U. S., at 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151](#).

2

Second, NetChoice has not established *what* kinds of content appear on all the regulated platforms, and we cannot determine whether these platforms create an “inherently expressive” compilation of third-party speech until we know what is being compiled.

We know that social-media platforms *generally* allow their users to create accounts; send direct messages through private inboxes; post written messages, photos, and videos; and comment on, repost, or otherwise interact with other users’ posts. And NetChoice acknowledges in fairly general terms that its members engage in most—though [*789] not all—of these functions. But such generalities are insufficient.

For one thing, the ways in which users post, send direct messages, or interact with content may differ in meaningful ways from platform to platform. And NetChoice’s failure to account for these differences may be decisive. To see how, consider [****109] X and Yelp. Both platforms allow users to post comments and photos, but they differ in other respects.³¹ X permits users to post (or “Tweet”) on a broad range of topics because its “purpose is to serve the public conversation,”³² and as a result, many elected officials use X to communicate with constituents. [***1133] Yelp, by contrast, allows users to post comments and pictures only for the purpose of advertising local businesses or providing “firsthand accounts” that reflect their “consumer

³¹ Yelp and X are both covered by S. B. 7072 and H. B. 20. See Brief for Yelp Inc. as *Amicus Curiae* 4, n. 4.

³² The X Rules, X, <https://help.x.com/en/rules-and-policies/x-rules> (last accessed Apr. 23, 2024).

experience” with businesses.³³ It does not permit “rants about political ideologies, a business’s employment practices, extraordinary circumstances, or other matters that don’t address the core of the consumer experience.”³⁴

As this example shows, X’s content is more political than Yelp’s, and Yelp’s content is more commercial than X’s. That difference may be significant for *First Amendment* purposes. See *Pittsburgh Press*, 413 U. S. 376, 93 S. Ct. 2553, 37 L. Ed. 2d 669. But NetChoice has not developed the record on that front. Nor has it shown what kinds of content appear across the diverse array of regulated platforms.

Social-media platforms are diverse, and each may be unique in potentially significant ways. On the present record, we are ill-equipped to account for the many [****110] platform-specific [*790] features that allow users to do things like sell or purchase goods,³⁵ live-stream events,³⁶ request a ride,³⁷ arrange a date,³⁸ create a discussion forum,³⁹ wire money to friends,⁴⁰ play a video [**2436] game,⁴¹ hire an employee,⁴² log a run,⁴³ or agree to watch a dog.⁴⁴ The challenged laws may apply

differently to these different functions, which may present different *First Amendment* issues. A court cannot invalidate the challenged laws if it has to speculate about their applications.

3

Third, NetChoice has not established *how* websites moderate content. NetChoice alleges that “[c]overed websites” generally use algorithms to organize and censor content appearing in “search results, comments, or in feeds.” Brief for Petitioners in No. 22-555, at 4, 6. But at this stage and on this record, we have no way of confirming whether all of the regulated platforms use algorithms to organize all of their content, much less whether these algorithms are expressive. See *Hurley*, 515 U. S., at 568, 115 S. Ct. 2338, 132 L. Ed. 2d 487. Facebook and Reddit, for instance, both allow their users to post [***1134] about a wide range of topics.⁴⁵ But while Facebook uses algorithms to arrange [*791] and moderate its users’ posts, Reddit asserts that its content is moderated [****111] by Reddit users, “not by centralized algorithms.” Brief for Reddit, Inc., as *Amicus Curiae* 2. If Reddit and other platforms entirely outsource curation to others, they can hardly claim that their compilations express their own views.

Perhaps recognizing this, NetChoice argues in passing that it cannot tell us how its members moderate content because doing so would embolden “malicious actors” and divulge “proprietary and closely held” information. *E.g.*, Brief for Petitioners in No. 22-555, at 11. But these harms are far from inevitable. Various platforms already make similar disclosures—both voluntarily and to comply with the European Union’s Digital

³³ Content Guidelines, Yelp, <https://www.yelp.com/guidelines> (last accessed Apr. 23, 2024).

³⁴ *Ibid.*

³⁵ *E.g.*, Facebook Marketplace, Etsy.

³⁶ *E.g.*, X Live, Twitch.

³⁷ *E.g.*, Uber, Lyft.

³⁸ *E.g.*, Facebook Dating, Tinder.

³⁹ *E.g.*, Reddit, Quora.

⁴⁰ *E.g.*, Meta Pay, Venmo, PayPal.

⁴¹ *E.g.*, Metaverse, Discord.

⁴² *E.g.*, Indeed, LinkedIn.

⁴³ *E.g.*, Strava.

⁴⁴ *E.g.*, Rover.

⁴⁵ Community Standards, Facebook, <https://transparency.meta.com/policies/community-standards> (“[Facebook] wants people to be able to talk openly about the issues that matter to them, whether through written comments, photos, music, or other artistic mediums”); Brief for Reddit, Inc., as *Amicus Curiae* 12 (“[T]he Reddit platform as a whole accommodates a wide range of communities and modes of discourse”).

Services Act⁴⁶—yet the sky has not fallen. And on remand, NetChoice will have the opportunity to contest whether particular disclosures are necessary and whether any relevant materials should be filed under seal.

Various NetChoice members already disclose in broad strokes how they use algorithms to curate content. Many platforms claim to use algorithms to identify and remove violent, obscene, sexually explicit, and false posts that violate their community guidelines. Brief for Developers Alliance et al. as *Amici Curiae* 11. Some [****112] platforms—like X, for instance—say they use algorithms, not for the purpose of removing all nonconforming speech, but to “promot[e] counterspeech” that “presents [**2437] facts to correct misstatements” or [**792] “denounces hateful or dangerous speech.”⁴⁷ Still others, like Parler,⁴⁸ Reddit,⁴⁹ and Signal Messenger,⁵⁰ say they engage in little or no content moderation.

Some platforms have also disclosed that they use

⁴⁶ Comm’n Reg. 2022/2065, Art. 17, 2022 O. J. (L. 277) 51-52. NetChoice does not dispute the States’ assertion that the regulated platforms are required to comply with this law. Compare Brief for Petitioners in No. 22-277, p. 49, with Reply Brief in No. 22-277, p. 24; Tr. of Oral Arg. in No. 22-555, pp. 20-21. If, on remand, the States show that the platforms have been able to comply with this law in Europe without having to forgo “exercising editorial discretion at all,” Brief for Respondents in No. 22-277, p. 40, then that might help them prove that their disclosure laws are not “unduly burdensome” under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985).

⁴⁷ Our Approach to Policy Development and Enforcement Philosophy, X, <http://www.help.x.com/en/rules-and-policies/enforcement-philosophy>.

⁴⁸ Community Guidelines, Parler, <https://www.parler.com/community-guidelines>.

⁴⁹ Reddit Content Policy, Reddit, <https://www.redditinc.com/policies/content-policy>.

⁵⁰ Signal Terms & Privacy Policy, Signal Messenger (May 25, 2018), <https://www.signal.org/legal>.

algorithms to help their users find relevant content. The e-commerce platform Etsy, for instance, uses an algorithm that matches a user’s search terms to the [****1135] “attributes” that a seller ascribes to its wares.⁵¹ Etsy’s algorithm also accounts for things like the date of the seller’s listing, the proximity of the seller and buyer, and the quality of the seller’s customer-service ratings. *Ibid*.

YouTube says it answers search queries based on “relevance, engagement and quality”—taking into account how well a search query matches a video title, the kinds of videos a particular user viewed in the past, and each creator’s “expertise, authoritativeness, and trustworthiness on a given topic.”⁵²

These disclosures suggest that platforms can say something about their content-moderation practices without enabling [****113] malicious actors or disclosing proprietary information. They also suggest that not all platforms curate all third-party content in an inherently expressive way. Without more information about how regulated platforms moderate [**793] content, it is not possible to determine whether these laws lack “a ‘plainly legitimate sweep.’” ’’ *Washington State Grange*, 552 U. S., at 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151.

For all these reasons, NetChoice failed to establish whether the content-moderation provisions violate the *First Amendment* on their face.

D

Although the only question the Court must decide today is whether NetChoice showed that the Florida

⁵¹ How Etsy Search Works, Etsy Help Center, <https://help.etsy.com/hc/en-us/articles/115015745428-How-Etsy-Search-Works?segment=selling> (visited Apr. 9, 2024).

⁵² YouTube Search, <https://www.youtube.com/howyoutubeworks/product-features/search> (last accessed Apr. 23, 2024). Unlike many other platforms, YouTube does not accept payment for better placement within organic search

and Texas laws are facially unconstitutional, much of the majority opinion addresses a different question: whether the Texas law's content-moderation provisions are constitutional as applied to two features of two platforms—Facebook's News Feed and YouTube's homepage. The opinion justifies this discussion on the ground that the Fifth Circuit cannot apply the facial constitutionality test without resolving that question, see, *e.g.*, *ante*, at 727, 744, but that is not necessarily true. Especially in light of the wide reach of the Texas law, NetChoice may still fall far short of establishing facial unconstitutionality—even if it is assumed for the [****114] sake of argument that the Texas law is unconstitutional as applied to Facebook's News Feed and YouTube's homepage.⁵³

[**2438] For this reason, the majority's "guidance" on this issue may well be superfluous. Yet superfluity is not its most egregious flaw. The majority's discussion also rests on wholly conclusory assumptions that lack record support. For example, the majority paints an attractive, though simplistic, picture of what Facebook's News Feed and YouTube's homepage do behind the scenes. Taking NetChoice at its word, the majority says that the platforms' use of algorithms to enforce their community standards is *per se* expressive. But the platforms have refused to disclose how these [***1136] algorithms were created and how they actually work. And the [*794] majority fails to give any serious consideration to key arguments pressed by the States. Most notable is the majority's conspicuous failure to address the States' contention that platforms like YouTube and Facebook—which constitute the 21st century equivalent of the old "public square"—should be viewed as common carriers. See *Biden v. Knight First Amendment Institute at Columbia University*, 593 U. S. _____, 141 S. Ct. 1220, 209 L. Ed. 2d 519 (2021) (Thomas, J., concurring) (slip op., at 6). Whether or not the Court ultimately accepts that argument, it

deserves serious treatment.

Instead of seriously engaging with [****115] this and other arguments, the majority rests on NetChoice's dubious assertion that there is no constitutionally significant difference between what newspaper editors did more than a half-century ago at the time of *Tornillo* and what Facebook and YouTube do today.

Maybe that is right—but maybe it is not. Before mechanically accepting this analogy, perhaps we should take a closer look.

Let's start with size. Currently, Facebook and YouTube each produced—on a daily basis—more than four petabytes (4,000,000,000,000,000 bytes) of data.⁵⁴ By my calculation, that is roughly 1.3 billion times as many bytes as there are in an issue of the New York Times.⁵⁵

No human being could possibly review even a tiny fraction of this gigantic outpouring of speech, and it is therefore hard to see how any shared message could be discerned. And even if someone could view all this data and find such a message, [*795] how likely is it that the addition of a small amount of discordant speech would change the overall message?

Now consider how newspapers and social-media platforms edit content. Newspaper editors are real human beings, and when the Court decided *Tornillo* (the case that the majority finds most instructive), editors [****116] assigned articles to particular reporters, and copyeditors went over typescript with a blue pencil. The platforms, by contrast, play no role in selecting the billions of texts and videos that users try to convey to each other. And the vast

⁵³ This problem is even more pronounced for the Florida law, which covers more platforms and conduct than the Texas law.

⁵⁴ Breaking Down the Numbers: How Much Data Does the World Create Daily in 2024? Edge Delta (Mar. 11, 2024), <https://www.edgedelta.com/company/blog/how-much-data-is-created-per-day>.

⁵⁵ The average issue of the New York Times, excluding ads, contains about 150,000 words. A typical word consists of 10 to 20 bytes. Therefore, the average issue of the New York Times contains around 3 million bytes.

bulk of the “curation” and “content moderation” carried out by platforms is not done by human beings. Instead, algorithms remove a small fraction of nonconforming posts *post hoc* and prioritize content based on factors that the platforms have not revealed and may not even know. After all, many of the biggest platforms are beginning to use AI algorithms to help them moderate content. And when AI algorithms make a decision, “even the researchers [**2439] and programmers creating them don’t really understand why the models they have [***1137] built make the decisions they make.”⁵⁶ Are such decisions equally expressive as the decisions made by humans? Should we at least think about this?

Other questions abound. Maybe we should think about the enormous power exercised by platforms like Facebook and YouTube as a result of “network effects.” Cf. *Ohio v. American Express Co.*, 585 U.S. 529, 138 S. Ct. 2274, 201 L. Ed. 2d 678 (2018). And maybe we should think about the unique ways in which social-media platforms influence public thought. To be sure, I do not suggest [****117] that we should decide at this time whether the Florida and Texas laws are constitutional as applied to Facebook’s News Feed or YouTube’s homepage. My argument is just the opposite. Such questions should be resolved in the context [**796] of an as-applied challenge. But no as-applied question is before us, and we do not have all the facts that we need to tackle the extraneous matters reached by the majority.

Instead, when confronted with the application of a constitutional requirement to new technology, we should proceed with caution. While the meaning of the Constitution remains constant, the application of enduring principles to new technology requires an understanding of that technology and its effects. Premature resolution of such questions creates the risk of decisions that will quickly turn into

embarrassments.

IV

Just as NetChoice failed to make the showing necessary to demonstrate that the States’ content-moderation provisions are facially unconstitutional, NetChoice’s facial attacks on the individual-disclosure provisions also fell short. Those provisions require platforms to explain to affected users the basis of each content-censorship decision. Because these regulations provide for [****118] the disclosure of “purely factual and uncontroversial information,” they must be reviewed under *Zauderer*’s framework, which requires only that such laws be “reasonably related to the State’s interest in preventing deception of consumers” and not “unduly burde[n]” speech. *471 U.S.*, at 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652.⁵⁷

For *Zauderer* purposes, a law is “unduly burdensome” if it threatens to “chil[l] protected commercial speech.” *Ibid.* Here, NetChoice claims that these disclosures have that effect and lead platforms to “conclude that the safe course is to . . . not exercis[e] editorial discretion at all” rather than explain why they remove “millions of posts per day.” Brief [**797] for Respondents in No. 22-277, at 39-40 (internal quotation marks omitted).

Our unanimous agreement regarding NetChoice’s failure to show that a sufficient number of its members engage in constitutionally protected expression prevents us from accepting NetChoice’s argument regarding these provisions. In the lower courts, [***1138] NetChoice did not even try to show how these disclosure provisions chill each platform’s speech. Instead, NetChoice merely identified one subset of one platform’s content that would be affected by these laws: billions of nonconforming [****119] [**2440] comments

⁵⁶T. Xu, AI Makes Decisions We Don’t Understand—That’s a Problem, (Jul. 19, 2021), <https://builtin.com/artificial-intelligence/ai-right-explanation>.

⁵⁷Both lower courts reviewed these provisions under the *Zauderer* test. And in the Florida case in particular, NetChoice did not contest—and accordingly forfeited—whether *Zauderer* applies here. See Brief for Appellants in No. 21-12355 (CA11), at 21; Brief for Appellees in No. 21-12355 (CA11), p. 44.

that YouTube removes each year. [49 F. 4th, at 487](#); see also Brief for Appellees in No. 21-12355 (CA11), p. 13. But if YouTube uses automated processes to flag and remove these comments, it is not clear why having to disclose the bases of those processes would chill YouTube’s speech. And even if having to explain each removal decision would unduly burden YouTube’s [First Amendment](#) rights, the same does not necessarily follow with regard to all of NetChoice’s members.

NetChoice’s failure to make this broader showing is especially problematic since NetChoice does not dispute the States’ assertion that many platforms already provide a notice-and-appeal process for their removal decisions. In fact, some have even *advocated* for such disclosure requirements. Before its change in ownership, the previous Chief Executive Officer of the platform now known as X went as far as to say that “all companies” should be required to explain censorship decisions and “provide a straightforward process to appeal decisions made by humans or algorithms.”⁵⁸ Moreover, as mentioned, many platforms are already providing similar disclosures pursuant to the European Union’s Digital Services Act. Yet complying with that **[*798]** law does not appear **[****120]** to have unduly burdened each platform’s speech in those countries. On remand, the courts might consider whether compliance with EU law chilled the platforms’ speech.

The only binding holding in these decisions is that NetChoice has yet to prove that the Florida and Texas laws they challenged are facially unconstitutional. Because the majority opinion ventures far beyond the question we must decide, I concur only in the judgment.

End of Document

⁵⁸Does Section 230’s Sweeping Immunity Enable Big Tech Bad Behavior? Hearing before the Senate Committee on Commerce, Science, and Transportation, 116th Cong., 2d Sess., 2 (2020) (statement of Jack Dorsey, CEO, Twitter, Inc.).



Caution

As of: October 18, 2026 7:03 AM Z

Mormile v. Sinclair

Court of Appeal of California, Fourth Appellate District, Division Three

January 19, 1994, Decided

No. G013485.

Reporter

21 Cal. App. 4th 1508 *; 26 Cal. Rptr. 2d 725 **; 1994 Cal. App. LEXIS 34 ***; 94 Cal. Daily Op. Service 438; 94 Daily Journal DAR 727

MARY MORMILE et al., Plaintiffs and Respondents, v. ALEXANDER SINCLAIR, Defendant and Appellant.

Prior History: [***1] Superior Court of Orange County, No. 633684, Cecil Hicks, Judge.

Disposition: The order denying Sinclair's petition to compel arbitration is reversed. The case is remanded and the trial court is directed to enter an order granting Sinclair's petition. Sinclair shall recover his costs on appeal.

Case Summary

Procedural Posture

Defendant physician appealed from an order of the Superior Court of Orange County (California), which denied his petition to compel arbitration of plaintiff husband's loss of consortium claim arising out of plaintiff wife's medical malpractice lawsuit pursuant to the Medical Injury Compensation Reform Act of 1987, [Cal. Civ. Proc. Code § 1295](#).

Overview

Plaintiff wife signed an agreement which required that all claims that arose out of services provided by defendant physician, including those of any spouse, be submitted to arbitration. The trial court granted defendant's petition to compel arbitration as to plaintiff wife's medical malpractice lawsuit, but denied his petition as to plaintiff husband's loss of

consortium claim. On appeal, the court reversed and held that the trial court erred in refusing to compel plaintiff husband to arbitrate his claim. The court held that the agreement was intended to bind plaintiff husband, whose claim was based on his wife's injury, which allegedly resulted from defendant's professional negligence. The court held that an order compelling arbitration of plaintiff husband's claim was consistent with the Medical Injury Compensation Reform Act of 1987, [Cal. Civ. Proc. § 1295](#), subverted the legislative goals underlying [§ 1295](#), and protected plaintiff wife's right to privacy in her relationship with her physician. The court concluded that plaintiff wife's right to decide the terms of her medical treatment outweighed plaintiff husband's right to a jury trial of his loss of consortium claim.

Outcome

The court reversed the trial court's order denying defendant physician's petition to compel arbitration of plaintiff husband's loss of consortium claim, and remanded with directions to enter an order granting defendant's petition, because plaintiff husband was bound by the arbitration agreement signed by plaintiff wife.

LexisNexis® Headnotes

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Business & Corporate Compliance > Alternative
Dispute Resolution > Mandatory ADR

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Mandatory ADR

Business & Corporate
Compliance > Contracts > Contract Conditions &
Provisions > Arbitration Clauses

Contracts Law > Contract Conditions &
Provisions > Arbitration Clauses

Contracts
Law > Defenses > Unconscionability > General
Overview

Contracts
Law > Defenses > Unconscionability > Adhesion
Contracts

Business & Corporate
Compliance > Contracts > Types of
Contracts > Adhesion Contracts

Contracts Law > Types of Contracts > Adhesion
Contracts

Torts > Malpractice & Professional
Liability > Healthcare Providers

Torts > Procedural Matters > Alternative Dispute
Resolution

HN1 A medical services arbitration agreement must contain statutorily prescribed language, and, if in compliance with the Medical Injury Compensation Reform Act of 1987, [Cal. Civ. Proc. Code § 1295](#), it will not be deemed a contract of adhesion, nor unconscionable nor otherwise improper. [Cal. Civ. Proc. Code § 1295\(e\)](#).

Civil Procedure > ... > Alternative Dispute
Resolution > Arbitration > General Overview

Business & Corporate Compliance > Alternative
Dispute Resolution > Mandatory ADR

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Mandatory ADR

Torts > Malpractice & Professional
Liability > Healthcare Providers

Torts > Procedural Matters > Alternative Dispute

Resolution

HN2 The first article of a medical services contract providing for arbitration must state: It is understood that any dispute as to medical malpractice that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration. Medical Injury Compensation Reform Act of 1987, [Cal. Civ. Proc. Code § 1295\(a\)](#).

Civil Procedure > ... > Alternative Dispute
Resolution > Arbitration > General Overview

Business & Corporate Compliance > Alternative
Dispute Resolution > Mandatory ADR

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Mandatory ADR

Business & Corporate
Compliance > Contracts > Contract Conditions &
Provisions > Arbitration Clauses

Contracts Law > Contract Conditions &
Provisions > Arbitration Clauses

Labor & Employment Law > Collective Bargaining &
Labor Relations > Labor Arbitration > Enforcement

Torts > Malpractice & Professional
Liability > Healthcare Providers

Torts > Procedural Matters > Alternative Dispute
Resolution

HN3 The following advisement, printed in at least 10-point bold red type, must appear in a medical services contract providing for arbitration above the patient's signature line: Notice: by Signing This Contract You Are Agreeing to Have Any Issue of

Medical Malpractice Decided by Neutral Arbitration and You Are Giving Up Your Right to a Jury Or Court Trial. See Article 1 of This Contract.

Business & Corporate Compliance > Alternative Dispute Resolution > Mandatory ADR

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Torts > Malpractice & Professional Liability > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > Procedural Matters > Alternative Dispute Resolution

[HN4](#) Where a patient expressly contracts to submit to arbitration any dispute as to medical malpractice, and that agreement fully complies with the Medical Injury Compensation Reform Act of 1987, [Cal. Civ. Proc. Code § 1295](#), it must be deemed to apply to all medical malpractice claims arising out of the services contracted for, regardless of whether they are asserted by the patient or a third party.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A patient brought a malpractice action against a physician, and her husband asserted a loss of consortium cause of action. The physician petitioned to compel arbitration, and the trial court granted the petition as to the patient, but denied it as to her husband. The arbitration agreement signed by the patient provided for arbitration of all claims arising out of or relating to the physician's medical treatment or services, including the claims of any spouse or heir. (Superior Court of Orange County, No. 633684, Cecil Hicks, Judge.)

The Court of Appeal reversed the order denying the physician's petition to compel arbitration, remanded the case, and directed the trial court to enter an order granting the physician's petition. The court held that if a nonsignatory spouse with a loss of consortium claim were allowed to litigate that claim, the purpose of [Code Civ. Proc., § 1295](#) (arbitration provision in contract for medical services), would be defeated, for the patient would be compelled to arbitrate, but the physician would still have to answer in a civil suit for claims dependent on identical facts regarding the professional standard of care, its breach by the defendant, and causation of injury to the patient. No savings would be effected, and the patient might fail to establish liability in arbitration, while the nonsignatory spouse might prevail in the loss of consortium action. Further, the court held, the sanctity of the physician-patient relationship would be threatened if the physician were obliged to obtain the signature of the patient's spouse to the arbitration agreement. (Opinion by Sonenshine, J., with Sills, P. J., and Crosby, J., concurring.)

Headnotes

[CA\(1a\)](#) (1a) [CA\(1b\)](#) (1b)

Healing Arts and Institutions § 29.2—Physicians, Surgeons, and Other Medical Practitioners—Arbitration Agreements—Effect of Patient's Agreement to Arbitrate on Husband's Loss of Consortium Claim.

--In a medical malpractice action in which the patient's husband asserted a loss of consortium cause of action, the trial court erred in denying defendant physician's petition to compel arbitration of the consortium claim, where the agreement signed by the patient provided for arbitration of all claims arising out of or relating to the physician's medical treatment or services, including the claims of any spouse or heir. If a spouse with a loss of consortium claim were allowed to litigate that claim, the purpose of [Code Civ. Proc., § 1295](#), would be defeated, for the patient would be

compelled to arbitrate, but the physician would still have to answer in a civil suit for claims dependent on identical facts. No savings would be effected, and the patient might fail to establish liability in arbitration, while the nonsignatory spouse might prevail in the loss of consortium action. Further, the sanctity of the physician-patient relationship would be threatened if the physician were obliged to obtain the signature of the patient's spouse to the arbitration agreement.

[Arbitration of medical malpractice claims, note, 84 **A.L.R.3d** 375. See also 6 **Witkin**, Summary of Cal. Law (9th ed. 1988) Torts, §§ 783, 784.]

CA(2) (2)

Arbitration and Award § 5—Arbitration Agreements—Effect—Nonsignatory Parties.

--Arbitration agreements are enforced with regularity against nonsignatory parties. Minors are bound by a parent's contract to arbitrate medical malpractice claims with a group health plan. State employees who have never agreed to arbitrate their claims are bound to do so when a state employer has entered into a medical services contract containing an arbitration provision. Where a husband's application for health insurance for himself and his wife contains an arbitration provision, the nonsignatory wife is required to arbitrate her wrongful death claim. The parents' agreement to arbitrate claims against a group health provider is binding on an infant, even for *in utero* injuries. And the wrongful death claims of nonsignatory heirs of a member of a group health plan must be arbitrated according to the provisions of the subscriber's agreement. Moreover, pursuant to [Code Civ. Proc., § 1295, subd. \(d\)](#), where parents have signed for medical services rendered to a minor, the agreement may not be disaffirmed, and the result is the same even if it is the unemancipated minor, rather than the parent, who has signed.

Counsel: Baker, Silberberg & Keener, Steven R.

Van Sicklen, Schmid & Norek, Susan H. Schmid and Denise H. Greer for Defendant and Appellant.

Lapping & Sturm and Edward W. Sturm for Plaintiffs and Respondents.

Judges: Opinion by Sonenshine, J., with Sills, P. J., and Crosby, J., concurring.

Opinion by: SONENSHINE, J.

Opinion

[*1510] [726]** Alexander Sinclair, M.D., appeals from an order denying his petition to compel arbitration of Gary Mormile's loss of consortium claim. We reverse.

Discussion

When Mary Mormile first consulted with Sinclair for medical treatment, she signed a physician/patient agreement which provided inter alia: "All Claims Must Be Arbitrated: It is the intention of the parties that this agreement bind all parties whose claims may arise out of or relate to treatment or services provided by the physician, including any spouse or heirs of the patient." Later, when she became dissatisfied with Sinclair's treatment, **[***2]** Mary filed a medical malpractice lawsuit, in which her husband, Gary, asserted a loss of consortium cause of action. Sinclair's petition to compel arbitration was granted as to Mary, but denied as to Gary, the court stating: "[I]n spite of certain cases cited, which I don't think are applicable . . . whatever Mrs. Mormile signed is not, absolutely not binding on him. I don't see how it could be." As we will discuss, the court erred in refusing to compel Gary to arbitrate his claim against Sinclair.

I

[Code of Civil Procedure](#) ¹ [section 1295](#) is part of

¹All statutory references are to the Code of Civil Procedure unless otherwise stated.

the Medical Injury Compensation Reform Act of 1987. It "was enacted . . . to alleviate the escalating cost of medical malpractice insurance premiums (and resulting problems of health care availability) due to the surge of medical malpractice actions and high jury awards. [Citations.]" ([Rosenfield v. Superior Court \(1983\) 143 Cal.App.3d 198, 203 \[191 Cal.Rptr. 611\]](#).) It authorizes medical services contracts which require arbitration of disputes relating to professional negligence of a health care provider. [HN1](#) A medical services arbitration agreement must contain statutorily prescribed language, [\[***3\]](#) ² and, if in compliance with the statute, it will not be [\[**727\]](#) deemed "a contract of adhesion, nor unconscionable nor otherwise improper." ([§ 1295, subd. \(e\).](#))

[\[***4\]](#) [\[*1511\]](#) II

[CA\(1a\)](#) (1a) The issue before us is whether Mary's agreement to arbitrate claims arising out of Sinclair's professional negligence binds Gary, who never signed the agreement. We note arbitration agreements are enforced with regularity against nonsignatory parties. [CA\(2\)](#) (2) As stated in [Keller Construction Co. v. Kashani \(1990\) 220 Cal.App.3d 222, 225-226 \[269 Cal.Rptr. 259\]](#), minors are bound by a parent's contract to arbitrate medical malpractice claims with a group health plan ([Doyle v. Giuliani \(1965\) 62 Cal.2d 606,](#)

[607-608 \[43 Cal.Rptr. 697, 401 P.2d 1\]](#)); state employees who have never agreed to arbitrate their claims are bound to do so when a state employer has entered into a medical services contract containing an arbitration provision ([Madden v. Kaiser Foundation Hospitals \(1976\) 17 Cal.3d 699, 702, 704, 709 \[131 Cal.Rptr. 882, 552 P.2d 1178\]](#)); where a husband's application for health insurance for himself and his wife contains an arbitration provision, the nonsignatory wife is required to arbitrate her wrongful death [\[***5\]](#) claim ([Hawkins v. Superior Court \(1979\) 89 Cal.App.3d 413, 415-416 \[152 Cal.Rptr. 491\]](#)); the parents' agreement to arbitrate claims against a group health provider is binding on an infant, even for *in utero* injuries ([Wilson v. Kaiser Foundation Hospitals \(1983\) 141 Cal.App.3d 891, 893-894 \[190 Cal.Rptr. 649\]](#)); and the wrongful death claims of nonsignatory heirs of a member of a group health plan must be arbitrated according to the provisions of the subscriber's agreement. ([Herbert v. Superior Court \(1985\) 169 Cal.App.3d 718, 720-721 \[215 Cal.Rptr. 477\]](#).) Moreover, by statute, where parents have signed for medical services rendered to a minor, the agreement may not be disaffirmed. ([§ 1295, subd. \(d\).](#)) And the result is the same even if it is the unemancipated minor, rather than the parent, who has signed. ([Michaelis v. Schori \(1993\) 20 Cal.App.4th 133, 138 \[24 Cal.Rptr.2d 380\]](#).)

[CA\(1b\)](#) (1b) To date, this district has not had to decide whether a patient can bind his or her nonsignatory spouse to arbitrate a [\[***6\]](#) loss of consortium claim against a health care provider. However, the question is not one of first impression in California. In [Gross v. Recabaren \(1988\) 206 Cal.App.3d 771 \[253 Cal.Rptr. 820\]](#), the reviewing court held such a claim subject to arbitration. The physician-patient agreement provided for arbitration of " 'any dispute as to medical malpractice.' " (*Id.* at p. 781.) The court concluded mandatory arbitration was "not only consistent with the language [\[*1512\]](#) of the statute [\[section 1295\]](#), but . . . essential to further the goals of the legislation and the judicially declared preference in

² [HN2](#) The first article of a medical services contract providing for arbitration must state: "It is understood that any dispute as to medical malpractice that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration." ([§ 1295, subd. \(a\).](#)) [HN3](#)

In addition, the following advisement, printed in at least 10-point bold red type, must appear above the patient's signature line: "Notice: by Signing This Contract You Are Agreeing to Have Any Issue of Medical Malpractice Decided by Neutral Arbitration and You Are Giving Up Your Right to a Jury Or Court Trial. See Article 1 of This Contract."

favor of joining loss of consortium and negligence claims [citation]; safeguard the physician-patient relationship; and preserve important privacy rights of the patient." (*Ibid.*) The court further noted "[a] loss of consortium claim . . . 'is not merely derivative or collateral to the [patient-] spouse's cause of action [citation], . . . [but] is based on the physical injury or disability of [that individual].'" (*Ibid.*)

The *Gross* court engaged in an extensive discussion of policy, including that relating to the patient's right to [***7] privacy. "[I]n our view the most significant consideration, to authorize [**728] an intrusion into a patient's confidential relationship with a physician as the price for guaranteeing a third person, even a spouse, access to a jury trial *on matters arising from the patient's own treatment*, poses problems of a particularly serious nature. One might hope that spouses will voluntarily communicate with each other regarding their respective medical treatment, whether it involves a routine matter or a most intimate and sensitive procedure such as a vasectomy or the termination of a pregnancy. Nonetheless, it would be impermissible to adopt a rule that would require them, or their physicians, to do so, or that would permit one spouse to exercise a type of veto power over the other's decisions. Yet construing [section 1295](#) to require a spouse's concurrence in an arbitration agreement would, in certain situations at least, have exactly that effect." ([Gross v. Recabaren, supra, 206 Cal.App.3d 771, 782.](#)) And the court concluded: "It would appear indisputable that if spouses disagree on any decision regarding the terms of medical treatment, [***8] including the desirability of an arbitration provision, the view of only one can prevail. Inasmuch as the patient is more directly and immediately affected, as between the two, the balance must weigh in that individual's favor." (*Id.*, at p. 783)

In [Bolanos v. Khalatian \(1991\) 231 Cal.App.3d 1586 \[283 Cal.Rptr. 209\]](#), the court, following *Gross*, reversed the trial court's order denying a health care provider's petition to compel arbitration

of claims arising out of alleged negligent care rendered to a mother prior to and during the delivery of her child. Inter alia, the *Bolanos* court held the mother's signature to the arbitration agreement bound not only her and her infant, but the father as well. His alleged injury was emotional distress occasioned by his having witnessed the injuries inflicted on his wife. (See [Dillon v. Legg \(1968\) 68 Cal.2d 728 \[69 Cal.Rptr.2d 72, 441 P.2d 912, 29 A.L.R.3d 1316\]](#).) The court reiterated the holding of *Gross*, that [HN4](#) " ' . . . where . . . a patient expressly contracts to submit to arbitration "any dispute as to medical malpractice," [***9] and that agreement fully complies with [\[\] section 1295](#), it must be deemed to apply to *all* medical malpractice claims arising out of the services contracted [**1513] for, regardless of whether they are asserted by the patient or a third party.' [Citation.]" ([Bolanos v. Khalatian, supra, 231 Cal.App.3d 1586, 1591.](#))

The *Bolanos* arbitration agreement was essentially identical to the one under consideration here: It provided, inter alia: " 'Article 2: All Claims Must be Arbitrated: It is the intention of the parties that this agreement bind all parties whose claims may arise out of or relate to treatment or services provided by the physician including any spouse or heirs of the patient.' " ([Bolanos v. Khalatian, supra, 231 Cal.App.3d 1586, 1591.](#)) The *Bolanos* court aptly stated: "Article 2 makes it clear that the agreement was intended to bind *all* parties whose claims arise out or relate[] to the treatment provided to [the patient]." (*Ibid.*)

More recently, in [Michaelis v. Schori, supra, 20 Cal.App.4th 133](#), the reviewing [***10] court reversed an order denying a physician's motion to compel arbitration. The *Michaelis* agreement, containing a clause identical to those in *Bolanos* and in the instant case, was signed by a pregnant 17-year-old whose infant was subsequently stillborn. Following the reasoning of *Bolanos*, the court decided the arbitration agreement (1) was not subject to disaffirmance by reason of minority, and (2) was binding on the nonsignatory father of the

baby.

Not all courts agree the spouse/patient may bind the nonsignatory spouse to arbitrate claims arising from the care and treatment rendered by the physician. In [*Baker v. Birnbaum* \(1988\) 202 Cal.App.3d 288 \[248 Cal.Rptr. 336\]](#), the court was "asked to decide whether a spouse who signs an agreement to arbitrate her medical malpractice claims thereby binds a nonsignatory spouse to arbitration when the medical services for which the signatory spouse contracted were for herself only." (*Id.* at p. 291.) It concluded the nonsignatory husband was not required to arbitrate his loss of consortium claim because the agreement contained **[**729]** *no language extending to claims made by the husband on his* **[***11]** *own behalf*. As the court noted: "[I]t seems clear from paragraph 3 of the 1984 agreement that the submission to arbitration of any dispute as to medical malpractice refers to claims asserted by Mrs. Baker or *on her behalf*. The agreement further provides that if she signs the agreement 'on behalf of some other person for whom I have responsibility . . .' that person will also be bound. There is no need to interpret the legal effect of this language, as *there is no language in the agreement which would support a finding that it was signed on behalf of any person other than Mrs. Baker.*" ([*Baker v. Birnbaum*, supra, 202 Cal.App.3d 288, 292](#), italics added.) Given those facts, the case could have been decided solely on the narrow basis of established contract law, under which the trial court's refusal to compel arbitration of the husband's claim was correct.

[*1514] But the *Baker* court, harkening back to one of its earlier decisions, chose, unnecessarily, to rely on a far broader principle, i.e., "that the 'policy [in favor of arbitration] does not extend to those who are not parties to an arbitration agreement or who have **[***12]** not authorized anyone to act for them in executing such an agreement.' " ([*Baker v. Birnbaum*, supra, 202 Cal.App.3d 288, 291](#).) In [*Byerly v. Sale* \(1988\) 204 Cal.App.3d 1312 \[251 Cal.Rptr. 749\]](#), this court declined to express any opinion "concerning the soundness of the [*Baker*]

rule" (*id.* at p. 1315, fn. 2), because the appellants did not challenge the propriety of the lower court's order directing arbitration of the husband's loss of consortium claim. The time has come for us to express such an opinion.

Initially, we note Division Two of the Second District, when placed in the "unhappy position of having to choose between the decisions of two of our colleagues," (*Baker*, decided by Div. Four, and [*Herbert v. Superior Court* \(1985\) 169 Cal.App.3d 718 \[215 Cal.Rptr. 477\]](#), decided by Div. Five), rejected the *Baker* line of reasoning, finding *Herbert* "more appropriately treats with the practical realities of the situation and more accurately reflects existing case law governing the applicability of arbitration agreements to non signatories." **[***13]** ([*Gross v. Recabaren*, supra, 206 Cal.App.3d 771, 780](#).) Next, we observe *Baker*, which has generally been ignored or questioned, constitutes a minority view, with its overly restrictive reading of the scope of arbitration agreements. (See [*Keller Construction Co. v. Kashani* \(1990\) 220 Cal.App.3d 222, 226, fn. 3 \[269 Cal.Rptr. 259\]](#).) But more importantly, we find compelling the reasons set forth in *Gross* and its progeny, for requiring nonsignatory spouses to arbitrate their claims arising out of injuries suffered by the signatory spouse.

Two competing rights are at stake: the patient's right of privacy and the spouse's right to jury trial of a treatment-related claim. Without trivializing the latter right, we believe the *Gross* court's focus was most appropriately placed on the sanctity of the physician-patient relationship--a safe haven which would be severely threatened if the physician were obliged to obtain the signature of the patient's spouse to the arbitration agreement. As the *Gross* court noted: "The significance of a patient's personal privacy rights with respect to **[***14]** medical matters is accorded special protection by the Legislature. [Citations.] [P] In addition, the California voters in 1972 amended article I, section 1 of our state Constitution to include among the various 'inalienable rights' that of 'pursuing and

obtaining . . . privacy.' The 'zones of privacy' created by this amendment 'extend to the details of one's medical history' [citation], '. . . an area of privacy infinitely more intimate, more personal in equality and nature than many areas already judicially recognized.' [Citation.]" ([Gross v. Recabaren, supra, 206 Cal.App.3d 771, 782.](#))

[*1515] Gross points to problems inherent in a rule that would require a spouse's signature to the physician-patient arbitration agreement: "It is true a physician may inquire into, and if honestly answered ascertain, a patient's marital status at the time of the **[**730]** initial visit, but relationships change. Consequently, to insure the inviolability of an arbitration agreement a doctor, at a minimum, would be required to reinterrogate the patient at every visit, and postpone further treatment if a recently acquired spouse is not present **[***15]** to join in the execution of a new agreement. We have previously rejected such a potential solution as unworkable and undesirable . . . and one which would appear certain to have a deleterious effect on the physician-patient relationship." ([Gross v. Recabaron, supra, 206 Cal.App.3d 771, 782.](#)) Gross notes other potential problems: "[W]ere patients to be less than candid concerning their marital status, should their duplicity be permitted to involuntarily expose to the expense and trauma inherent in a civil suit those whom they ask to minister to their medical needs? On the other hand, were we to protect the physician from such deception, would we not be allowing mendacity to achieve that which integrity could not, i.e., the binding of a nonsignatory to an arbitration agreement?" (*Ibid.*) How is a patient to maintain privacy in his or her physician consultations when, in essence, a spouse's intrusion into the relationship is a prerequisite to its formation?

Moreover, if a spouse with a loss of consortium claim were allowed to litigate that claim, the purpose of [section 1295](#) would be defeated, for the patient would be compelled **[***16]** to arbitrate, but the physician would still have to answer in a civil suit for claims dependent on identical facts

regarding the professional standard of care, its breach by the defendant and causation of injury to the patient. No savings would be effected, and there would be the potential for an anomalous result: the patient might fail to establish liability in arbitration, while the nonsignatory spouse might prevail in the loss of consortium action.

Mary's agreement with her physician provided for arbitration of *all* claims arising out of or relating to Sinclair's medical treatment or services, including the claims of any spouse or heir. There is no question the agreement was intended to define and bind those individuals with a potential cause of action if negligent treatment of Mary resulted in her injury or death. (See [Weeks v. Crow \(1980\) 113 Cal.App.3d 350, 353 \[169 Cal.Rptr. 830\].](#)) Gary's loss of consortium claim is based on Mary's injury or disability allegedly resulting from Sinclair's professional negligence. An order compelling arbitration of Gary's claim is consistent with the language of the statute, subserves the legislative **[***17]** goals underlying [section 1295](#), protects Mary's right to privacy in her relationship with her physician and ensures that no third party will be able to intrude into that relationship or veto Mary's choices. In the balance, **[*1516]** Mary's right to decide the terms of her medical treatment outweighs Gary's right to a jury trial of his loss of consortium claim.

The order denying Sinclair's petition to compel arbitration is reversed. The case is remanded and the trial court is directed to enter an order granting Sinclair's petition. Sinclair shall recover his costs on appeal.

Sills, P. J., and Crosby, J., concurred.



Positive

As of: October 18, 2026 7:14 AM Z

N.E. v. Hedges

United States Court of Appeals for the Sixth Circuit

December 10, 2004, Submitted ; December 20, 2004, Decided ; December 20, 2004, Filed

File Name: 04a0437p.06

Nos. 03-6680; 04-5156

Reporter

391 F.3d 832 *; 2004 U.S. App. LEXIS 26423 **; 2004 FED App. 0437P (6th Cir.) ***

N.E., as biological father of E.D.L., a minor,
Plaintiff-Appellant, v. CINDY J. HEDGES,
BRIAN HEDGES, and JAMES C. MONK, in his
official capacity as county attorney for Carroll
County, Defendants-Appellees.

Subsequent History: US Supreme Court certiorari
denied by [N. E. v. Hedges, 2005 U.S. LEXIS 7668](#)
(U.S., Oct. 17, 2005)

Prior History: **[**1]** Appeal from the United
States District Court for the Eastern District of
Kentucky at Frankfort. No. 03-00020. Joseph M.
Hood, District Judge.

Disposition: Affirmed.

Core Terms

child support, paternity, doctrine, constitutional
right, sexual, biological relationship, biological
parent

Case Summary

Procedural Posture

In a constitutional challenge to Kentucky's child
support laws, pro se appellant father sought judicial
review of a decision by the United States District
Court for the Eastern District of Kentucky at
Frankfort dismissing his complaint pursuant to [Fed.](#)
[R. Civ. P. 12\(b\)\(6\)](#) and awarding attorney's fees and
costs to appellees, mother, stepfather, and county

attorney, pursuant to [42 U.S.C.S. § 1988](#).

Overview

The theory of the action was that the Kentucky
statutes requiring a natural father to pay child
support for his son born out of wedlock violated the
substantive due process protections of the
[Fourteenth Amendment](#). He argued that the
Kentucky paternity and child support laws were
inconsistent with recognized sexual and procreative
privacy rights. The father limited his appeal to a
claim for injunctive relief based on a declaration
that the Kentucky paternity and child support laws
were invalid. He also sought an order enjoining the
county attorney from enforcing child support orders
entered in his case in the Kentucky courts. The
sexual privacy cases referred to by the father did
not give either biological parent the right to escape
responsibility after the child is born. Neither the
laws of biological reproduction nor the Due Process
Clause recognized the fairness arguments the father
raised. The father's reproduction and child support
requirements occurred without regard to his wishes
or his emotional attachment to the child. Finally,
the district court did not abuse its authority to
award fees under [§ 1988](#).

Outcome

The judgment of the district court was affirmed.

LexisNexis® Headnotes

Family Law > ... > Support
Obligations > Enforcement > General Overview

Public Health & Welfare Law > Social
Security > Assistance to Families > Child &
Spousal Support

Family Law > Child Support > General
Overview

Family Law > Child Support > Support
Obligations > General Overview

Family Law > Paternity & Surrogacy > General
Overview

HN1 Support Obligations, Enforcement

[Ky. Rev. Stat. Ann. § 406.021](#) provides the county attorney with the authority to file paternity actions in the district courts of Kentucky seeking to enforce child support obligations established by the Kentucky Cabinet for Families and Children under [Ky. Rev. Stat. Ann. § 405.430\(4\)](#). Those state paternity and child support actions are encouraged and supported by the original Child Support Enforcement Act, [42 U.S.C.S. §§ 651-669](#).

Family Law > Child Support > General
Overview

Public Health & Welfare Law > Social
Security > Assistance to Families > Child &
Spousal Support

Family Law > ... > Support
Obligations > Enforcement > General Overview

Family Law > Paternity &
Surrogacy > Establishing Paternity > General
Overview

HN2 Family Law, Child Support

A state, under the Child Support Enforcement Act,

[42 U.S.C.S. §§ 651-669](#), must do more than simply collect overdue support payments; it must also establish a comprehensive system to establish paternity, locate absent parents, and help families obtain support orders.

Constitutional Law > Substantive Due
Process > Scope

Family Law > Child Support > Support
Obligations > General Overview

Family Law > Family Relationships &
Torts > Wrongful Death & Survival > General
Overview

HN3 Constitutional Law, Substantive Due Process

Courts have never found that legal classifications based on the biological relationship of fathers and their children were subject to a high level of scrutiny. A putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Family Law > Child Support > Support
Obligations > General Overview

HN4 Privacy, Personal Decisions

The paternity requirement emanates primarily from the state's power to intervene under the *parens patriae* doctrine, a doctrine that enforces the duties of biological parents, not their constitutional rights. The *parens patriae* authority was granted by the English sovereign to the chancery courts to act as general guardians of all infants. Under that doctrine, the children's welfare rather than the parents' rights became the most important factor. American courts have generally recognized the

doctrine and regarded as an important interest the fact that the state is entitled to adjust its legal system to account for children's vulnerability.

Reproduction and child support requirements occur without regard to the male's wishes or his emotional attachment to his offspring.

Family Law > Child Support > Taxation

Tax Law > ... > Individuals > Divorce & Separation Payments > General Overview

Constitutional Law > Substantive Due Process > Scope

Family Law > Child Support > General Overview

Family Law > Child Support > Support Obligations > General Overview

Family Law > Paternity & Surrogacy > Establishing Paternity > General Overview

Tax Law > State & Local Taxes > Public Utility Taxes > General Overview

HN5 Child Support, Taxation

There are no judicial decisions recognizing a constitutional right of a man to terminate his duties of support under state law for a child that he has fathered, no matter how removed he may be emotionally from the child. Child support has long been a tax fathers have had to pay in Western civilization. For reasons of child welfare and social utility, if not for moral reasons, the biological relationship between a father and his offspring--even if unwanted and unacknowledged--remains constitutionally sufficient to support paternity tests and child support requirements.

Family Law > Child Support > Support Obligations > General Overview

HN6 Child Support, Support Obligations

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > Reasonable Fees

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > Statutory Attorney Fee Awards

HN7 Basis of Recovery, Statutory Awards

Under [42 U.S.C.S. § 1988](#), which provides that a court may award attorney's fees to the prevailing party in its discretion, the appropriate standard provides that the court may award such fees to a defendant if the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.

Counsel: ON BRIEF: Neal F. Eggeson, Jr., Carmel, Indiana, for Appellant.

Sandra Mendez Dawahare, DAWAHARE & KERSHAW, Lexington, Kentucky, for Appellee.

D. Brent Irvin, OFFICE OF THE ATTORNEY GENERAL, Frankfort, Kentucky, for Appellees.

Judges: Before: MERRITT, GIBBONS, and ROGERS, Circuit Judges.

Opinion by: MERRITT

Opinion

[*833] [***1] MERRITT, Circuit Judge. Plaintiff-appellant, a lawyer, brings his own *pro se* action and appeal against the mother of his child born out of wedlock and her husband, the stepfather of the child. He also sues James Monk, the county attorney of Carroll County, Kentucky, in his official capacity. The theory [*834] of the action is that the Kentucky statutes requiring a natural father to pay child support for his son born out of wedlock, as enforced in the state courts in this case by Monk,¹ violate the substantive due process [***2] protections of the [Fourteenth Amendment](#). The Kentucky courts have ordered plaintiff to pay \$ 851 per month in child support. The District Court dismissed plaintiff's complaint for "failure to state [**2] a claim upon which relief can be granted" under [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#) and awarded costs and attorneys fees to defendants under [42 U.S.C. § 1988](#). The essential holding of District Judge Hood was stated as follows:

Plaintiff has identified no action taken by a state actor that impacted in any way his choice to father a child. As he complains of actions taken under the Commonwealth's statutes that permit the establishment of paternity and the imposition and enforcement of child support obligations, the Court sees no evidence that the state required him to engage in the sexual

activity that resulted in the conception of his son. Further he has identified no action taken by a state actor that interfered in any way with his choice to use or not to use contraceptive methods--or additional contraceptive methods, as the case may be--during sexual activity to avoid his sexual partner's resulting pregnancy. Accordingly, he cannot state a claim for a violation of his substantive rights under the [Fourteenth Amendment](#) by the application of the laws of Kentucky for establishing paternity and imposing [**3] and enforcing child support obligations.

JA 81-82.

Although plaintiff sought money damages of \$ 1 million and injunctive relief requiring the stepfather to adopt the child and various [**4] other forms of relief in his original complaint, he limits his appeal to a claim for injunctive relief based on a declaration that Kentucky paternity and child support laws are invalid. He also seeks an order enjoining Monk from enforcing child support orders entered in his case in Kentucky courts. The parties have filed extensive briefs but waived oral argument.

Plaintiff makes a kind of "fairness" or "reciprocity" argument. His basic claim is that the mother of the child "fraudulently induced" sexual intercourse, claiming that her birth control pills would prevent pregnancy, then left the state, married another man, and delayed seeking child support for several years after birth. The plaintiff argues that the Kentucky paternity and child support laws are inconsistent with sexual and procreative "privacy" rights recognized by the Supreme Court, *e.g.*, [Griswold v. Connecticut](#), 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965); [Roe v. Wade](#), 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973); [Planned Parenthood of Central Missouri v. Danforth](#), 428 U.S. 52, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976); [Planned Parenthood of Southeastern Pennsylvania v. Casey](#), 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992). [**5] The right to procreative privacy, he argues, "includes the right to decide not

¹ [HN1 Ky. Rev. Stat. § 406.021](#) provides the county attorney with the authority to file paternity actions in the district courts of Kentucky seeking to enforce child support obligations established by the Kentucky Cabinet for Families and Children under [§ 405.430\(4\)](#) of Kentucky law. These state paternity and child support actions are encouraged and supported by the original Child Support Enforcement Act, [42 U.S.C. §§ 651-669](#), an act interpreted and explained in [Blessing v. Freestone](#), 520 U.S. 329, 333-34, 137 L. Ed. 2d 569, 117 S. Ct. 1353 (1997) ("But [HN2](#) the state [under the federal law] must do more than simply collect overdue support payments; it must also establish a comprehensive system to establish paternity, locate absent parents, and help families obtain support orders.")

to become **[*835]** a parent even after conception," and "must extend to both biological parents," so that "Kentucky's statutory scheme" must be invalidated because it "imposes parenthood on biological fathers while denying them any right or opportunity to decide not to become a parent after conception." (Appellant's Reply Brief, p. 3.) ² His **[***3]** "fairness" argument seems to be that he should receive this constitutional right in exchange for the woman's right to abort her pregnancy.

[6]** State requirements, and federal encouragement, of child support from unwed fathers has a long historical tradition. It emanates necessarily from the biological relationship, a relationship that may have only marginal importance for the male in some cases like the one before us in which the father seeks to remove himself completely from the child. **HN3** Courts have never found that legal classifications based on this biological relationship of fathers and their children were subject to a high level of scrutiny. See *Parham v. Hughes*, 441 U.S. 347, 355-57, 60 L. Ed. 2d 269, 99 S. Ct. 1742 (1979) (upholding

wrongful death statute granting cause of action only to unwed mothers, not unwed fathers, and imposing low level of scrutiny); *Rivera v. Minnich*, 483 U.S. 574, 580, 97 L. Ed. 2d 473, 107 S. Ct. 3001 (1987) ("putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law"); *Developments in the Law -- The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1270-83 (1980). **HN4** The paternity requirement emanates primarily from the state's power to intervene under the *parens patriae* **[**7]** doctrine, a doctrine that enforces the duties of biological parents, not their constitutional rights. ³ The *parens patriae* authority was granted by the English sovereign to the chancery courts to act as "general guardians of all infants," 3 William Blackstone, *Commentaries* **[*836]** *47. Under this doctrine, the children's welfare rather than the parents' rights became the most important factor, *Developments in the Law -- The Constitution and the Family*, *supra*, at 1221. American courts have generally recognized the doctrine and regarded as an important interest the fact that "the State is entitled to adjust its legal system to account for children's vulnerability" *Bellotti v. Baird*, 443 U.S. 622, 635, 61 L. Ed. 2d 797, 99 S. Ct. 3035 (1979).

[8]** As the plaintiff concedes, **HN5** there are no judicial decisions recognizing a constitutional right of a man to terminate his duties of support under state law for a child that he has fathered, no matter how removed he may be emotionally from the

² Plaintiff's argument is succinctly stated at p. 6 of his reply brief as follows:

It is disingenuous to pretend that imposing a child support obligation is separate and distinct from forcing fatherhood on an unwilling male. Even if Kentucky eliminated all child support obligations tomorrow, its paternity laws would remain unconstitutional. It is the fact that Kentucky forced N.E. [plaintiff] to participate in paternity proceedings which proved his fatherhood that renders the statutory scheme unconstitutional. No one disputes that providing for the financial well-being of out-of-wedlock children is important, but Kentucky does not arrest random individuals off the streets and require each of them to financially support wards of the state; rather, Kentucky reserves that burden for those men it has forced to become fathers. The ONLY reason N.E. is forced to financially support minor E.D.L. is because of the finding of paternity. It was unconstitutional for Kentucky to force parenthood on N.E. Because the support obligation necessarily follows from the forced fatherhood, it is therefore unconstitutional for Kentucky to impose a child support order on N.E.; the issues are inextricably intertwined.

This argument appears to be based on arguments for new state legislation in a law review article, Melanie McCulley, *The Male Abortion: The Putative Father's Right to Terminate His Interests in and Obligations to the Unborn Child*, 7 J.L. & POL'Y 1 (1998).

³ The historical *parens patriae* power discussed here should not be confused with its generic modern relative, the *parens patriae* civil action, a type of action not necessarily related to either parents or children. Used in the modern sense, *parens patriae* is "[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen" BLACK'S LAW DICTIONARY 1137 (7th ed. 1999). For example, under *section 4c of the Clayton Act*, "any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State . . . for injury sustained by such natural persons to their property by reason of any violation of *section 1 to 7* of this title." 15 U.S.C. § 15c (2000).

child. Child support has long been a tax fathers have had to pay in Western civilization. For reasons of child welfare and social utility, if not for moral reasons, the biological relationship between a father and his offspring -- even if unwanted and unacknowledged -- remains constitutionally sufficient to support paternity tests and child support requirements. We do not have a system of government like ancient Sparta where male children are taken over early in their lives by the state for military service. The biological parents remain responsible for their welfare. One of the ways the state enforces this duty is through paternity laws. This responsibility is not growing weaker in our body politic, as plaintiff seems to suggest, but stronger as the passage of the *Child Support Recovery Act of 1992*, Pub. L. No. 102-521, the *Deadbeat Parents Punishment Act of 1998*, Pub. L. No. 105-187, and the *Child Support Performance and Incentive Act of 1998*, Pub. L. No. 105-200 [**9] , would indicate. The sexual privacy cases referred to by plaintiff do not give either biological parent the right to escape responsibility after the child is born. Neither the laws of biological reproduction nor the [Due Process Clause](#) recognize the "fairness" arguments plaintiff raises. [HN6](#) Reproduction and child support requirements occur without regard to the male's wishes or his emotional attachment to his offspring.

With respect to the District Court's award of costs and attorneys fees in civil rights cases [HN7](#) under [42 U.S.C. § 1988](#) (court may award attorney's fees to the "prevailing party" in "its discretion"), the appropriate standard provides that the court may award such fees to a defendant if "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." [Wayne v. Village of Sebring, 36 F.3d 517, 530 \(6th Cir. 1994\)](#). In the present case, the facts are not in dispute. The [***4] plaintiff presents simply a novel legal theory, a theory that would invalidate the paternity and child support laws of the fifty states and the federal acts on child support. The theory [**10] is that unwed fathers,

as a matter of reciprocity, should also be given the choice to deny any financial responsibility for the child's existence. It is a theory so foreign to our legal tradition that it has no "foundation," no chance of success. We cannot imagine that any federal court would agree with plaintiff's principle that the concept of "procreative privacy" should be stretched to include the constitutional right for a father to receive the constitutional equivalent of the termination of the mother's pregnancy by allowing him the right to deny paternity and deny the duty of financial support. The District Court therefore did not abuse its authority to award fees under [§ 1988](#).

Accordingly, the judgment of the District Court is AFFIRMED.

End of Document

Obergefell v. Hodges

Supreme Court of the United States

April 28, 2015, Argued *; June 26, 2015, Decided

Nos. 14-556, 14-562, 14-571, 14-574

*Together with No. 14-562, *Tanco et al. v. Haslam, Governor of Tennessee, et al.*, No. 14-571, *DeBoer et al. v. Snyder, Governor of Michigan, et al.*, and No. 14-574, *Bourke et al. v. Beshear, Governor of Kentucky*, also on certiorari to the same court.

Reporter

576 U.S. 644 *; 135 S. Ct. 2584 **; 192 L. Ed. 2d 609 ***; 2015 U.S. LEXIS 4250 ****; 83 U.S.L.W. 4592; 99 Empl. Prac. Dec. (CCH) P45,341; 115 A.F.T.R.2d (RIA) 2015-2309; 2015 LX 24192; 25 Fla. L. Weekly Fed. S 472

JAMES OBERGEFELL, et al., Petitioners (No. 14-556) v. RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, et al. VALERIA TANCO, et al., Petitioners (No. 14-562) v. BILL HASLAM, GOVERNOR OF TENNESSEE, et al. APRIL DeBOER, et al., Petitioners (No. 14-571) v. RICK SNYDER, GOVERNOR OF MICHIGAN, et al. GREGORY BOURKE, et al., Petitioners (No. 14-574) v. STEVE BESHEAR, GOVERNOR OF KENTUCKY

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: Costs and fees proceeding at, Motion granted by, in part, Motion denied by, in part, Sub nomine at [Tanco v. Haslam, 2016 U.S. Dist. LEXIS 39403 \(M.D. Tenn., Mar. 25, 2016\)](#)

Prior History: [****1] ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Deboer v. Snyder, 772 F.3d 388, 2014 U.S. App. LEXIS 21191 \(6th Cir.\), 2014 FED App. 275P \(6th Cir.\) \(6th Cir. Mich., 2014\)](#)

Disposition: [772 F. 3d 388](#), reversed.

Core Terms

marriage, same-sex, couple, marry, fundamental rights, the, majority's, opposite-sex, dignity, religious, lesbian, invalidate, man and woman, love, procreate, liberty, intimate, sex, due process, today's, license, sexual, root, intimacy, profound, deprive, endure, right, woman, religious liberty

Case Summary**Overview**

HOLDINGS: [1]-Under the Due Process and [Equal Protection Clauses of the Fourteenth Amendment](#), same-sex couples have a fundamental right to marry. Laws of Michigan, Kentucky, Ohio, and Tennessee were held invalid to the extent they excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples; [2]-Because same-sex couples can exercise the fundamental right to marry in all states, it follows that there is no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character.

Outcome

Judgment reversed. 5-4 decision; 4 dissents.

LexisNexis® Headnotes

Constitutional Law > Substantive Due Process > Scope

HN1 Constitutional Law, Substantive Due Process

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due

Process > Scope

HN2 Privacy, Personal Decisions

Under the [Due Process Clause of the Fourteenth Amendment](#), no State shall deprive any person of life, liberty, or property, without due process of law. The fundamental liberties protected by this Clause include most of the rights enumerated in the [Bill of Rights](#). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.

Constitutional Law > Bill of
Rights > Fundamental Rights > General
Overview

HN3 Bill of Rights, Fundamental Rights

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, has not been reduced to any formula. Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects history and learns from it without allowing the past alone to rule the present.

Constitutional Law > Bill of Rights > General
Overview

Constitutional Law > Substantive Due
Process > Scope

HN4 Constitutional Law, Bill of Rights

The nature of injustice is that one may not always

see it in one's own time. The generations that wrote and ratified the [Bill of Rights](#) and the [Fourteenth Amendment](#) did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as they learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Family Law > Marriage > Nature of Marriage

Constitutional Law > Substantive Due
Process > Scope

HN5 Privacy, Personal Decisions

The right to marry is protected by the Constitution. Marriage is one of the vital personal rights essential to the orderly pursuit of happiness by free men. The right to marry is fundamental under the Due Process Clause.

Constitutional Law > Substantive Due
Process > Scope

Family Law > Marriage > Nature of Marriage

Family Law > Marriage > Types of
Marriages > Same Sex Marriages

HN6 Constitutional Law, Substantive Due Process

Same-sex couples may exercise the right to marry. The reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

Constitutional Law > Substantive Due

Process > Privacy > Personal Decisions

Family Law > Marriage > Validity > Interracial Marriages

Family Law > Marriage > Nature of Marriage

HN7 Privacy, Personal Decisions

The right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving v. Virginia* invalidated interracial marriage bans under the Due Process Clause. The right to marry is of fundamental importance for all individuals. Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. Indeed, it would be contradictory to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in U.S. society.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

HN8 Privacy, Personal Decisions

As the U.S. Supreme Court held in *Lawrence v. Texas*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Family Law > Marriage > Nature of Marriage

HN9 Privacy, Personal Decisions

A basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. The U.S. Supreme Court has recognized these connections by describing the varied rights as a unified whole: The right to marry, establish a home and bring up children is a central part of the liberty protected by the Due Process Clause.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Family Law > Marriage > Validity > General Overview

Family Law > Marriage > Nature of Marriage

HN10 Privacy, Personal Decisions

An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the U.S. Supreme Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due Process > Scope

HN11 Privacy, Personal Decisions

Washington v. Glucksberg did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach the U.S. Supreme Court has used in discussing other fundamental rights, including marriage and intimacy.

Constitutional Law > Equal
Protection > Gender & Sex

Family Law > Marriage > Types of
Marriages > Same Sex Marriages

Constitutional Law > Substantive Due
Process > Scope

Constitutional Law > Equal Protection > Nature
& Scope of Protection

HN12 Equal Protection, Gender & Sex

The right of same-sex couples to marry that is part of the liberty promised by the [Fourteenth Amendment](#) is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the [Equal Protection Clause](#) are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers the U.S. Supreme Court's understanding of what freedom is and must become.

Constitutional Law > Equal Protection > Nature
& Scope of Protection

HN13 Equal Protection, Nature & Scope of Protection

In interpreting the [Equal Protection Clause](#), the U.S. Supreme Court has recognized that new insights and societal understandings can reveal unjustified inequality within the United States' most fundamental institutions that once passed unnoticed and unchallenged.

Constitutional Law > Equal Protection > Nature
& Scope of Protection

Family Law > Marriage > Nature of Marriage

HN14 Equal Protection, Nature & Scope of Protection

The [Equal Protection Clause](#) can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Constitutional Law > Equal
Protection > Gender & Sex

Family Law > Marriage > Types of
Marriages > Same Sex Marriages

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

HN15 Equal Protection, Gender & Sex

The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and [Equal Protection Clauses of the Fourteenth Amendment](#) couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental

right to marry. No longer may this liberty be denied to them. *Baker v. Nelson*, 409 U.S. 810 (1972) must be and is overruled, and [Mich. Const. art. I, § 25](#), [Ky. Const. § 233a](#), [Ohio Rev. Code Ann. § 3101.01](#) (2008), and [Tenn. Const. art. XI, § 18](#) are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

Constitutional Law > Separation of Powers

[HN16](#) Bill of Rights, Fundamental Rights

The Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. The Supreme Court has noted the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times. Indeed, it is most often through democracy that liberty is preserved and protected in one's life. But the freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power. Thus, when the rights of persons are violated, the Constitution requires redress by the courts, notwithstanding the more general value of democratic decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

Constitutional Law > Separation of Powers

[HN17](#) Bill of Rights, Fundamental Rights

The dynamic of the United States' constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in the United States' basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution is to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. This is why fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

Family Law > Marriage > Types of Marriages > Same Sex Marriages

[HN18](#) Types of Marriages, Same Sex Marriages

Same-sex couples may exercise the fundamental right to marry in all States. It follows that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

Lawyers' Edition Display

Decision

[*609]** Same-sex couples held able to exercise right to marry in all states; no lawful basis held to exist for state to refuse to recognize lawful same-sex marriage performed in another state on ground of same-sex character.

Summary

Overview: HOLDINGS: [1]-Under the Due Process and [Equal Protection Clauses of the Fourteenth Amendment](#), same-sex couples have a fundamental right to marry. Laws of Michigan,

Kentucky, Ohio, and Tennessee were held invalid to the extent they excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples; [2]-Because same-sex couples can exercise the fundamental right to marry in all states, it follows that there is no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character.

Outcome: Judgment reversed. 5-4 decision; 4 dissents.

Headnotes

[***610]

CONSTITUTIONAL LAW §525 > RIGHTS --

LIBERTY > Headnote:

[LEdHN\[1\]](#) [1]

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §525 > DUE PROCESS --

PERSONAL CHOICES > Headnote:

[LEdHN\[2\]](#) [2]

Under the [Due Process Clause of the Fourteenth Amendment](#), no State shall deprive any person of life, liberty, or property, without due process of law. The fundamental liberties protected by this Clause include most of the rights enumerated in the [Bill of Rights](#). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §9 > CONSTITUTION --

JUDICIAL CONSTRUCTION > Headnote:

[LEdHN\[3\]](#) [3]

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, has not been reduced to any formula. Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects history and learns from it without allowing the past alone to rule the present. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §9 CONSTITUTIONAL

LAW §525 > CONSTITUTION -- JUDICIAL

CONSTRUCTION > Headnote:

[LEdHN\[4\]](#) [4]

The nature of injustice is that one may not always see it in one's own time. The generations that wrote and ratified the [Bill of Rights](#) and the [Fourteenth Amendment](#) did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as they learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §525.5MARRIAGE

§1 > DUE PROCESS -- RIGHT TO MARRY

> Headnote:

[LEdHN\[5\]](#) [5]

The right to marry is protected by the Constitution. Marriage is one of the vital personal rights essential to the orderly pursuit of happiness by free men. The right to marry is fundamental under the [Due Process Clause](#). (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

[***611]

CONSTITUTIONAL LAW §525.5MARRIAGE

§1 > RIGHT TO MARRY -- SAME-SEX COUPLES

> Headnote:

[LEdHN\[6\]](#) [6]

Same-sex couples may exercise the right to marry. The reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §525.5MARRIAGE

§1 > DUE PROCESS -- RIGHT TO MARRY

> Headnote:

[LEdHN\[7\]](#) [7]

The right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving v. Virginia* invalidated interracial marriage bans under the [Due Process Clause](#). The right to marry is of fundamental importance for all individuals. Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an

individual can make. Indeed, it would be contradictory to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in U.S. society. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §528.1 > LIBERTY AND FREEDOM -- SAME-SEX COUPLES > Headnote:

[LEdHN\[8\]](#) [8]

As the U.S. Supreme Court held in *Lawrence v. Texas*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §525.5MARRIAGE

§1 > DUE PROCESS -- RIGHT TO MARRY

> Headnote:

[LEdHN\[9\]](#) [9]

A basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. The U.S. Supreme Court has recognized these connections by describing the varied rights as a unified whole: The right to marry, establish a home and bring up

children is a central part of the liberty protected by the [Due Process Clause](#). (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

[***612]

CONSTITUTIONAL LAW §525.5MARRIAGE

§1 > DUE PROCESS -- RIGHT TO MARRY

> Headnote:

[LEdHN\[10\]](#) [10]

An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the U.S. Supreme Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §17 CONSTITUTIONAL

LAW §525.5MARRIAGE §1 > DUE PROCESS --

RIGHT TO MARRY > Headnote:

[LEdHN\[11\]](#) [11]

Washington v. Glucksberg did insist that liberty under the [Due Process Clause](#) must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach the U.S. Supreme Court has used in discussing other fundamental rights, including marriage and intimacy. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §313.3

CONSTITUTIONAL LAW §525.5MARRIAGE

§1 > DUE PROCESS -- EQUAL PROTECTION --

RIGHT TO MARRY > Headnote:

[LEdHN\[12\]](#) [12]

The right of same-sex couples to marry that is part of the liberty promised by the [Fourteenth Amendment](#) is derived, too, from that Amendment's guarantee of the equal protection of the laws. The [Due Process Clause](#) and the [Equal Protection Clause](#) are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers the U.S. Supreme Court's understanding of what freedom is and must become. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §348.5 > EQUAL

PROTECTION -- UNJUSTIFIED INEQUALITY

> Headnote:

[LEdHN\[13\]](#) [13]

In interpreting the [Equal Protection Clause](#), the U.S. Supreme Court has recognized that new insights and societal understandings can reveal unjustified inequality within the United States' most fundamental institutions that once passed unnoticed and unchallenged. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §348.5MARRIAGE

§1 > EQUAL PROTECTION -- INSTITUTION OF

MARRIAGE > Headnote:

[LEdHN\[14\]](#) [14]

The [Equal Protection Clause](#) can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

[***613]

CONSTITUTIONAL LAW §348.5

CONSTITUTIONAL LAW §525.5 > FOURTEENTH AMENDMENT -- SAME-SEX COUPLES -- RIGHT TO MARRY > Headnote:

[LEdHN\[15\]](#) [15]

The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and [Equal Protection Clauses of the Fourteenth Amendment](#) couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson*, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972) must be and is overruled, and [Mich. Const. art. I, § 25](#), [Ky. Const. § 233a](#), [Ohio Rev. Code Ann. § 3101.01](#) (2008), and [Tenn. Const. art. XI, § 18](#) are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §101 > FUNDAMENTAL RIGHTS -- GOVERNMENTAL POWER -- JUDICIAL REDRESS > Headnote:

[LEdHN\[16\]](#) [16]

The Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. The

Supreme Court has noted the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times. Indeed, it is most often through democracy that liberty is preserved and protected in one's life. But the freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power. Thus, when the rights of persons are violated, the Constitution requires redress by the courts, notwithstanding the more general value of democratic decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §101 > FUNDAMENTAL RIGHTS -- JUDICIAL REDRESS > Headnote:

[LEdHN\[17\]](#) [17]

The dynamic of the United States' constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in the United States' basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution is to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. This is why fundamental rights may not be submitted to a vote; they depend on the outcome of no elections. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §525.5MARRIAGE

§1 > RIGHT TO MARRY -- SAME-SEX COUPLES

> Headnote:

[LEdHN\[18\]](#) [18]

Same-sex couples may exercise the fundamental right to marry in all States. It follows that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

Syllabus

[*644] [***614] [**2588] Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials [****2] violate the [Fourteenth Amendment](#) by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.

Held: The [Fourteenth Amendment](#) requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. [Pp. ____ - ____, 192 L. Ed. 2d, at 619-635.](#)

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court. [Pp. ____ - ____, 192 L. Ed. 2d, at 619-623.](#)

(1) The history of marriage as a union between two persons of the opposite sex marks the beginning of these cases. To the respondents, it would demean a timeless institution if marriage were extended to same-sex couples. But the petitioners, far

[***615] from seeking to devalue marriage, seek it for themselves because of their respect--and need--for its privileges and responsibilities, as illustrated by the petitioners' own experiences. [Pp. ____ - ____, 192 L. Ed. 2d, at 619-621.](#)

(2) The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked [****3] deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of [*645] a Nation where new dimensions of freedom become apparent to new generations.

This dynamic can be seen in the Nation's experience with gay and lesbian rights. Well into the 20th century, many States condemned same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2013, this Court overruled its 1986 decision in [Bowers v. Hardwick](#), 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140, which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime “demea[n] the lives of homosexual persons.”

[**2589] [Lawrence v. Texas](#), 539 U.S. 558, 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508. In 2013, the federal Defense of Marriage Act was also struck down. [United States v. Windsor](#), 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808. Numerous same-sex marriage cases reaching the federal [****4] courts and state supreme courts have added to the dialogue. [Pp. ____ - ____, 192 L. Ed. 2d, at 621-623.](#)

(b) The [Fourteenth Amendment](#) requires a State to

license a marriage between two people of the same sex. Pp. ____ - ____, 192 L. Ed. 2d, at 623-634.

(1) The fundamental liberties protected by the Fourteenth Amendments Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S. Ct. 1029, 31 L. Ed. 2d 349; Griswold v. Connecticut, 381 U.S. 479, 484-486, 85 S. Ct. 1678, 14 L. Ed. 2d 510. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010, invalidated bans on interracial unions, and Turner v. Safley, 482 U.S. 78, 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64, held that prisoners could not be denied the right to marry. To be sure, these cases presumed a relationship involving opposite-sex partners, as **[***616]** did Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65, a one-line summary decision issued in 1972, holding that the exclusion of same-sex couples from marriage did not present a substantial federal question. **[****5]** But other, more instructive precedents have expressed broader principles. See, e.g., Lawrence, supra, at 574, 123 S. Ct. 2472, 156 L. Ed. 2d 508. In assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long **[*646]** protected. See, e.g., Eisenstadt, supra, at 453-454, 92 S. Ct. 1029, 31 L. Ed. 2d 349. This analysis compels the conclusion that same-sex couples may exercise the right to marry. Pp. ____ - ____, 192 L. Ed. 2d, at 623-625.

(2) Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U.S., at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010. Decisions about marriage are among the most intimate that an individual can make. See Lawrence, supra, at 574, 123 S. Ct. 2472, 156 L. Ed. 2d 508. This is true for all persons, whatever their sexual orientation.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate **[****6]** association protected by this right was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception, 381 U.S., at 485, 85 S. Ct. 1678, 14 L. Ed. 2d 510, and was acknowledged in Turner, supra, at 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. See Lawrence, supra, at 567, 123 S. Ct. 2472, 156 L. Ed. 2d 508.

[2590]** A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. See

Windsor, supra, at 772, 133 S. Ct. 2675, 186 L. Ed. 2d 808. This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on [****7] the capacity or commitment to procreate.

Finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order. See Maynard v. Hill, 125 U.S. 190, 211, 8 S. Ct. 723, 31 L. Ed. 654. States have contributed to the fundamental character of marriage by [***617] placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to [*647] marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. Pp. - , 192 L. Ed. 2d, at 625-629.

(3) The right of same-sex couples to marry is also derived from the Fourteenth Amendment's guarantee of equal protection. The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always [****8] co-extensive, yet each may be instructive as to the meaning and reach of the other. This dynamic is reflected in *Loving*, where the Court invoked both the Equal Protection Clause and the Due Process Clause; and in *Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618*, where the Court invalidated a law barring fathers delinquent on child-support payments from

marrying. Indeed, recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged, this Court has invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage, see, e.g., Kirchberg v. Feenstra, 450 U.S. 455, 460-461, 101 S. Ct. 1195, 67 L. Ed. 2d 428, and confirmed the relation between liberty and equality, see, e.g., M. L. B. v. S. L. J., 519 U.S. 102, 120-121, 117 S. Ct. 555, 136 L. Ed. 2d 473.

The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See Lawrence, supra at 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508. This dynamic also applies to same-sex marriage. The challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality. The marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this [****9] denial [***2591] works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians. Pp. - , 192 L. Ed. 2d, at 629-631.

(4) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. *Baker v. Nelson* is overruled. The State laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. Pp. - , 192 L. Ed. 2d, at 631.

[*648] (5) There may be an initial inclination to await further legislation, litigation, [***618] and debate, but referenda, legislative debates, and grassroots campaigns; studies and other writings;

and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right. *Bowers*, in effect, upheld state action that denied gays and lesbians a fundamental right. Though it was eventually repudiated, men and women [****10] suffered pain and humiliation in the interim, and the effects of these injuries no doubt lingered long after *Bowers* was overruled. A ruling against same-sex couples would have the same effect and would be unjustified under the [Fourteenth Amendment](#). The petitioners' stories show the urgency of the issue they present to the Court, which has a duty to address these claims and answer these questions. The respondents' argument that allowing same-sex couples to wed will harm marriage as an institution rests on a counterintuitive view of opposite-sex couples' decisions about marriage and parenthood. Finally, the [First Amendment](#) ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. *Pp.* ____ - ____, 192 L. Ed. 2d, at 631-634.

(c) The [Fourteenth Amendment](#) requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. *Pp.* ____ - ____, 192 L. Ed. 2d, at 634-635.

[772 F. 3d 388](#), reversed.

Counsel: Mary L. Bonauto argued the cause for petitioner on Question 1.

Donald B. Verrilli, [**11] Jr.**, argued the cause for the United States, as amicus curiae, by special leave of court on Question 1.

John J. Bursch argued the cause for respondents on Question 1.

Douglas Hallward-Driemeier for the petitioners on Question 2.

Joseph F. Whalen for the respondents on Question 2.

Judges: Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined, _____. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined, _____. Thomas, J., filed a dissenting opinion, in which Scalia, J., joined, _____. Alito, J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined, _____.

Opinion by: Kennedy

Opinion

[*651] [**2593] Justice **Kennedy** delivered the opinion of the Court.

[HN1](#) [LEdHN\[1\]](#) [1] The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, [*652] within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

[*653] I

These cases come from Michigan, Kentucky, Ohio, [****12] and Tennessee, States that define marriage as a union between one [*654] man and one woman. See, e.g., [Mich. Const., Art. I, §25](#); [Ky.](#)

[Const. §233A](#); [Ohio Rev. Code Ann. §3101.01](#) (Lexis 2008); [***619] [Tenn. Const., Art. XI, §18](#). The petitioners are 14 same-sex couples and two men whose same-sex partners are [*655] deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the [Fourteenth Amendment](#) by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

[*656] The petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. Citations to those cases are in Appendix A, *infra*. The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. [DeBoer v. Snyder, 772 F. 3d 388 \(2014\)](#). The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. 574 U.S. 1118, 135 S. Ct. 1039; 190 L. Ed. 2d 908 (2015). The first, presented by the cases from Michigan and Kentucky, is whether the [Fourteenth Amendment](#) requires a State to license a marriage [****13] between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the [Fourteenth Amendment](#) requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

A

From their beginning to their most recent page, the annals of human history [**2594] reveal the transcendent importance of marriage. The lifelong

union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who [*657] find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, [****14] marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, “The first bond of society is marriage; next, children; and then the family.” See *De Officiis* 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

[***620] That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here [****15] and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were

their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. [*658] Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided [****16] to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for [**2595] the rest of time." App. in No. 14-556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they

welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special [****17] needs joined their family. Michigan, however, permits [*659] only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class [***621] Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial [****18] burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man [*660] and a woman. See N. Cott, *Public Vows: A History of Marriage and the Nation* 9-17 (2000); S. Coontz, *Marriage, A History* 15-16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, *Commentaries on the Laws of England* 430 (1765). As women gained legal, political, [****19] and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as *Amici Curiae* 16-19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally N. Cott, *Public Vows*; S. Coontz, *Marriage*; H. [**2596] Hartog, *Man & Wife in America: A History* (2000).

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many [****20] persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even

when a greater awareness [***622] of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread [*661] social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as *Amicus Curiae* 5-28.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See Position Statement on Homosexuality and Civil Rights, 1973, in 131 *Am. J. Psychiatry* 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both [****21] a normal expression of human sexuality and immutable. See Brief for American Psychological Association et al. as *Amici Curiae* 7-17.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in [*Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 \(1986\)](#). There it upheld the constitutionality of a Georgia law deemed to criminalize certain

homosexual acts. Ten years later, in [Romer v. Evans](#), 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996), the Court invalidated an amendment to Colorado’s Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled [*662] [Bowers](#), holding that laws making same-sex intimacy a crime “demea[n] the lives of homosexual persons.” [Lawrence v. Texas](#), 539 U.S. 558, 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508.

Against this background, [****22] the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii’s law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to [**2597] strict scrutiny under the Hawaii Constitution. [Baehr v. Lewin](#), 74 Haw. 530, 852 P. 2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as “only a legal union between one man and one woman as husband and wife.” [1 U.S.C. §7](#).

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts [***623] held the State’s Constitution guaranteed same-sex couples the right to marry. See [Goodridge v. Department of Public Health](#), 440 Mass. 309, 798 N. E. 2d 941 (2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, *infra*. Two Terms ago, in [United States v. Windsor](#), 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013), this Court invalidated DOMA to the extent it barred the [****23] Federal Government from treating same-sex marriages as

valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples “who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.” *Id.*, at 764, 133 S. Ct. 2675, 186 L. Ed. 2d at 823.

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on [*663] principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, see [Citizens for Equal Protection v. Bruning](#), 455 F. 3d 859, 864-868 (CA8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue [****24] in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A, *infra*.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage. See Office of the Atty. Gen. of Maryland, *The State of Marriage Equality in America*, State-by-State Supp. (2015).

III

[HN2 LEdHN\[2\]](#) [2] Under the [Due Process Clause of the Fourteenth Amendment](#), no State shall “deprive any person of life, liberty, or property, without due process of law.” The fundamental liberties protected by this Clause include most of the rights enumerated in the [Bill of Rights](#). See

[Duncan v. Louisiana, 391 U.S. 145, 147-149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 \(1968\)](#). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, e.g., [****2598**] [Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S. Ct. 1029, 31 L. Ed. 2d 349 \(1972\)](#); [Griswold v. Connecticut, 381 U.S. 479, 484-486, 85 S. Ct. 1678, 14 L. Ed. 2d 510 \(1965\)](#).

HN3 [LEdHN\[3\]](#) [3] The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, “has not been reduced [***664**] to any formula.” [Poe v. Ullman, 367 U.S. 497, 542, 81 S. Ct. 1752, 6 L. Ed. 2d 989 \(1961\)](#) (Harlan, J., dissenting). Rather, it requires courts to exercise [*****624**] reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See [******25**] *ibid*. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See [Lawrence, supra, at 572, 123 S. Ct. 2472, 156 L. Ed. 2d 508](#). That method respects our history and learns from it without allowing the past alone to rule the present.

HN4 [LEdHN\[4\]](#) [4] The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the [Bill of Rights](#) and the [Fourteenth Amendment](#) did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held **HN5** [LEdHN\[5\]](#) [5] the right to marry is protected by the Constitution. In [Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010](#)

[\(1967\)](#), which invalidated bans on interracial unions, a unanimous Court held marriage is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.” The Court reaffirmed [******26**] that holding in [Zablocki v. Redhail, 434 U.S. 374, 384, 98 S. Ct. 673, 54 L. Ed. 2d 618 \(1978\)](#), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in [Turner v. Safley, 482 U.S. 78, 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64 \(1987\)](#), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the [Due Process Clause](#). See, e.g., [M. L. B. v. S. L. J., 519 U.S. 102, 116, 117 S. Ct. 555, 136 L. Ed. 2d 473 \(1996\)](#); [Cleveland Bd. of Ed. v. LaFleur, \[***665**\] 414 U.S. 632, 639-640, 94 S. Ct. 791, 39 L. Ed. 2d 52 \(1974\)](#); [Griswold, supra, at 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510](#); [Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 \(1942\)](#); [Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 \(1923\)](#).

It cannot be denied that this Court’s cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court’s cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, e.g., [****2599**] [Lawrence, 539 U.S., at 574, 123 S. Ct. 2472, 156 L. Ed. 2d 508](#);

Turner, supra, at 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64; Zablocki, supra [****27], at 384, 98 S. Ct. 673, 54 L. Ed. 2d 618; Loving, [***625] supra, at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010; Griswold, supra, at 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, e.g., Eisenstadt, supra, at 453-454, 92 S. Ct. 1029, 31 L. Ed. 2d 349; Poe, supra, at 542-553, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (Harlan, J., dissenting).

This analysis compels the conclusion that HN6 LEdHN[6] [6] same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that HN7 LEdHN[7] [7] the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U.S., at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010; see also Zablocki, supra, at 384, 98 S. Ct. 673, 54 L. Ed. 2d 618 (observing *Loving* held "the right to marry is of fundamental importance [***666**] for all individuals"). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See Lawrence, supra, at 574, 123 S. Ct. 2472, 156 L. Ed. 2d 508. Indeed, the Court has [******28**] noted it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." Zablocki, supra, at 386, 98 S. Ct. 673, 54 L. Ed. 2d 618.

Choices about marriage shape an individual's

destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." Goodridge, 440 Mass., at 322, 798 N. E. 2d, at 955.

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See Windsor, 570 U.S., at 770 -772, 133 S. Ct. 2675, 186 L. Ed. 2d at 828. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. Loving, supra, at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it [******29**] supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception. 381 U.S., at 485, 85 S. Ct. 1678, 14 L. Ed. 2d 510. Suggesting that marriage is a right "older than the *Bill of Rights*," *Griswold* described marriage this way:

[*667] [*****626**] "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose [****2600**] as any involved in our prior decisions. " Id., at 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510.

And in *Turner*, the Court again acknowledged the

intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. See [482 U.S., at 95-96, 107 S. Ct. 2254, 96 L. Ed. 2d 64](#). The right to marry thus dignifies couples who “wish to define themselves by their commitment to each other.” [Windsor, supra, at 763, 133 S. Ct. 2675, 186 L. Ed. 2d at 823](#). Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship [****30] and understanding and assurance that while both still live there will be someone to care for the other.

[HN8 LEdHN\[8\]](#) [8] As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.” [539 U.S., at 567, 123 S. Ct. 2472, 156 L. Ed. 2d 508](#). But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

[HN9 LEdHN\[9\]](#) [9] A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce v. Society of Sisters*, [268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 \(1925\)](#); [*668] [Meyer, 262 U.S., at 399, 43 S. Ct. 625, 67 L. Ed. 1042](#). The Court has recognized these connections by describing the varied rights as a unified whole: “[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the *Due Process Clause*.” [Zablocki, 434 U.S., at 384, 98 S. Ct. 673, 54 L. Ed. 2d 618](#) (quoting [Meyer, supra, at 399, 43 S. Ct. 625, 67 L. Ed.](#)

[1042](#)). Under the laws of the several [****31] States, some of marriage’s protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents’ relationship, marriage allows children “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” [Windsor, supra, at 772, 133 S. Ct. 2675, 186 L. Ed. 2d at 828](#). Marriage also affords the permanency and stability important to children’s best interests. See Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22-27.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. See Brief for Gary J. Gates as *Amicus Curiae* 4. Most States have allowed [***627] gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents, see *id.*, at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without [****32] the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue [**2601] here thus harm and humiliate the children of same-sex couples. See [Windsor, supra, at 772, 133 S. Ct. 2675, 186 L. Ed. 2d at 828](#).

[*669] That is not to say the right to marry is less meaningful for those who do not or cannot have children. [HN10 LEdHN\[10\]](#) [10] An ability, desire, or promise to procreate is not and has not been a

prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

"There is certainly no country in the world [****33] where the tie of marriage is so much respected as in America . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace [H]e afterwards carries [that image] with him into public affairs." 1 *Democracy in America* 309 (H. Reeve transl., rev. ed. 1990).

In *Maynard v. Hill*, 125 U.S. 190, 211, 8 S. Ct. 723, 31 L. Ed. 654 (1888), the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been "'a great public institution, giving character to our whole civil polity.'" *Id.*, at 213, 8 S. Ct. 723, 31 L. Ed. 654. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. See generally N. Cott, *Public Vows*. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general [*670] free to vary the benefits they confer [****34] on all married couples, they have throughout our history made

marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; [***628] professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as *Amicus Curiae* 6-9; Brief for American Bar Association as *Amicus Curiae* 8-29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor*, 570 U.S., at 765, 133 S. Ct. 2675, 186 L. Ed. 2d at 824. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of [****35] benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes [**2602] marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is [*671] now manifest. With that knowledge must come the

recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to [*Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 \(1997\)](#), which called for a “careful description” of fundamental rights. They assert [****36] the petitioners do not seek to exercise the right to marry but rather a new and nonexistent “right to same-sex marriage.” Brief for Respondent in No. 14-556, p. 8. [HN11 LEdHN\[11\]](#) [11] *Glucksberg* did insist that liberty under the [Due Process Clause](#) must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a “right to interracial marriage”; *Turner* did not ask about a “right of inmates to marry”; and *Zablocki* did not ask about a “right of fathers with unpaid child support duties to marry.” Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. See also [Glucksberg, 521 U.S., at 752-773, 117 S. Ct. 2258, 138 L. Ed. 2d 772](#) (Souter, J., concurring in judgment); [id., at 789-792, 117 S. Ct. 2258, 138 L. Ed. 2d 772](#) (Breyer, J., concurring in judgments).

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued [***629] justification [****37] and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See [Loving, 388 U.S., at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010](#); [Lawrence, 539 U.S., at 566-567, 123 S. Ct. 2472, 156 L. Ed. 2d 508](#).

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how [*672] constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the *imprimatur* of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

[HN12 LEdHN\[12\]](#) [12] The right of same-sex couples to marry that is part of the liberty promised by the [Fourteenth Amendment](#) is derived, too, from that Amendment’s guarantee of [****38] the equal protection of the laws. The [Due Process Clause](#) and the [Equal Protection Clause](#) [**2603] are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. See [M. L. B., 519 U.S., at 120-121, 117 S. Ct. 555, 136 L. Ed. 2d 473](#); [id., at 128-129, 117 S. Ct. 555, 136 L. Ed. 2d 473](#) (Kennedy, J., concurring in judgment); [Bearden v. Georgia, 461 U.S. 660, 665, 103 S. Ct. 2064, 76 L. Ed. 2d 221 \(1983\)](#). This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court’s cases touching upon the right to marry

reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the [Equal Protection Clause](#) and the [Due Process Clause](#). The Court first declared the prohibition invalid because of its unequal treatment [*673] of interracial couples. It stated: “There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the [Equal Protection Clause](#).” [388 U.S., at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010](#). With this link to equal protection the Court proceeded to hold [****39] the prohibition offended central precepts of liberty: “To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the [Fourteenth Amendment](#), is surely to deprive all the State’s citizens of liberty without due process of law.” *Ibid*. The reasons why marriage is a fundamental right became more clear and compelling from a full awareness [***630] and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the [Equal Protection Clause](#) as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court’s holding that the law burdened a right “of fundamental importance.” [434 U.S., at 383, 98 S. Ct. 673, 54 L. Ed. 2d 618](#). It was the essential nature of the marriage right, discussed at length in *Zablocki*, see *id.*, [at 383-387, 98 S. Ct. 673, 54 L. Ed. 2d 618](#), that made apparent the law’s incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding [****40] of the other.

Indeed, [HN13 LEdHN\[13\]](#) [13] in interpreting the [Equal Protection Clause](#), the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed

and unchallenged. To take but one period, this occurred with respect to marriage in the 1970’s and 1980’s. Notwithstanding the gradual erosion of the doctrine of coverture, see *supra*, at 6, invidious sex-based classifications in marriage remained [*674] common through the mid-20th century. See App. to Brief for Appellant in *Reed v. Reed*, O. T. 1971, No. 70-4, pp. 69-88 (an extensive reference to laws extant as of 1971 treating women as unequal to men in marriage). These classifications denied the equal dignity of men and women. One State’s law, for example, provided in 1971 that “the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her [**2604] separately, either for her own protection, or for her benefit.” Ga. Code Ann. §53-501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. See, e.g., [Kirchberg v. Feenstra, 450 U.S. 455, 101 S. Ct. 1195, 67 L. Ed. 2d 428 \(1981\)](#); [Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 100 S. Ct. 1540, 64 L. Ed. 2d 107 \(1980\)](#); [Califano v. Westcott, 443 U.S. 76, 99 S. Ct. 2655, 61 L. Ed. 2d 382 \(1979\)](#); [Orr v. Orr, 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 \(1979\)](#); [Califano v. Goldfarb, 430 U.S. 199, 97 S. Ct. 1021, 51 L. Ed. 2d 270 \(1977\)](#) (plurality [****41] opinion); [Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S. Ct. 1225, 43 L. Ed. 2d 514 \(1975\)](#); [Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 \(1973\)](#). Like *Loving* and *Zablocki*, these precedents show [HN14 LEdHN\[14\]](#) [14] the [Equal Protection Clause](#) can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In *M. L. B. v. S. L. J.*, the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. See [519 U.S., at 119-124, 117 S. Ct. 555, 136 L. Ed. 2d 473](#). In *Eisenstadt v. Baird*, the

Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. See [405 U.S., at 446-454, 92 S. Ct. 1029, 31 L. Ed. 2d \[***631\] 349](#). And in *Skinner v. Oklahoma ex rel. Williamson*, the Court invalidated under both principles a law that allowed sterilization of habitual criminals. See [316 U.S., at 538-543, 62 S. Ct. 1110, 86 L. Ed. 1655](#).

In *Lawrence*, the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the [*675] legal treatment of gays and lesbians. See [539 U.S., at 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508](#). Although *Lawrence* elaborated its holding under the [Due Process Clause](#), it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. [****42] See *ibid.* *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State “cannot demean their existence or control their destiny by making their private sexual conduct a crime.” *Id.*, [at 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508](#).

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: Same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the [Equal Protection Clause](#), like the [Due Process Clause](#), prohibits this unjustified infringement of the fundamental right to marry. See, e.g., [Zablocki, supra, at 383-388, 98 S. Ct. 673, 54 L. Ed. 2d 618](#); [Skinner, 316 U.S., at 541, 62 S. Ct. 1110, 86 L. Ed.](#)

[1655](#).

These considerations lead to the conclusion that [HN15 LEdHN\[15\]](#) [15] the right to marry is a fundamental right inherent in the liberty of the person, and under the [****43] Due Process and [Equal Protection Clauses of the Fourteenth Amendment](#) couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that [**2605] same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the state laws challenged by the petitioners in these cases are now held invalid to the extent they exclude [*676] same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents’ States to await further public discussion and political measures before licensing same-sex marriages. See [DeBoer, 772 F. 3d, at 409](#).

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots [***632] campaigns, as well as countless studies, papers, [****44] books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. See Appendix A, *infra*. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in

American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.

Of course, [HN16 LEdHN\[16\]](#) [16] the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic [*677] principle in [Schuette v. BAMN](#), [572 U.S. 291](#), [134 S. Ct. 1623](#), [188 L. Ed. 2d 613](#) (2014), noting the “right of citizens to debate so they can learn and decide [****45] and then, through the political process, act in concert to try to shape the course of their own times.” [Id.](#), at 312, [134 S. Ct. 1623](#), [188 L. Ed. 2d at 628](#). Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, “[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power.” [Id.](#), at 311, [134 S. Ct. 1623](#), [188 L. Ed. 2d at 628](#). Thus, when the rights of persons are violated, “the Constitution requires redress by the courts,” notwithstanding the more general value of democratic decisionmaking. [Id.](#), at 313, [134 S. Ct. 1623](#), [188 L. Ed. 2d at 628](#). This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

[HN17 LEdHN\[17\]](#) [17] The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature

refuses to act. The idea of [**2606] the Constitution “was to withdraw certain subjects from [****46] the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” [West Virginia Bd. of Ed. v. Barnette](#), [319 U.S. 624](#), [638](#), [63 S. Ct. 1178](#), [87 L. Ed. 1628](#) (1943). This is why “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.” *Ibid.* It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law criminalizing [***633] [*678] same-sex intimacy. See [478 U.S.](#), at 186, [190-195](#), [106 S. Ct. 2841](#), [92 L. Ed. 2d 140](#). That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. See [id.](#), at 199, [106 S. Ct. 2841](#), [92 L. Ed. 2d 140](#) (Blackmun, J., joined by Brennan [****47], Marshall, and Stevens, JJ., dissenting); [id.](#), at 214, [106 S. Ct. 2841](#), [92 L. Ed. 2d 140](#) (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). That is why *Lawrence* held *Bowers* was “not correct when it was decided.” [539 U.S.](#), at 578, [123 S. Ct. 2472](#), [156 L. Ed. 2d 508](#). Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the

same effect—and, like *Bowers*, would be unjustified under the [Fourteenth Amendment](#). The petitioners’ stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage. Properly presented with the petitioners’ cases, the Court has a duty to address [****48] these claims and answer these questions.

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may [*679] exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society’s most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection [**2607] between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple’s decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, [****49] romantic, and practical

considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See [Kitchen v. Herbert, 755 F. 3d 1193, 1223 \(CA10 2014\)](#) (“[I]t is wholly illogical to believe that state recognition [***634] of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples”). The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The [First Amendment](#) ensures that religious organizations and persons are given proper protection as they seek to teach the principles [*680] that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations [****50] to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

V

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of Obergefell and Arthur, and by that of DeKoe and Kostura, the recognition bans inflict substantial and continuing harm on same-sex

couples.

Being married in one State but having that valid marriage denied in another is one of “the most perplexing and distressing complication[s]” in the law of domestic relations. [*Williams v. North Carolina*, 317 U.S. 287, 299, 63 S. Ct. 207, 87 L. Ed. 279 \(1942\)](#) (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family [****51] or friends risks causing severe hardship in the event of a spouse’s hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to [*681] recognize those marriages performed elsewhere are undermined. See Tr. of Oral Arg. on Question 2, p. 44. The Court, in this decision, holds [*HN18 LEdHN\[18\]*](#) [18] same-sex couples may exercise the fundamental right to marry in all States. It [**2608] follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

[***635] * * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these [****52] cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is

that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

APPENDICES

A

State and Federal Judicial Decisions

Addressing Same-Sex Marriage

United States Courts of Appeals Decisions

[*Adams v. Howerton*, 673 F. 2d 1036 \(CA9 1982\)](#)

[*Smelt v. County of Orange*, 447 F. 3d 673 \(CA9 2006\)](#)

[*682] [*Citizens for Equal Protection v. Bruning*, 455 F. 3d 859 \(CA8 2006\)](#)

[*Windsor v. United States*, 699 F. 3d 169 \(CA2 2012\)](#)

[*Massachusetts v. Department of Health and Human Services*, 682 F. 3d 1 \(CA1 2012\)](#)

[*Perry v. Brown*, 671 F. 3d 1052 \(CA9 2012\)](#)

[*Latta v. Otter*, 771 F. 3d 456 \(CA9 2014\)](#)

[*Baskin v. Bogan*, 766 F. 3d 648 \(CA7 2014\)](#)

[*Bishop v. Smith*, 760 F. 3d 1070 \(CA10 2014\)](#)

[*Bostic v. Schaefer*, 760 F. 3d 352 \(CA4 2014\)](#)

[*Kitchen v. Herbert*, 755 F. 3d 1193 \(CA10 2014\)](#)

[*DeBoer v. Snyder*, 772 F. 3d 388 \(CA6 2014\)](#)

[*Latta v. Otter*, 779 F. 3d 902 \(CA9 2015\)](#) (O’Scannlain, J., dissenting from the denial of

rehearing en banc)

United States District Court Decisions

[Adams v. Howerton, 486 F. Supp. 1119 \(CD Cal. 1980\)](#)

[Citizens for Equal Protection, Inc. v. Bruning, 290 F. Supp. 2d 1004 \(Neb. 2003\)](#)

[Citizens for Equal Protection v. Bruning, 368 F. Supp. 2d 980 \(Neb. 2005\)](#)

[Wilson v. Ake, 354 F. Supp. 2d 1298 \(MD Fla. 2005\)](#)

[Smelt v. County of Orange, 374 F. Supp. 2d 861 \(CD Cal. 2005\)](#)

[Bishop v. Oklahoma ex rel. Edmondson, 447 F. Supp. 2d 1239 \(ND Okla. 2006\)](#)

[Massachusetts v. Department of Health and Human Services, 698 F. Supp. 2d 234 \(Mass. 2010\)](#)

[Gill v. Office of Personnel Management, 699 F. Supp. 2d 374 \(Mass. 2010\)](#)

[2609]** [\[***636\] Perry v. Schwarzenegger, 704 F. Supp. 2d 921 \(ND Cal. 2010\)](#)

[*683] [Dragovich v. Department of Treasury, 764 F. Supp. 2d 1178 \(ND Cal. 2011\)](#)

[Golinski v. Office of Personnel Management, 824 F. Supp. 2d 968 \(ND Cal. 2012\)](#)

[Dragovich v. Department of Treasury, 872 F. Supp. 2d 944 \(ND Cal. 2012\)](#)

[Windsor v. United States, 833 F. Supp. 2d 394 \(SDNY 2012\)](#)

[Pedersen v. Office of Personnel Management, 881 F. Supp. 2d 294 \(Conn. 2012\)](#)

[Jackson v. Abercrombie, 884 F. Supp. 2d 1065 \(Haw. 2012\)](#)

[Sevcik v. Sandoval, 911 F. Supp. 2d 996 \(Nev. 2012\)](#)

[Merritt v. Attorney General, 2013 U.S. Dist. LEXIS 162583, 2013 WL 6044329 \(MD La., Nov. 14, 2013\)](#)

[Gray v. Orr, 4 F. Supp. 3d 984 \(ND Ill. 2013\)](#)

[Lee v. Orr, 2013 U.S. Dist. LEXIS 173801, 2013 WL 6490577 \(ND Ill., Dec. 10, 2013\)](#)

[Kitchen v. Herbert, 961 F. Supp. 2d 1181 \(Utah 2013\)](#)

[Obergefell v. Wymyslo, 962 F. Supp. 2d 968 \(SD Ohio 2013\)](#)

[Bishop v. United States ex rel. Holder, 962 F. Supp. 2d 1252 \(ND Okla. 2014\)](#)

[Bourke v. Beshear, 996 F. Supp. 2d 542 \(WD Ky. 2014\)](#)

[Lee v. Orr, 2014 U.S. Dist. LEXIS 21620, 2014 WL 683680 \(ND Ill., Feb. 21, 2014\)](#)

[Bostic v. Rainey, 970 F. Supp. 2d 456 \(ED Va. 2014\)](#)

[De Leon v. Perry, 975 F. Supp. 2d 632 \(WD Tex. 2014\)](#)

[Tanco v. Haslam, 7 F. Supp. 3d 759 \(MD Tenn. 2014\)](#)

[DeBoer v. Snyder, 973 F. Supp. 2d 757 \(ED Mich. 2014\)](#)

[Henry v. Himes, 14 F. Supp. 3d 1036 \(SD Ohio 2014\)](#)

[Latta v. Otter, 19 F. Supp. 3d 1054 \(Idaho 2014\)](#)

[Geiger v. Kitzhaber, 994 F. Supp. 2d 1128 \(Ore. 2014\)](#)

[Evans v. Utah, 21 F. Supp. 3d 1192 \(Utah 2014\)](#)

[Whitewood v. Wolf, 992 F. Supp. 2d 410 \(MD Pa. 2014\)](#)

[Wolf v. Walker, 986 F. Supp. 2d 982 \(WD Wis. 2014\)](#)

[Baskin v. Bogan, 12 F. Supp. 3d 1144 \(SD Ind. 2014\)](#)

[Love v. Beshear, 989 F. Supp. 2d 536 \(WD Ky. 2014\)](#)

[Burns v. Hickenlooper, 2014 U.S. Dist. LEXIS 100894, 2014 WL 3634834 \(Colo., July 23, 2014\)](#)

[Bowling v. Pence, 39 F. Supp. 3d 1025 \(SD Ind. 2014\)](#)

[Brenner v. Scott, 999 F. Supp. 2d 1278 \(ND Fla. 2014\)](#)

[Robicheaux v. Caldwell, 2 F. Supp. 3d 910 \(ED La. 2014\)](#)

[*684] [General Synod of the United Church of Christ v. Resinger, 12 F. Supp. 3d 790 \(WDNC 2014\)](#)

[Hamby v. Parnell, 56 F. Supp. 3d 1056 \(Alaska 2014\)](#)

[*637]** [Fisher-Borne v. Smith, 14 F. Supp. 3d 695 \(MDNC 2014\)](#)

[Majors v. Horne, 14 F. Supp. 3d 1313 \(Ariz. 2014\)](#)

[Connolly v. Jeanes, 73 F. Supp. 3d 1094, 2014 U.S. Dist. LEXIS 147950, 2014 WL 5320642 \(Ariz., Oct. 17, 2014\)](#)

[Guzzo v. Mead, 2014 U.S. Dist. LEXIS 148481, 2014 WL 5317797 \(Wyo., Oct. 17, 2014\)](#)

[Conde-Vidal v. Garcia-Padilla, 54 F. Supp. 3d 157 \(PR 2014\)](#)

[Marie v. Moser, 65 F. Supp. 3d 1175, 2014 U.S. Dist. LEXIS 157093, 2014 WL 5598128 \(Kan., Nov.](#)

[4, 2014\)](#)

[2610]** [Lawson v. Kelly, 58 F. Supp. 3d 923 \(WD Mo. 2014\)](#)

[McGee v. Cole, 66 F. Supp. 3d 747, 2014 U.S. Dist. LEXIS 158680, 2014 WL 5802665 \(SD W. Va., Nov. 7, 2014\)](#)

[Condon v. Haley, 21 F. Supp. 3d 572 \(S. C. 2014\)](#)

[Bradacs v. Haley, 58 F. Supp. 3d 514 \(S. C. 2014\)](#)

[Rolando v. Fox, 23 F. Supp. 3d 1227 \(Mont. 2014\)](#)

[Jernigan v. Crane, 64 F. Supp. 3d 1260, 2014 U.S. Dist. LEXIS 165898, 2014 WL 6685391 \(ED Ark., Nov. 25, 2014\)](#)

[Campaign for Southern Equality v. Bryant, 64 F. Supp. 3d 906, 2014 U.S. Dist. LEXIS 165913, 2014 WL 6680570 \(SD Miss., Nov. 25, 2014\)](#)

[Inniss v. Aderhold, 80 F. Supp. 3d 1335, 2015 U.S. Dist. LEXIS 9697, 2015 WL 300593 \(ND Ga., Jan. 8, 2015\)](#)

[Rosenbrahn v. Daugaard, 61 F. Supp. 3d 862, 61 F. Supp. 3d 862, 2015 U.S. Dist. LEXIS 4018 \(S. D., 2015\)](#)

[Caspar v. Snyder, 77 F. Supp. 3d 616, 2015 U.S. Dist. LEXIS 4644, 2015 WL 224741 \(ED Mich., Jan. 15, 2015\)](#)

[Searcey v. Strange, 81 F. Supp. 3d 1285, 2015 U.S. Dist. LEXIS 7776 \(SD Ala., Jan. 23, 2015\)](#)

[Strawser v. Strange, 44 F. Supp. 3d 1206 \(SD Ala. 2015\)](#)

[Waters v. Ricketts, 48 F. Supp. 3d 1271 \(Neb. 2015\)](#)

State Highest Court Decisions

[Baker v. Nelson, 291 Minn. 310, 191 N. W. 2d 185 \(1971\)](#)

[Jones v. Hallahan, 501 S. W. 2d 588 \(Ky. 1973\)](#)

<i>Baehr v. Lewin</i>, 74 Haw. 530, 852 P. 2d 44 (1993)	<i>3d 1036 (2013)</i>
<i>Dean v. District of Columbia</i>, 653 A. 2d 307 (D. C. 1995)	<i>Ex parte State ex rel. Alabama Policy Institute</i>, 200 So. 3d 495, 2015 Ala. LEXIS 33, 2015 WL 892752 (Ala., Mar. 3, 2015)
<i>Baker v. State</i>, 170 Vt. 194, 744 A. 2d 864 (1999)	
<i>Brause v. State</i>, 21 P. 3d 357 (Alaska 2001) (ripeness)	[**2611] B State Legislation and Judicial Decisions
<i>Goodridge v. Department of Public Health</i>, 440 Mass. 309, 798 N. E. 2d 941 (2003)	Legalizing Same-Sex Marriage
<i>In re Opinions of the Justices to the Senate</i>, 440 Mass. 1201, 802 N. E. 2d 565 (2004)	Legislation <i>Del. Code Ann.</i> , Tit. 13, §129 (Cum. Supp. 2014)
[*685] <i>Li v. State</i>, 338 Or. 376, 110 P. 3d 91 (2005)	D. C. Act No. 18-248, <i>57 D. C. Reg. 27</i> (2010)
<i>Cote-Whitacre v. Department of Public Health</i>, 446 Mass. 350, 844 N. E. 2d 623 (2006)	<i>Haw. Rev. Stat. §572-1</i> (2006 and 2013 Cum. Supp.)
<i>Lewis v. Harris</i>, 188 N. J. 415, 908 A. 2d 196 (2006)	Ill. Pub. Act No. 98-597
[***638] <i>Andersen v. King County</i>, 158 Wash. 2d 1, 138 P. 3d 963 (2006)	Me. Rev. Stat. Ann., Tit. 19, §650-A (Cum. Supp. 2014)
<i>Hernandez v. Robles</i>, 7 N. Y. 3d 338, 855 N. E. 2d 1, 821 N.Y.S.2d 770 (2006)	<i>2012 Md. Laws p. 9</i>
<i>Conaway v. Deane</i>, 401 Md. 219, 932 A. 2d 571 (2007)	2013 Minn. Laws p. 404
<i>In re Marriage Cases</i>, 43 Cal. 4th 757, 76 Cal. Rptr. 3d 683, 183 P. 3d 384 (2008)	2009 N. H. Laws p. 60
<i>Kerrigan v. Commissioner of Public Health</i>, 289 Conn. 135, 957 A. 2d 407 (2008)	2011 N. Y. Laws p. 749
<i>Strauss v. Horton</i>, 46 Cal. 4th 364, 93 Cal. Rptr. 3d 591, 207 P. 3d 48 (2009)	<i>2013 R. I. Laws p. 7</i>
<i>Varnum v. Brien</i>, 763 N. W. 2d 862 (Iowa 2009)	<i>2009 Vt. Acts & Resolves p. 33</i>
<i>Griego v. Oliver</i>, 2014-NMSC-003, N. M., 316 P. 3d 865 (2013)	2012 Wash. Sess. Laws p. 199
<i>Garden State Equality v. Dow</i>, 216 N. J. 314, 79 A.	[*686] Judicial Decisions
	<i>Goodridge v. Department of Public Health</i>, 440 Mass. 309, 798 N. E. 2d 941 (2003)
	<i>Kerrigan v. Commissioner of Public Health</i>, 289 Conn. 135, 957 A. 2d 407 (2008)
	<i>Varnum v. Brien</i>, 763 N. W. 2d 862 (Iowa 2009)
	<i>Griego v. Oliver</i>, 2014-NMSC-003, 2013 N. M.

[LEXIS 414, 316 P. 3d 865 \(2013\)](#)

[Garden State Equality v. Dow, 216 N. J. 314, 79 A. 3d 1036 \(2013\)](#)

Dissent by: Roberts; Scalia; Thomas; Alito

Dissent

Chief Justice **Roberts**, with whom Justice **Scalia** and Justice **Thomas** join, dissenting.

Petitioners make strong arguments rooted in social [****53] policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what [***639] it should be. The people who ratified the Constitution authorized courts to exercise “neither force nor will but merely judgment.” The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization).

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State’s decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. [****54] In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage [*687] to include same-sex couples, or to retain the historic definition.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority’s approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That [**2612] ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent. The majority expressly disclaims judicial “caution” and omits even a pretense of humility, openly relying on its desire [****55] to remake society according to its own “new insight” into the “nature of injustice.” [Ante, at _____, 192 L. Ed. 2d, at 624, 631](#). As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution “is made for people of fundamentally differing views.” [Lochner v. New York, 198 U.S. 45, 76, 25 S. Ct. 539, 49 L. Ed. 937 \(1905\)](#) (Holmes, J., dissenting). Accordingly, “courts are not concerned with the wisdom or policy of legislation.” [Id., at 69, 25 S. Ct. 539, 49 L. Ed. 937](#) (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the [*688] Constitution leaves to the people, at a time when

the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own “understanding of what freedom is and must become.” *Ante, at* ___, 192 L. Ed. 2d, at 629. I have no choice but to dissent.

Understand well what this dissent is [****56] about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the [***640] people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.

I

Petitioners and their *amici* base their arguments on the “right to marry” and the imperative of “marriage equality.” There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes “marriage,” or—more precisely—who decides what constitutes “marriage”?

The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. Even if history and precedent are not “the end” of these cases, *ante, at* ___, 192 L. Ed. 2d, at 620, I would not “sweep away what has so long been settled” without showing greater respect for all that preceded us. *Town of Greece v. Galloway*, 572 U.S. 565, 577, 134 S. Ct. 1811, 188 L. Ed. 2d 835, 846 (2014).

A

As the majority acknowledges, marriage “has existed for millennia and [****57] across civilizations.” *Ante, at* ___, 192 L. Ed. 2d, at 619. For all those millennia, across all those civilizations, “marriage” referred to only one

relationship: the union of a man and a woman. See *ibid.* Tr. of Oral Arg. on Question 1, p. 12 [*689] (petitioners conceding that they are not aware of any society that permitted same-sex marriage before 2001). [**2613] As the Court explained two Terms ago, “until recent years, . . . marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.” *United States v. Windsor*, 570 U.S. 744, 763, 133 S. Ct. 2675, 186 L. Ed. 2d 823 (2013).

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. See G. Quale, *A History of Marriage Systems* 2 (1988); cf. M. Cicero, *De Officiis* 57 (W. [****58] Miller transl. 1913) (“For since the reproductive instinct is by nature’s gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common.”).

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child’s prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur [***641] only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage. And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct [*690] sexual relations within marriage rather than without. As one prominent scholar put it, “Marriage is a socially arranged solution for the problem of getting people to stay together and [****59] care for children that the mere desire for children, and the sex that makes children possible, does not solve.” J. Wilson, *The Marriage Problem* 41 (2002).

This singular understanding of marriage has prevailed in the United States throughout our history. The majority accepts that at “the time of the Nation’s founding [marriage] was understood to be a voluntary contract between a man and a woman.” *Ante, at* [___](#), 192 L. Ed. 2d, at 621. Early Americans drew heavily on legal scholars like William Blackstone, who regarded marriage between “husband and wife” as one of the “great relations in private life,” and philosophers like John Locke, who described marriage as “a voluntary compact between man and woman” centered on “its chief end, procreation” and the “nourishment and support” of children. 1 W. Blackstone, *Commentaries* *410; J. Locke, *Second Treatise of Civil Government* §§78-79, p. 39 (J. Gough ed. 1947). To those who drafted and ratified the Constitution, this conception of marriage and family “was a given: its structure, its stability, roles, and values accepted by all.” Forte, *The Framers’ Idea of Marriage and Family*, in *The Meaning of Marriage* 100, 102 (R. George & J. Elshstain eds. 2006).

The Constitution itself says [****60] nothing about marriage, and the Framers thereby entrusted the States with “[t]he whole subject of the domestic relations of husband and wife.” [**2614] *Windsor*, 570 U.S., at 767, 133 S. Ct. 2675, 186 L. Ed. 2d 824 (quoting *In re Burrus*, 136 U.S. 586, 593-594, 10 S. Ct. 850, 34 L. Ed. 500 (1890)). There is no dispute that every State at the founding—and every State throughout our history until a dozen years

ago—defined marriage in the traditional, biologically rooted way. The four States in these cases are typical. Their laws, before and after statehood, have treated marriage as the union of a man and a woman. See *DeBoer v. Snyder*, 772 F. 3d 388, 396-399 (CA6 2014). Even when state laws did not specify this definition expressly, no one [*691] doubted what they meant. See *Jones v. Hallahan*, 501 S. W. 2d 588, 589 (Ky. App. 1973). The meaning of “marriage” went without saying.

Of course, many did say it. In his first American dictionary, Noah Webster defined marriage as “the legal union of a man and woman for life,” which served the purposes of “preventing the promiscuous intercourse of the sexes, . . . promoting domestic felicity, and . . . securing the maintenance and education of children.” 1 *An American Dictionary of the English Language* (1828). An influential 19th-century treatise defined marriage as “a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction [****61] of sex.” J. Bishop, *Commentaries on the Law of Marriage and Divorce* 25 (1852). The first edition of Black’s Law Dictionary defined marriage as “the civil status of one man and one woman united in law for life.” *Black’s Law Dictionary* 756 (1891) (emphasis [***642] deleted). The dictionary maintained essentially that same definition for the next century.

This Court’s precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. Early cases on the subject referred to marriage as “the union for life of one man and one woman,” *Murphy v. Ramsey*, 114 U.S. 15, 45, 5 S. Ct. 747, 29 L. Ed. 47 (1885), which forms “the foundation of the family and of society, without which there would be neither civilization nor progress,” *Maynard v. Hill*, 125 U.S. 190, 211, 8 S. Ct. 723, 31 L. Ed. 654 (1888). We later described marriage as “fundamental to our very existence and survival,” an understanding that necessarily implies a procreative component. *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817,

[18 L. Ed. 2d 1010 \(1967\)](#); see [Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 \(1942\)](#). More recent cases have directly connected the right to marry with the “right to procreate.” [Zablocki v. Redhail, 434 U.S. 374, 386, 98 S. Ct. 673, 54 L. Ed. 2d 618 \(1978\)](#).

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given [*692] way to pairings based on romantic love. States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, [****62] with laws that respect each participant’s separate status. Racial restrictions on marriage, which “arose as an incident to slavery” to promote “White Supremacy,” were repealed by many States and ultimately struck down by this Court. [Loving, 388 U.S., at 6-7, 87 S. Ct. 1817, 18 L. Ed. 2d 1010](#).

The majority observes that these developments “were not mere superficial changes” in marriage, but rather “worked deep transformations in its structure.” [Ante, at —, 192 L. Ed. 2d, at 621](#). They did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, “Marriage is the union of a man and a woman, where the woman is subject to coverture.” The majority may be right [**2615] that the “history of marriage is one of both continuity and change,” but the core meaning of marriage has endured. [Ante, at —, 192 L. Ed. 2d, at 621](#).

B

Shortly after this Court struck down racial restrictions on marriage in *Loving*, a gay couple in Minnesota sought a marriage license. They argued that the Constitution required States to allow marriage between people of the same sex for the same reasons that it requires States to allow marriage between people of different races. The Minnesota Supreme Court rejected [****63] their analogy to *Loving*, and this Court summarily

dismissed an appeal. *Baker v. Nelson*, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972).

In the decades after *Baker*, greater numbers of gays and lesbians began living openly, and many expressed a desire to have their relationships recognized as marriages. Over time, more people came to see marriage in a way that could be extended to such couples. Until recently, this new view of marriage remained a minority position. After the Massachusetts Supreme Judicial Court in 2003 interpreted its [*693] State Constitution to require recognition of same-sex marriage, many States—including the [***643] four at issue here—enacted constitutional amendments formally adopting the longstanding definition of marriage.

Over the last few years, public opinion on marriage has shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional [****64] definition of marriage.

In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.

Petitioners brought lawsuits contending that the Due Process and [Equal Protection Clauses of the Fourteenth Amendment](#) compel their States to license and recognize marriages between same-sex couples. In a carefully reasoned decision, the Court of Appeals acknowledged the democratic “momentum” in favor of “expand[ing] the definition of marriage to include gay couples,” but concluded that petitioners had not made “the case

for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters.” 772 F. 3d, at 396, 403. That decision interpreted the Constitution correctly, and I would affirm.

II

Petitioners first contend that the marriage laws of their States violate the Due Process Clause. The Solicitor General [*694] of the United States, appearing in support of petitioners, expressly disowned that position before this Court. See Tr. of Oral Arg. on Question 1, at 38-39. The majority [****65] nevertheless resolves these cases for petitioners based almost entirely on the Due Process Clause.

The majority purports to identify four “principles and traditions” in this Court’s due process precedents that support a fundamental right for same-sex couples to marry. Ante, at , 192 L. Ed. 2d, at 625. In reality, however, [**2616] the majority’s approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937. Stripped of its shiny rhetorical gloss, the majority’s argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority’s position indefensible as a matter of constitutional law.

A

Petitioners’ “fundamental right” claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States’ marriage laws violate an *enumerated* constitutional right, such as the freedom of speech protected by the First Amendment. There is, after all, no “Companionship and Understanding” or

“Nobility and Dignity” [***644] Clause in the Constitution. See ante, at , 192 L. Ed. 2d, at 619, 626. They [****66] argue instead that the laws violate a right *implied* by the Fourteenth Amendment’s requirement that “liberty” may not be deprived without “due process of law.”

This Court has interpreted the Due Process Clause to include a “substantive” component that protects certain liberty interests against state deprivation “no matter what process is provided.” Reno v. Flores, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993). The theory is that some liberties are “so rooted in the traditions [*695] and conscience of our people as to be ranked as fundamental,” and therefore cannot be deprived without compelling justification. Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934).

Allowing unelected federal judges to select which unenumerated rights rank as “fundamental”—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges “exercise the utmost care” in identifying implied fundamental rights, “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” Washington v. Glucksberg, 521 U.S. 702, 720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (internal quotation marks omitted); see Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint 13 (1986) (Address at Stanford University) (“One can conclude that certain essential, or fundamental, rights should exist in any just society. It [****67] does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.”).

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a

statute in [*Dred Scott v. Sandford*, 60 U.S. 393, 19 How. 393, 15 L. Ed. 691 \(1857\)](#). There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so. It asserted that “an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law.” [*Id.*, at 450, 19 How. 393, 15 L. Ed. 691](#). In a dissent that has outlasted the majority opinion, Justice **[**2617]** Curtis explained that **[*696]** when the “fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical opinions of individuals are allowed to control” the Constitution’s **[****68]** meaning, “we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.” [*Id.*, at 621, 19 How. 393, 15 L. Ed. 691](#).

Dred Scott’s holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the [*Due Process Clause*](#) reappeared. In a series of early 20th-century cases, most prominently *Lochner v. New York*, this Court invalidated state statutes that presented “meddlesome **[***645]** interferences with the rights of the individual,” and “undue interference with liberty of person and freedom of contract.” [198 U.S., at 60, 61, 25 S. Ct. 539, 49 L. Ed. 937](#). In *Lochner* itself, the Court struck down a New York law setting maximum hours for bakery employees, because there was “in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law.” [*Id.*, at 58, 25 S. Ct. 539, 49 L. Ed. 937](#).

The dissenting Justices in *Lochner* explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at

least “room for debate and for an honest difference of opinion.” [*Id.*, at 72, 25 S. Ct. 539, 49 L. Ed. 937](#) (opinion of Harlan, J.). The majority’s contrary conclusion **[****69]** required adopting as constitutional law “an economic theory which a large part of the country does not entertain.” [*Id.*, at 75, 25 S. Ct. 539, 49 L. Ed. 937](#) (opinion of Holmes, J.). As Justice Holmes memorably put it, “The [*Fourteenth Amendment*](#) does not enact Mr. Herbert Spencer’s Social Statics,” a leading work on the philosophy of Social Darwinism. *Ibid.* The Constitution “is not intended to embody a particular economic theory It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question **[*697]** whether statutes embodying them conflict with the Constitution.” [*Id.*, at 75-76, 25 S. Ct. 539, 49 L. Ed. 937](#).

In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that “[t]he criterion of constitutionality is not whether we believe the law to be for the public good.” [*Adkins v. Children’s Hospital of D. C.*, 261 U.S. 525, 570, 43 S. Ct. 394, 67 L. Ed. 785 \(1923\)](#) (opinion of Holmes, J.). By empowering judges to elevate their own policy judgments to the status of constitutionally protected “liberty,” the *Lochner* line of cases left “no alternative to regarding the court as a . . . legislative chamber.” L. Hand, [*The Bill of Rights*](#) 42 (1958).

Eventually, the Court recognized **[****70]** its error and vowed not to repeat it. “The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely,” we later explained, “has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.” [*Ferguson v. Skrupa*, 372 U.S. 726, 730, 83 S. Ct. 1028, 10 L. Ed. 2d 93 \(1963\)](#); see [*Day-*](#)

Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423, 72 S. Ct. 405, 96 L. Ed. 469 (1952) (“we do not sit as a super-legislature to weigh the wisdom of legislation”). Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them “unwise, improvident, or out of harmony [**2618] with a particular school of thought.” Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1955).

Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner*’s error of converting personal preferences into constitutional mandates, our modern substantive [***646] due process cases have stressed the need for “judicial self-restraint.” Collins v. Harker Heights, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). Our precedents have required that implied fundamental rights be “objectively, [*698] deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered [****71] liberty, such that neither liberty nor justice would exist if they were sacrificed.” Glucksberg, 521 U.S., at 720-721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (internal quotation marks omitted).

Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in *Glucksberg*, many other cases both before and after have adopted the same approach. See, e.g., District Attorney’s Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 72, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009); Flores, 507 U.S., at 303113 S. Ct. 1439, 123 L. Ed. 2d 1; United States v. Salerno, 481 U.S. 739, 751, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); Moore v. East Cleveland, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (plurality opinion); see also *id.*, at 544, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (White, J., dissenting) (“The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable

roots in the language or even the design of the Constitution.”); Troxel v. Granville, 530 U.S. 57, 96-101, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (Kennedy, J., dissenting) (consulting “[o]ur Nation’s history, legal traditions, and practices” and concluding that “[w]e owe it to the Nation’s domestic relations legal structure . . . to proceed with caution” (quoting Glucksberg, 521 U.S., at 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772)).

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. Ante, at —, 192 L. Ed. 2d, at 628. But given the few “guideposts for responsible decisionmaking in this uncharted area,” [****72] Collins, 503 U.S., at 125, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261, “an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula,” Moore, 431 U.S., at 504, n. 12, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (plurality opinion). Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of “discipline” in identifying fundamental rights, ante, at — - —, 192 L. Ed. 2d, at 623-624, does not provide a meaningful constraint on a judge, for “what he is really likely to be ‘discovering,’ [*699] whether or not he is fully aware of it, are his own values,” J. Ely, *Democracy and Distrust* 44 (1980). The only way to ensure restraint in this delicate enterprise is “continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers.” Griswold v. Connecticut, 381 U.S. 479, 501, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (Harlan, J., concurring in judgment).

B

The majority acknowledges none of [***647] this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades [**2619] of

precedent and returns the Court to the unprincipled approach of *Lochner*.

1

The majority's driving themes are that marriage is desirable and petitioners desire [****73] it. The opinion describes the "transcendent importance" of marriage and repeatedly insists that petitioners do not seek to "demean," "devalue," "denigrate," or "disrespect" the institution. Ante, at _____, _____, 192 L. Ed. 2d, at 619, 620, 621, 635. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners' wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental "right to marry." Turner v. Safley, 482 U. S. 78, 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); Zablocki, 434 U.S., at 383, 98 S. Ct. 673, 54 L. Ed. 2d 618; see Loving, 388 U.S., at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010. These cases do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In *Loving*, the Court held that racial restrictions on the right to marry lacked a compelling justification. [*700] In *Zablocki*, restrictions based on child support debts did not suffice. In *Turner*, restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core [****74] definition of marriage as the union of a man and a woman. The laws challenged in *Zablocki* and *Turner* did not define marriage as "the union of a man and a woman, where neither party owes child support or is in prison." Nor did the interracial marriage ban at issue in *Loving* define marriage as "the union of a man and a woman of the same race." See Tragen, Comment, Statutory Prohibitions Against

Interracial Marriage, 32 Cal. L. Rev. 269 (1944) ("at common law there was no ban on interracial marriage"); post, at _____, n. 5, 192 L. Ed. 2d, at 666 (Thomas, J., dissenting). Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners." Ante, at _____, 192 L. Ed. 2d, at 624.

In short, the "right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. See Windsor, 570 U.S., at 808, 133 S. Ct. 2675, 186 L. Ed. 2d at 852 (Alito, J., dissenting) ("What *Windsor* and the United States [****75] seek . . . is not the protection of a deeply rooted right but the recognition of a very new right."). Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

[***648] 2

The majority suggests that "there are other, more instructive precedents" informing the right to marry. Ante, at _____, 192 L. Ed. 2d, at 624. Although not entirely clear, this reference seems to correspond [*701] to a line of cases discussing an implied fundamental "right of privacy." Griswold, 381 U.S., at 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510. In the first of those cases, the Court invalidated a criminal law that banned the use of contraceptives. Id., at 485-486, 85 S. Ct. 1678, 14 L. Ed. 2d 510. The Court stressed the invasive nature of the ban, [**2620] which threatened the intrusion of "the police to search the sacred precincts of marital bedrooms." Id., at 485, 85 S. Ct. 1678, 14 L. Ed. 2d

510. In the Court’s view, such laws infringed the right to privacy in its most basic sense: the “right to be let alone.” Eisenstadt v. Baird, 405 U.S. 438, 453-454, n. 10, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972) (internal quotation marks omitted); see Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting).

The Court also invoked the right to privacy in Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), which struck down a Texas statute criminalizing homosexual sodomy. *Lawrence* relied on the position that criminal sodomy laws, like bans on contraceptives, invaded [****76] privacy by inviting “unwarranted government intrusions” that “touc[h] upon the most private human conduct, sexual behavior . . . in the most private of places, the home.” *Id.*, at 562, 567, 123 S. Ct. 2472, 156 L. Ed. 2d 508.

Neither *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is “condemned to live in loneliness” by the laws challenged in these cases—no one. *Ante*, at ___, 192 L. Ed. 2d, at 635. At the same time, the laws in no way interfere with the “right to be let alone.”

The majority also relies on Justice Harlan’s influential dissenting opinion in Poe v. Ullman, 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961). As the majority recounts, that opinion states that “[d]ue process has not been reduced to any formula.” *Id.*, at 542, 81 S. Ct. 1752, 6 L. Ed. 2d 989. But far from conferring the broad interpretive discretion that the majority discerns, Justice Harlan’s opinion makes clear that [*702] courts implying fundamental rights are not “free to roam

where unguided speculation might take them.” *Ibid.* They must instead have “regard [****77] to what history teaches” and exercise not only “judgment” but “restraint.” *Ibid.* Of particular relevance, Justice Harlan explained that “laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.” *Id.*, at 546, 81 S. Ct. 1752, 6 L. Ed. 2d 989.

In sum, the privacy cases provide no support for the majority’s position, because petitioners do not seek privacy. Quite the opposite, they seek [***649] public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 196, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35-37, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973); *post*, at ___ - ___, 192 L. Ed. 2d, at 664-667 (Thomas, J., dissenting). Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

3

Perhaps recognizing how little support it can derive [****78] from precedent, the majority goes out of its way to jettison the “careful” approach to implied fundamental rights [**2621] taken by this Court in *Glucksberg*. *Ante*, at ___, 192 L. Ed. 2d, at 628 (quoting 521 U.S., at 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772). It is revealing that the majority’s position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor.

Nobody **[*703]** could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority's methodology: *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937. The majority opens its opinion by announcing petitioners' right to "define and express their identity." *Ante*, at —, 192 L. Ed. 2d, at 618. The majority later explains that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." *Ante*, at —, 192 L. Ed. 2d, at 625. This freewheeling notion of individual autonomy echoes nothing so much as "the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor." *Lochner*, 198 U.S., at 58, 25 S. Ct. 539, 49 L. Ed. 937 (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own "reasoned judgment," informed **[****79]** by its "new insight" into the "nature of injustice," which was invisible to all who came before but has become clear "as we learn [the] meaning" of liberty. *Ante*, at —, —, 192 L. Ed. 2d, at 624, 624. The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that "it would disparage their choices and diminish their personhood to deny them this right." *Ante*, at —, 192 L. Ed. 2d, at 629. Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*. See 198 U.S., at 61, 25 S. Ct. 539, 49 L. Ed. 937 ("We do not believe in the soundness of the views which uphold this law," which "is an illegal interference with the rights of individuals . . . to make contracts regarding labor upon such terms as they may think best").

The majority recognizes that today's cases do not mark "the first time **[***650]** the Court has been

asked to adopt a cautious approach to recognizing and protecting fundamental rights." *Ante*, at —, 192 L. Ed. 2d, at 632. On that much, we agree. The Court was "asked"—and it agreed—to "adopt a cautious approach" to **[*704]** implying fundamental rights after the debacle of the *Lochner* era. Today, the majority casts caution aside and revives **[****80]** the grave errors of that period.

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Cf. *Brown v. Buhman*, 947 F. Supp. 2d 1170 (Utah 2013), appeal pending, No. 14—4117 (CA10). Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," *ante*, at **[**2622]** —, 192 L. Ed. 2d, at 625, why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex **[****81]** couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser," *ante*, at —, 192 L. Ed. 2d, at 627, why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," *ante*, at —, 192 L. Ed. 2d, at 631, serve to

disrespect and subordinate people who find fulfillment in polyamorous relationships? See Bennett, Polyamory: The Next Sexual Revolution? *Newsweek*, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married [*705] Lesbian “Throuple” Expecting First Child, *N. Y. Post*, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, [64 Emory L. J. 1977 \(2015\)](#).

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State “doesn’t have such an institution.” Tr. of Oral Arg. on Question 2, p. [****82] 6. But that is exactly the point: The States at issue here do not have an institution of same-sex marriage, either.

4

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to include same-sex couples, the majority insists, would “pose no risk of harm to themselves or third parties.” *Ante*, ___, 192 L. Ed. 2d, [***651] at 634. This argument again echoes *Lochner*, which relied on its assessment that “we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act.” 198 U.S., at 57, 25 S. Ct. 539, 49 L. Ed. 937.

Then and now, this assertion of the “harm principle” sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice’s commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of “due process.” There is indeed a process due the people on issues

of this sort—the democratic process. Respecting that understanding requires [****83] the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Justice [*706] Holmes’s dissent in *Lochner*, the [Fourteenth Amendment](#) does not enact John Stuart Mill’s *On Liberty* any more than it enacts Herbert Spencer’s *Social Statics*. See Randolph, Before *Roe v. Wade*: Judge Friendly’s Draft Abortion Opinion, 29 Harv. J. L. & Pub. Pol’y 1035, 1036-1037, 1058 (2006). And it certainly does not enact any one concept of marriage.

The majority’s understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down [**2623] democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country’s entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the [****84] “nature of injustice is that we may not always see it in our own times.” *Ante*, at ___, 192 L. Ed. 2d, at 624. As petitioners put it, “times can blind.” Tr. of Oral Arg. on Question 1, at 9, 10. But to blind yourself to history is both prideful and unwise. “The past is never dead. It’s not even past.” W. Faulkner, *Requiem for a Nun* 92 (1951).

III

In addition to their due process argument, petitioners contend that the [Equal Protection Clause](#) requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a “synergy between” the [Equal Protection Clause](#) and the [Due Process](#)

[Clause](#), and that some precedents relying on one Clause have also relied on the other. [Ante, at 192 L. Ed. 2d, at 630](#). Absent from this portion of the opinion, however, [*707] is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the “modern Supreme Court’s treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing.” G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & [***652] P. Karlan, *Constitutional Law* 453 (7th ed. 2013). [****85] The majority’s approach today is different:

“Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.” [Ante, at 192 L. Ed. 2d, at 629](#).

The majority goes on to assert in conclusory fashion that the [Equal Protection Clause](#) provides an alternative basis for its holding. [Ante, at 192 L. Ed. 2d, at 631](#). Yet the majority fails to provide even a single sentence explaining how the [Equal Protection Clause](#) supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. See [Northwest Austin Municipal Util. Dist. No. One v. Holder](#), 557 U.S. 193, 197, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009). In any event, the marriage laws at issue here do not violate the [Equal Protection Clause](#), because distinguishing between opposite-sex and same-sex couples is rationally related to the States’ “legitimate state interest” in “preserving the traditional institution of marriage.” [Lawrence](#), 539 U.S., at 585, 123 S. Ct. 2472, 156 L.

[Ed. 2d 508](#) (O’Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners [****86] have challenged. Although they discuss some of the ancillary [*708] legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents, petitioners’ lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to [**2624] license and recognize marriages between same-sex couples.

IV

The legitimacy of this Court ultimately rests “upon the respect accorded to its judgments.” [Republican Party of Minn. v. White](#), 536 U.S. 765, 793, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002) (Kennedy, J., concurring). That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority’s telling, it is the courts, not the people, who are responsible for [****87] making “new dimensions of freedom . . . apparent to new generations,” for providing “formal discourse” on social issues, and for ensuring “neutral discussions, without scornful or disparaging commentary.” [Ante, at 192 L. Ed. 2d, at 621-623](#).

Nowhere is the majority’s extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate [***653] regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side,

there has been “extensive litigation,” “many thoughtful District Court decisions,” “countless studies, papers, books, and other popular and scholarly writings,” and “more than 100” *amicus* briefs [*709] in these cases alone. [Ante, at _____, 192 L. Ed. 2d, at 623, 623, 632](#). What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers’ “better informed understanding” of “a liberty that remains urgent in our own era.” [Ante, at _____, 192 L. Ed. 2d, at 629](#). The answer is surely there in one of those *amicus* briefs or studies.

Those who founded our country would not recognize the majority’s conception of the judicial role. They after all risked their lives and [****88] fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after “a quite extensive discussion.” [Ante, at _____, 192 L. Ed. 2d, at 622](#). In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will. “Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unresolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution.” Rehnquist, *The Notion of a Living Constitution*, 54 *Texas L. Rev.* 693, 700 (1976). As a plurality of this Court explained just last year, “It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.” [Schuette v. BAMN, 572 U.S. 291, 313, 134 S. Ct. 1623, 188 L. Ed. 2d 613, 628 \(2014\)](#).

The Court’s accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, [****89]

people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage. They see voters carefully considering same-sex marriage, casting ballots in favor or opposed, and sometimes changing their minds. They see political leaders similarly [*710] reexamining their positions, and either reversing [**2625] course or explaining adherence to old convictions confirmed anew. They see governments and businesses modifying policies and practices with respect to same-sex couples, and participating actively in the civic discourse. They see countries overseas democratically accepting profound social change, or declining to do so. This deliberative process is making people take seriously questions that they may not have even regarded as questions before.

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. “That [****90] is exactly [***654] how our system of government is supposed to work.” [Post, at _____, 192 L. Ed. 2d, at 656](#) (Scalia, J., dissenting).

But today the Court puts a stop to all that. By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, “The political process was moving . . . , not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved,

conflict.” Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, [63 N. C. L. Rev. 375, 385-386 \(1985\)](#) (footnote omitted). Indeed, however heartened the proponents of same-sex marriage might be on [*711] this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow [****91] citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today’s decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. [Amdt. 1](#).

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority’s decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to “advocate” and “teach” their views of marriage. [Ante, at _____, 192 L. Ed. 2d, at 634](#). The [First Amendment](#) guarantees, however, the freedom to “exercise” religion. [****92] Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student [**2626] housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married

couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. See Tr. of Oral Arg. on Question 1, at 36-38. There is little doubt that these and similar [*712] questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Perhaps the most discouraging aspect of today’s decision is the extent to [***655] which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. [Ante, at _____, 192 L. Ed. 2d, at 629](#). That disclaimer is hard to square with the very next sentence, in which the majority explains that “the necessary [****93] consequence” of laws codifying the traditional definition of marriage is to “demea[n] or stigmatiz[e]” same-sex couples. [Ibid.](#) The majority reiterates such characterizations over and over. By the majority’s account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States’ enduring definition of marriage—have acted to “lock . . . out,” “disparage,” “disrespect and subordinate,” and inflict “[d]ignitary wounds” upon their gay and lesbian neighbors. [Ante, at _____, 192 L. Ed. 2d, at 628, 629, 631, 633](#). These apparent assaults on the character of fairminded people will have an effect, in society and in court. See [post, at _____, 192 L. Ed. 2d, at 672-673](#) (Alito, J., dissenting). Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority’s “better informed understanding” as bigoted. [Ante, at _____, 192 L. Ed. 2d, at 629](#).

In the face of all this, a much different view of the Court’s role is possible. That view is more modest

and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is [****94] more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for [*713] the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.

* * *

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today’s decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent.

Justice Scalia, with whom Justice Thomas joins, dissenting.

I join The Chief Justice’s opinion in full. I write separately to call attention to this Court’s threat to American democracy.

The substance of today’s decree [****95] is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements [**2627] it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval [***656] that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special

importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest [*714] extension in fact—and the furthest extension one can even imagine—of the Court’s claimed power to create “liberties” that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and [****96] won in the Revolution of 1776: the freedom to govern themselves.

I

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to. ¹ Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work. ²

The Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments. Forbidden are laws “impairing the

¹ Brief for Respondents in No. 14-571, p. 14.

² Accord, [*Schuette v. BAMN*, 572 U.S. 291, 311, 134 S. Ct. 1623, 188 L. Ed. 2d 613, 628 \(2014\)](#) (plurality opinion).

Obligation of Contracts,”³ denying “Full Faith and Credit” to the “public Acts” of other States,⁴ prohibiting the free exercise of religion,⁵ abridging the freedom [*715] of speech, [****97]⁶ infringing the right to keep and bear arms,⁷ authorizing unreasonable searches and seizures,⁸ and so forth. Aside from these limitations, those powers “reserved to the States respectively, or to the people”⁹ can be exercised as the States or the People desire. These cases ask us to decide whether the [Fourteenth Amendment](#) contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove *that* issue from the political process?

[***657] Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author [**2628] of today’s opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today):

“[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States.”¹⁰

“[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.”¹¹

³ [U. S. Const., Art. I, §10.](#)

⁴ [Art. IV, §1.](#)

⁵ [Amdt. 1.](#)

⁶ *Ibid.*

⁷ [Amdt. 2.](#)

⁸ [Amdt. 4.](#)

⁹ [Amdt. 10.](#)

¹⁰ [United States v. Windsor](#), 570 U.S. 744, 766, 133 S. Ct. 2675, 186 L. Ed. 2d 808 at 814 (2013) (internal quotation marks and citation omitted).

¹¹ *Id.*, at 767, 133 S. Ct. 2675, 186 L. Ed. 2d 808 at 824)

But we need not speculate. When the [Fourteenth Amendment](#) was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning [****98] of a vague constitutional provision—such as “due process of law” or “equal protection of the laws”—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice [*716] that remained both universal and uncontroversial in the years after ratification.¹² We have no basis for striking down a practice that is not expressly prohibited by the [Fourteenth Amendment](#)’s text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment’s ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter *what* it was the People ratified, the [Fourteenth Amendment](#) protects those rights that the Judiciary, in its “reasoned judgment,” thinks the [Fourteenth Amendment](#) ought to protect.¹³ That is so because “[t]he generations that wrote and ratified the [Bill of Rights](#) and the [Fourteenth Amendment](#) did [****99] not presume to know the extent of freedom in all of its dimensions”¹⁴ One would think that sentence would continue: “. . . and therefore they provided for a means by which the People could amend the Constitution,” or perhaps “. . . and therefore they left the creation of

¹² See [Town of Greece v. Galloway](#), 572 U.S. 565, 576-577, 134 S. Ct. 1811, 188 L. Ed. 2d 835, 846 (2014).

¹³ *Ante*, at ___, 192 L. Ed. 2d, at 624.

¹⁴ *Ibid.*

additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation.” But no. What logically follows, in the majority’s judge-empowering estimation, is: “and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.” ¹⁵ The “we,” needless to say, is the nine [***658] of us. “History and tradition guide and discipline [our] inquiry but do not set its outer boundaries.” ¹⁶ Thus, [*717] rather than focusing on *the People’s* understanding of “liberty”—at the time of ratification or even today—the majority focuses on four “principles and traditions” that, *in the majority’s view*, prohibit States from defining marriage as an institution consisting of one man and one woman. ¹⁷

[**2629] This is a naked judicial claim to legislative—indeed, *super-legislative*—power; a claim fundamentally at odds with [****100] our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices’ “reasoned judgment.” A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers ¹⁸ who studied at Harvard or Yale Law

School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans ¹⁹), or even a Protestant of any denomination. The strikingly unrepresentative [*718] character of the body voting [****101] on today’s social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today’s majority are not voting on that basis; *they say they are not*. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

II

But what really astounds is the hubris reflected in today’s judicial Putsch. The five Justices who compose today’s majority [****102] are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the [Fourteenth Amendment](#)’s ratification and Massachusetts’ permitting of same-sex marriages in 2003. ²⁰ They have discovered in the [Fourteenth Amendment](#) [***659] a “fundamental right” overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver

¹⁵ *Ibid.*

¹⁶ [Ibid.](#)

¹⁷ [Ante, at ____ - ____, 192 L. Ed. 2d, at 624-629.](#)

¹⁸ The predominant attitude of tall-building lawyers with respect to the questions presented in these cases is suggested by the fact that the American Bar Association deemed it in accord with the wishes of

its members to file a brief in support of the petitioners. See Brief for American Bar Association as *Amicus Curiae* in Nos. 14-571 and 14-574, pp. 1-5.

¹⁹ See Pew Research Center, *America’s Changing Religious Landscape* 4 (May 12, 2015).

²⁰ [Goodridge v. Department of Public Health, 440 Mass. 309, 798 N. E. 2d 941 \(2003\).](#)

Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not. They are certain that the People ratified the [Fourteenth Amendment](#) to bestow on them the power to remove questions from the democratic process when **[**2630]** that is called for by their “reasoned judgment.” These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every **[*719]** nation in history until 15 years ago, ²¹ cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous **[****103]** judgment of all generations and all societies, stands against the Constitution.

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so. ²² Of course the opinion’s showy profundities are often profoundly incoherent. “The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality.” ²³ (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy

is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, is a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can “rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.” ²⁴ (Huh? How **[****104]** can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty **[*720]** [never mind], give birth to a right?) And we are told that, “[i]n any particular case,” either the Equal Protection or [Due Process Clause](#) “may be thought to capture the essence of [a] right in a more accurate and comprehensive way,” than the other, “even as the two Clauses may converge in the identification and definition of the right.” ²⁵ (What say? What possible “essence” **[***660]** does substantive due process “capture” in an “accurate and comprehensive way”? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the [Equal Protection Clause](#), as employed today, identifies nothing except a difference in treatment that this Court *really* dislikes. Hardly a distillation of essence. If the opinion is correct that the two Clauses “converge in the identification and definition of [a] right,” that is only because the majority’s likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today’s opinion has to diminish **[****105]** this Court’s reputation for clear thinking and sober analysis.

* * *

[2631]** Hubris is sometimes defined as o’erweening pride; and pride, we know, goeth

²¹ [Windsor, 570 U.S., at 808, 133 S. Ct. 2675, 186 L. Ed. 2d at 830](#) (Alito, J., dissenting).

²² If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,” I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

²³ [Ante, at](#) , 192 L. Ed. 2d, at 625.

²⁴ [Ante, at](#) , 192 L. Ed. 2d, at 629.

²⁵ [Ante, at](#) 672, 192 L. Ed. 2d, at 629.

before a fall. The Judiciary is the “least dangerous” of the federal branches because it has “neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm” and the States, “even for the efficacy of its judgments.”²⁶ With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the “reasoned judgment” of a bare majority of this Court—we move one step closer to being reminded of our impotence.

[*721] Justice Thomas, with whom Justice Scalia joins, dissenting.

The Court’s decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the name of a “liberty” that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic. I cannot agree with it.

I

The majority’s decision today will require States to issue marriage licenses to same-sex couples and to recognize same-sex marriages entered in other States largely based on a constitutional provision guaranteeing “due process” before a person is deprived of his **[****107]** “life, liberty, or property.” I have elsewhere explained the dangerous fiction of treating the [Due Process](#)

[Clause](#) as a font of substantive rights. [McDonald v. Chicago](#), 561 U.S. 742, 811-812, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (Thomas, J., concurring in part and concurring in judgment). It distorts the constitutional text, which guarantees only whatever “process” is “due” before a person is deprived of life, liberty, and property. U. S. Const., Amdt. 14, §1. Worse, it invites judges to do exactly what the majority has done here—“‘roa[m] at large in the constitutional field’ guided only by their personal **[***661]** views” as to the “‘fundamental rights’” protected by that document. [Planned Parenthood of Southeastern Pa. v. Casey](#), 505 U.S. 833, 953, 964, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (Rehnquist, C. J., concurring in judgment in part and dissenting in **[*722]** part) (quoting [Griswold v. Connecticut](#), 381 U.S. 479, 502, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (Harlan, J., concurring in judgment)).

By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority. Petitioners argue that by enshrining the traditional definition of marriage in their State Constitutions through voter-approved amendments, the States have put the issue “beyond the reach of the normal democratic process.” Brief for Petitioners in No. 14-562, p. 54. But the result petitioners seek is far less democratic. They ask nine judges on this Court to enshrine their **[****108]** definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation. That a “bare majority” of **[**2632]** this Court, [ante](#), at ___, 192 L. Ed. 2d, at 632, is able to grant this wish, wiping out with a stroke of the keyboard the results of the political process in over 30 States, based on a provision that guarantees only “due process” is but further evidence of the danger of substantive due process.¹

¹The majority states that the right it believes is “part of the liberty promised by the [Fourteenth Amendment](#) is derived, too, from that Amendment’s guarantee of the equal protection of the laws.” [Ante](#), at ___, 192 L. Ed. 2d, at 629. Despite the “synergy” it finds “between

²⁶The Federalist No. 78, pp. **[****106]** 522, 523 (J. Cooke ed. 1961) (A. Hamilton).

II

Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would not have a claim. To invoke the protection of the [Due Process Clause](#) at all—whether under a theory of “substantive” or “procedural” due process—a party must first identify a deprivation of “life, liberty, or property.” The majority [****109] claims these state laws deprive petitioners of “liberty,” but the concept of “liberty” it conjures up bears no resemblance to any plausible meaning of that word as it is used in the [Due Process Clauses](#).

[*723] A

1

As used in the [Due Process Clauses](#), “liberty” most likely refers to “the power of loco-motion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint, unless by due course of law.” 1 W. Blackstone, *Commentaries on the Laws of England* 130 (1769) (Blackstone). That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution’s text and structure.

Both of the Constitution’s [Due Process Clauses](#) reach back to Magna Carta. See [Davidson v. New Orleans](#), 96 U.S. 97, 101-102, 24 L. Ed. 616 (1878). Chapter 39 of the original Magna Carta provided, “No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.” Magna Carta, [***662] ch. 39, in A. Howard, *Magna Carta: Text and Commentary* 43 (1964). Although the 1215 version

of Magna Carta was in effect for only a few weeks, this provision was later reissued in 1225 with modest changes to its wording as follows: [****110] “No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land.” 1 E. Coke, *The Second Part of the Institutes of the Laws of England* 45 (1797). In his influential commentary on the provision many years later, Sir Edward Coke interpreted the words “by the law of the land” to mean the same thing as “by due process of the common law.” *Id.*, at 50.

After Magna Carta became subject to renewed interest in the 17th century, see, e.g., *ibid.*, William Blackstone referred to this provision as protecting the “absolute rights of every Englishman.” 1 Blackstone 123. And he formulated those [*724] absolute rights as “the right of personal security,” which included the right to life; “the right of personal liberty”; and “the right of private property.” *Id.*, at 125. He defined “the right of personal liberty” as “the power of loco-motion, of changing situation, [**2633] or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint, unless by due course of law.” [****111] *Id.*, at 125, 130.²

The Framers drew heavily upon Blackstone’s formulation, adopting provisions in early State Constitutions that replicated Magna Carta’s language, but were modified to refer specifically to

th[ese] two protections,” [ante](#), at [_____](#), 192 L. Ed. 2d, at 630, the majority clearly uses equal protection only to shore up its substantive due process analysis, an analysis both based on an imaginary constitutional protection and revisionist view of our history and tradition.

²The seeds of this articulation can also be found in Henry Care’s influential treatise, *English Liberties*. First published in America in 1721, it described the “three things, which the Law of England . . . principally regards and taketh Care of,” as “*Life, Liberty and Estate*,” and described habeas corpus as the means by which one could procure one’s “Liberty” from imprisonment. The Habeas Corpus Act, comment., in *English Liberties*, or the Free-born Subject’s Inheritance 185 (H. Care comp. 5th ed. 1721). Though he used the word “*Liberties*” by itself more broadly, see, e.g., *id.*, at 7, 34, 56, 58, 60, he used “*Liberty*” in a narrow sense when placed alongside the words “*Life*” or “*Estate*,” see, e.g., *id.*, at 185, 200.

“life, liberty, or property.”³ State decisions interpreting these provisions between the founding and the ratification of the [Fourteenth Amendment](#) almost uniformly [*725] construed the word “liberty” to refer only to freedom from physical restraint. See Warren, *The New “Liberty” Under the Fourteenth Amendment*, 39 Harv. L. Rev. 431, 441-445 (1926). Even [****112] one case that has been identified as a possible exception to that view merely used broad language about liberty in the context of a habeas corpus proceeding—a proceeding [***663] classically associated with obtaining freedom from physical restraint. Cf. *id.*, at 444-445.

In enacting the [Fifth Amendment](#)’s [Due Process Clause](#), the Framers similarly chose to employ the “life, liberty, or property” formulation, though they otherwise deviated substantially from the States’ use of Magna Carta’s language in the Clause. See Shattuck, *The True Meaning of the Term “Liberty” in Those Clauses in the Federal and State Constitutions Which Protect “Life, Liberty, and Property,”* 4 Harv. L. Rev. 365, 382 (1890). When read in light of the history of that formulation, it is hard to see how the “liberty” protected by the Clause could be interpreted to include anything broader than freedom from physical restraint. That was the consistent usage of the time when “liberty” was paired with “life” and “property.” See *id.*, at

375. And that usage avoids rendering superfluous those protections for “life” and “property.”

If the [Fifth Amendment](#) uses “liberty” in this narrow sense, then the [Fourteenth Amendment](#) likely does as well. See [Hurtado v. California](#), 110 U.S. 516, 534-535, 4 S. Ct. 111, 28 L. Ed. 232 (1884). Indeed, this Court has previously commented, “The conclusion is . . . irresistible, that when the same phrase was employed in [**2634] the [Fourteenth Amendment](#) [as was used in the [Fifth Amendment](#)], it was used in the same sense and with no greater extent.” *Ibid.* And this Court’s earliest [Fourteenth Amendment](#) decisions appear to interpret the Clause as [****114] using “liberty” to mean freedom from physical restraint. In [Munn v. Illinois](#), 94 U.S. 113, 24 L. Ed. 77 (1877), for example, the Court recognized the relationship between the two [Due Process Clauses](#) and Magna Carta, see *id.*, at 123-124, 24 L. Ed. 77, and implicitly rejected the dissent’s argument that “‘liberty’” [*726] encompassed “something more . . . than mere freedom from physical restraint or the bounds of a prison,” *id.*, at 142, 24 L. Ed. 77 (Field, J., dissenting). That the Court appears to have lost its way in more recent years does not justify deviating from the original meaning of the Clauses.

2

Even assuming that the “liberty” in those Clauses encompasses something more than freedom from physical restraint, it would not include the types of rights claimed by the majority. In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.

The founding-era understanding of liberty was heavily influenced by John Locke, whose writings “on natural rights and on the social and governmental contract” were cited “[i]n pamphlet after pamphlet” by American writers. B. Bailyn, *The Ideological Origins of the American Revolution* 27 (1967). Locke described men as existing in a state of nature, possessed of the [****115] “perfect freedom to order their

³ Maryland, North Carolina, and South Carolina adopted the phrase “life, liberty, or property” in provisions otherwise tracking Magna Carta: “That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land.” Md. Const., Declaration of Rights, Art. XXI (1776), in 3 *Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 1688 (F. Thorpe ed. 1909); see also S. C. Const., Art. XLI (1778), in 6 *id.*, at 3257; N. C. Const., Declaration of Rights, Art. XII (1776), in 5 *id.*, at 2788. Massachusetts and New Hampshire did the same, albeit with some alterations to Magna Carta’s framework: “[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.” [****113] [Mass. Const., pt. I, Art. XII](#) (1780), in 3 *id.*, at 1891; see also N. H. Const., pt. I, Art. XV (1784), in 4 *id.*, at 2455.

actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.” J. Locke, *Second Treatise of Civil Government*, §4, p. 4 (J. Gough ed. 1947) (Locke). Because that state of nature left men insecure in their persons and property, they entered civil society, trading a portion of their natural liberty for an increase in their security. See *id.*, §97, at 49. Upon consenting to that order, men obtained civil liberty, [***664] or the freedom “to be under no other legislative power but that established by consent in the commonwealth; nor under the dominion of any will or restraint of any law, but what that legislative shall enact according to the trust put in it.” *Id.*, §22, at 13.⁴

[*727] This philosophy permeated the 18th-century political scene in America. A 1756 editorial in the *Boston Gazette*, for example, declared that “Liberty in the *State of [**2635] Nature*” was the “inherent natural Right” “of each Man” “to make a free Use [****117] of his Reason and Understanding, and to chuse that Action which he thinks he can give the best Account of,” but that, “in Society, every Man parts with a small Share of

his *natural* Liberty, or lodges it in the publick Stock, that he may possess the Remainder without Controul.” *Boston Gazette and Country Journal*, No. 58, May 10, 1756, p. 1. Similar sentiments were expressed in public speeches, sermons, and letters of the time. See 1 C. Hyneman & D. Lutz, *American Political Writing During the Founding Era 1760-1805*, pp. 100, 308, 385 (1983).

The founding-era idea of civil liberty as natural liberty constrained by human law necessarily involved only those freedoms that existed *outside of* government. See Hamburger, *Natural Rights, Natural Law, and American Constitutions*, [102 Yale L. J. 907, 918-919 \(1993\)](#). As one later commentator observed, “[L]iberty in the eighteenth century was thought of much more in relation to ‘negative liberty’; that is, freedom *from*, not freedom *to*, freedom from a number [*728] of social and political evils, including arbitrary government power.” J. Reid, *The Concept of Liberty in the Age of the American Revolution* 56 (1988). Or as one scholar put it in 1776, “[T]he common idea of liberty is merely negative, and is [****118] only the *absence of restraint*.” R. Hey, *Observations on the Nature of Civil Liberty and the Principles of Government* §13, p. 8 (1776) (Hey). When the colonists described laws that would infringe their liberties, they discussed laws that would prohibit individuals “from walking in the streets and highways on certain saints days, or from being abroad after a certain time in the evening, or . . . restrain [them] from working up and manufacturing materials of [their] own growth.” Downer, *A Discourse at the Dedication of the Tree of Liberty*, in 1 Hyneman, *supra*, at 101. Each of those examples involved freedoms that existed outside of government.

B

Whether we define “liberty” as locomotion or freedom from governmental [***665] action more broadly, petitioners have in no way been deprived of it.

Petitioners cannot claim, under the most plausible

⁴ Locke’s theories heavily influenced other prominent writers of the 17th and 18th centuries. Blackstone, for one, agreed that “natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature,” and described civil liberty as that “which leaves the subject entire master of his own conduct,” except as “restrained [****116] by human laws.” 1 Blackstone 121-122. And in a “treatise routinely cited by the Founders,” [Zivotofsky v. Kerry, ante, at](#) [135 S. Ct. 2076, 192 L. Ed. 2d 83](#) (Thomas, J., concurring in judgment in part and dissenting in part), Thomas Rutherford wrote, “By liberty we mean the power, which a man has to act as he thinks fit, where no law restrains him; it may therefore be called a mans right over his own actions, authority only for second quotation in this sentence.” 1 T. Rutherford, *Institutes of Natural Law* 146 (1754). Rutherford explained that “[t]he only restraint, which a mans right over his own actions is originally under, is the obligation of governing himself by the law of nature, and the law of God,” and that “[w]hatever right those of our own species may have . . . to restrain [those actions] within certain bounds, beyond what the law of nature has prescribed, arises from some after-act of our own, from some consent either express or tacit, by which we have alienated our liberty, or transferred the right of directing our actions from ourselves to them.” *Id.*, at 147-148.

definition of “liberty,” that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabit and raise their children in peace. They have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in [****119] all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor, under the broader definition, can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, [*729] to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. Petitioners claim that as a matter of “liberty,” they are entitled to access privileges [**2636] and benefits that exist solely *because of* the government. They want, for example, to receive the State’s [****120] *imprimatur* on their marriages—on state issued marriage licenses, death certificates, or other official forms. And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of “liberty” that the Framers would have recognized.

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one’s spouse—without governmental interference. At the founding, such conduct was understood to predate government, not to flow from it. As Locke had explained many years earlier, “The first society was between man and wife, which gave beginning to that between [****121] parents and children.” Locke §77, at 39; see also J. Wilson, *Lectures on Law*, in 2 *Collected Works of James Wilson* 1068 (K. Hall and M. Hall [*730] eds. 2007) (concluding “that to the institution of marriage the true origin of society must be traced”). Petitioners misunderstand the institution of marriage when they say that it would “mean little” absent governmental recognition. Brief for Petitioners in No. 14-556, p. 33.

Petitioners’ misconception of liberty carries over into their discussion of [***666] our precedents identifying a right to marry, not one of which has expanded the concept of “liberty” beyond the concept of negative liberty. Those precedents all involved absolute prohibitions on private actions associated with marriage. [*Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 \(1967\)](#), for example, involved a couple who was criminally prosecuted for marrying in the District of Columbia and cohabiting in Virginia, [*id.*, at 2-3, 87 S. Ct. 1817, 18 L. Ed. 2d 1010](#).⁵ They [**2637] were

⁵ The suggestion of petitioners and their *amici* that antimiscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive and inaccurate. “America’s earliest laws against interracial sex and marriage were spawned by slavery.” P. Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* 19 (2009). For instance, Maryland’s 1664 law prohibiting marriages between “freeborne English women” and “Negro Sla[v]es” was passed as part of the very Act that authorized lifelong slavery in the colony. *Id.*, at 19-20. Virginia’s

each sentenced to a year [*731] of imprisonment, suspended for a term of 25 years on the condition that they not reenter the Commonwealth together during that time. *Id.*, at 3, 87 S. Ct. 1817, 18 L. Ed. 2d 1010. ⁶ In a similar vein, *Zablocki v. Redhail*, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978), involved a man who was prohibited, on pain of criminal penalty, from “marry[ing] in Wisconsin or elsewhere” because of his outstanding child-support [****122] obligations, *id.*, at 387, 98 S. Ct. 673, 54 L. Ed. 2d 618; see *id.*, at 377-378, 98 S. Ct. 673, 54 L. Ed. 2d 618. And *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), involved state inmates who were prohibited from entering marriages without the permission of the superintendent of the prison, permission that could not be granted absent compelling reasons, *id.*, at 82, 107 S. Ct. 2254, 96 L. Ed. 2d 64. In none of those cases were individuals denied solely governmental recognition and benefits associated with marriage.

antimiscegenation laws likewise were passed in a 1691 resolution entitled “An act for suppressing outlying Slaves.” Act of Apr. 1691, Ch. XVI, 3 Va. Stat. 86 (W. Henning ed. 1823) (reprint 1969) (italics deleted). “It was not until the Civil War threw the future of slavery into [****123] doubt that lawyers, legislators, and judges began to develop the elaborate justifications that signified the emergence of miscegenation law and made restrictions on interracial marriage the foundation of post-Civil War white supremacy.” Pascoe, *supra*, at 27-28.

Laws defining marriage as between one man and one woman do not share this sordid history. The traditional definition of marriage has prevailed in every society that has recognized marriage throughout history. Brief for Scholars of History and Related Disciplines as *Amici Curiae* 1. It arose not out of a desire to shore up an invidious institution like slavery, but out of a desire “to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world.” *Id.*, at 8. And it has existed in civilizations containing all manner of views on homosexuality. See Brief for Ryan T. Anderson as *Amicus Curiae* 11-12 (explaining that several famous ancient Greeks wrote approvingly of the traditional definition of marriage, though same-sex sexual relations were common in Greece at the time).

⁶The prohibition extended so far as to forbid even religious [****124] ceremonies, thus raising a serious question under the *First Amendment*’s *Free Exercise Clause*, as at least one *amicus* brief at the time pointed out. Brief for John J. Russell et al. as *Amici Curiae* in *Loving v. Virginia*, O.T. 1966, No. 395, pp. 12-16.

In a concession to petitioners’ misconception of liberty, the majority characterizes petitioners’ suit as a quest to “find . . . liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.” *Ante*, at ___, 192 L. Ed. 2d, at 618. But “liberty” is not lost, nor can it be found in the way petitioners [***667] seek. As a philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits. And as a constitutional matter, it is likely even narrower than that, encompassing only freedom from physical restraint and imprisonment. The majority’s “better informed understanding of how constitutional imperatives define . . . liberty,” *ante*, at ___, 192 L. Ed. 2d, at 629,—better informed, we must assume, than that of the people who ratified [*732] the *Fourteenth Amendment*—runs headlong into the reality that our Constitution is a “collection of ‘Thou shalt nots,’” *Reid v. Covert*, 354 U.S. 1, 9, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957) (plurality opinion), not “Thou shalt provides.”

III

The majority’s inversion [****125] of the original meaning of liberty will likely cause collateral damage to other aspects of our constitutional order that protect liberty.

A

The majority apparently disregards the political process as a protection for liberty. Although men, in forming a civil society, “give up all the power necessary to the ends for which they unite into society, to the majority of the community,” Locke §99, at 49, they reserve the authority to exercise natural liberty within the bounds of laws established by that society, *id.*, §22, at 13; see also Hey §§52, 54, at 30-32. To protect that liberty from arbitrary interference, they establish a process by which that society can adopt and enforce its laws. In our country, that process is primarily representative government at the state level, with the Federal Constitution serving as a backstop for

that process. As a general matter, when the States act through their representative governments or by popular vote, the liberty of their residents is fully vindicated. This is no less true when some residents disagree with the result; indeed, it seems difficult to imagine *any* law on which all residents **[**2638]** of a State would agree. See Locke §98, at 49 (suggesting that **[****126]** society would cease to function if it required unanimous consent to laws). What matters is that the process established by those who created the society has been honored.

That process has been honored here. The definition of marriage has been the subject of heated debate in the States. Legislatures have repeatedly taken up the matter on behalf of the People, and 35 States have put the question to the **[*733]** People themselves. In 32 of those 35 States, the People have opted to retain the traditional definition of marriage. Brief for Respondents in No. 14-571, pp. 1a-7a. That petitioners disagree with the result of that process does not make it any less legitimate. Their civil liberty has been vindicated.

B

Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect.

The history of religious liberty in our country is familiar: Many of the earliest immigrants to America came seeking freedom to practice their religion without restraint. See McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, [103 Harv. L. Rev. 1409, 1422-1425 \(1990\)](#). When they arrived, they created their own havens for **[***668]** religious practice. **[****127]** *Ibid.* Many of these havens were initially homogenous communities with established religions. *Ibid.* By the 1780's, however, "America was in the wake of a great religious revival" marked by a move toward free exercise of religion. *Id.*, at 1437. Every State save Connecticut adopted protections for religious freedom in their State Constitutions by 1789, *id.*, at

1455, and, of course, the [First Amendment](#) enshrined protection for the free exercise of religion in the U.S. Constitution. But that protection was far from the last word on religious liberty in this country, as the Federal Government and the States have reaffirmed their commitment to religious liberty by codifying protections for religious practice. See, e.g., Religious Freedom Restoration Act of 1993, 107 Stat. 1488, [42 U.S.C. §2000bb et seq.](#); [Conn. Gen. Stat. §52-571b](#) (2015).

Numerous *amici*—even some not supporting the States—have cautioned the Court that its decision here will “have unavoidable and wide-ranging implications for religious liberty.” Brief for General Conference of Seventh-day Adventists et al. as *Amici Curiae* 5. In our society, marriage **[*734]** is not simply a governmental institution; it is a religious institution as well. *Id.*, at 7. Today's decision might change the former, but it cannot change **[****128]** the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty in a single paragraph, [ante, at ____](#), [192 L. Ed. 2d, at 634](#). And even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for “religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.” *Ibid.* Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.⁷

⁷Concerns about threats to religious liberty in this context are not unfounded. During the hey day of antiscegenation laws in this country, for instance, Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies. Va. Code Ann. §20-60 (1960).

[2639]** Although **[****129]** our Constitution provides some protection against such governmental restrictions on religious practices, the People have long elected to afford broader protections than this Court’s constitutional precedents mandate. Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority’s decision short-circuits that process, with potentially ruinous consequences for religious liberty.

[*735] IV

Perhaps recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the “dignity” of same-sex couples. *Ante*, at _____, _____, 192 L. Ed. 2d, at 619, **[***669]** 625, 633, 635.⁸ The flaw in that reasoning, of course, is that the Constitution contains no “dignity” Clause, and even if it did, the government would be incapable of bestowing dignity.

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that “all men are created equal” and “endowed by their Creator with certain unalienable Rights,” they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

⁸The majority also suggests that marriage confers “nobility” on individuals. *Ante*, at _____, 192 L. Ed. 2d, at 619. I am unsure what that means. People may choose to marry or not to marry. The decision to do so does not make one person more “noble” **[****130]** than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.

The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.

The majority’s musings are thus deeply misguided, but at least those musings can have no effect on the dignity of the persons the majority **[****131]** demeans. Its mischaracterization of the arguments presented by the States and their *amici* can **[*736]** have no effect on the dignity of those litigants. Its rejection of laws preserving the traditional definition of marriage can have no effect on the dignity of the people who voted for them. Its invalidation of those laws can have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage. And its disdain for the understandings of liberty and dignity upon which this Nation was founded can have no effect on the dignity of Americans who continue to believe in them.

* * *

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One’s liberty, not to **[**2640]** mention one’s dignity, was something to be shielded from—not provided by—the State. Today’s decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on “due process” to afford substantive rights, disregards the most plausible understanding of the “liberty” protected by that clause, and distorts the principles on which this Nation was founded. Its decision will have inestimable consequences for our Constitution **[****132]** and our society. I respectfully dissent.

Justice Alito, with whom Justice Scalia and Justice Thomas join, dissenting.

Until the federal courts intervened, the American people were engaged in a debate about whether their States [***670] should recognize same-sex marriage.¹ The question in these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.

[*737] I

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term “liberty” in the [Due Process Clause of the Fourteenth Amendment](#) encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today’s majority, it has a distinctively postmodern [****133] meaning.

To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that “liberty” under the [Due Process Clause](#) should be understood to protect only those rights that are “‘deeply rooted in this Nation’s history and tradition.’” [Washington v. Glucksberg](#), 521 U.S. 702, 720-721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights. See [United States v. Windsor](#), 570 U.S. 744, 808, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808, 830 (2013) (Alito, J., dissenting). Indeed:

“In this country, no State permitted same-sex

marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See [Goodridge v. Department of Public Health](#), 440 Mass. 309, 798 N. E. 2d 941. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.

“What [those arguing in favor of a constitutional right to same-sex marriage] seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have [*738] cause for both caution and humility.” [Id.](#), at 809, 133 S. Ct. 2675, 186 L. Ed. 2d 808, 851 (footnote omitted).

For today’s majority, it does not matter [****134] that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in [**2641] the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

II

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to same-sex couples. This reasoning is dependent upon a particular understanding [***671] of the purpose of civil marriage. Although the Court expresses the point in loftier terms, its argument is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides emotional fulfillment and the promise of support in times of need. And by benefiting persons who choose to wed, marriage indirectly benefits society

¹I use the phrase “recognize marriage” as shorthand for issuing marriage licenses and conferring those special benefits and obligations provided under state law for married persons.

because persons who live in stable, fulfilling, and supportive relationships make better citizens. It is for these reasons, the argument goes, that States encourage and formalize marriage, confer [****135] special benefits on married persons, and also impose some special obligations. This understanding of the States' reasons for recognizing marriage enables the majority to argue that same-sex marriage serves the States' objectives in the same way as opposite-sex marriage.

This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.

[*739] Adherents to different schools of philosophy use different terms to explain why society should formalize marriage and attach special benefits and obligations to persons who marry. Here, the States defending their adherence to the traditional understanding of marriage have explained their position using the pragmatic vocabulary that characterizes most American political discourse. Their basic argument is that States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere [****136] for raising children. They thus argue that there are reasonable secular grounds for restricting marriage to opposite-sex couples.

If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed. Today, for instance, more than 40% of all children in this country are born to unmarried women.² This development undoubtedly

is both a cause and a result of changes in our society's understanding of marriage.

While, for many, the attributes [****137] of marriage in 21st-century America have changed, those States that do not want to [**2642] recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to [*740] marriage's further decay. It is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and [***672] others with similar cultural roots, but also in a great variety of countries and cultures all around the globe.

As I wrote in *Windsor*:

"The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.

"We can expect [****138] something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to

² See, e.g., Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, J. Martin, B. Hamilton, M. Osterman, S. Curtin, & T. Matthews, Births: Final Data for 2013, 64 National Vital Statistics Reports, No.

1, p. 2 (Jan. 15, 2015), online at http://www.cdc.gov/nchs/data/nvsr/nvsr64nvsr64_01.pdf (all Internet materials as visited June 24, 2015, and available in Clerk of Court's case file); cf. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics (NCHS), S. Ventura, Changing Patterns of Nonmarital Childbearing in the United States, NCHS Data Brief, No. 18 (May 2009), online at <http://www.cdc.gov/nchs/data/databrief/db18.pdf>.

come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. Others think that recognition of same-sex marriage will fortify a now-shaky institution.

“At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution [*741] simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people [****139] through their elected officials.” 570 U.S., at 809-810, 133 S. Ct. 2675, 186 L. Ed. 2d 808 at 852 (dissenting opinion) (citations and footnotes omitted).

III

Today’s decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. *E.g., ante, at* —, 192 L. Ed. 2d, at 624-625. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.

Perhaps recognizing how its reasoning may be

used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. Ante, at —, 192 L. Ed. 2d, at 633-634. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses [***673] of their homes, but if they repeat [**2643] those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

The system of federalism established by [****140] our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection for conscience rights. The majority [*742] today makes that impossible. By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.

Today’s decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. Even enthusiastic supporters of same-sex marriage should worry about the scope [****141] of the power that today’s majority claims.

Today’s decision shows that decades of attempts to restrain this Court’s abuse of its authority have failed. A lesson that some will take from today’s decision is that preaching about the proper method

of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.

Most Americans—understandably—will cheer or lament today's decision because of their views on the issue of same-sex marriage. But all Americans, whatever their thinking on that issue, should worry about what the majority's claim of power portends.

References

U.S.C.S., [Constitution, Amendment 14](#)

3 Civil Rights Actions P 12B.02 (Matthew Bender)

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Marriage § 1

L Ed Index, Homosexuality; Marriage

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concerning or affecting, homosexuals, under
Federal Constitution--Supreme Court cases. [134 L.
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Court cases. *96 L. Ed. 2d 716*.

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Amendments](#). *47 L. Ed. 2d 975*.

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aspects of the right of privacy. *43 L. Ed. 2d 871*.



Caution

As of: October 18, 2026 7:03 AM Z

Ohno v. Yasuma

United States Court of Appeals for the Ninth Circuit

May 9, 2012, Argued and Submitted, Pasadena, California; July 2, 2013, Filed

No. 11-55081

Reporter

723 F.3d 984 *; 2013 U.S. App. LEXIS 13496 **; 2013 WL 3306351

NAOKO OHNO, an individual, Plaintiff-Appellee,
v. YUKO YASUMA, an individual; SAINTS OF
GLORY CHURCH, a California corporation,
Defendants-Appellants.

Prior History: **[**1]** Appeal from the United
States District Court for the Central District of
California. D.C. No. 2:10-cv-06400-ODW-PJW.
Otis D. Wright, District Judge, Presiding.

Core Terms

church, domestic, repugnant, religious, state action,
public policy, cause of action, money judgment,
foreign-country, infliction of emotional distress,
religious belief, foreign judgment, saint, district
court, glory, tort law, religious freedom, religion,
constitutional scrutiny, undue influence,
government action, tort liability, emotional, comity,
religious entity, non-recognition, state actor,
arbitrate, sincerely, deprive

Case Summary

Procedural Posture

Defendants, a church and challenged a judgment of
the United States District Court for the Central
District of California awarding plaintiff, pursuant to
California's Uniform Foreign-Country Money
Judgments Recognition Act, [Cal. Code Civ. Proc.
§§ 1713-1724](#), monetary relief ordered by the
courts of Japan.

Overview

Enforcement, by the district court, of the Japanese
damages award pursuant to [Cal. Code Civ. Proc. §§
1715, 1716](#) did not render the imposition of tort
liability domestic state action, subject to
constitutional constraints. Thus, the district court's
order did not directly violate the Federal or
California Constitution. Nor was the Japanese
judgment or the underlying cause of action so
antithetical to the protections afforded by the [Free
Exercise Clause of the U.S. Constitution](#) and the
corresponding protections of religious freedom in
the California Constitution as to permit, let alone
require, non-recognition under California's Uniform
Act by reason of repugnancy to public policy under
[§ 1716\(c\)](#).

Outcome

The court affirmed the district court's order.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Religion > Free Exercise of
Religion

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Speech > Scope

[HN1](#) While private religious speech is as fully
protected under the Free Speech Clause as secular
private expression, it receives preferential treatment
under the [Free Exercise Clause](#).

Civil Procedure > Judgments > Enforcement & Execution > General Overview

HN2 The terms "recognition" and "enforcement" are distinct. Recognition of a judgment is a prerequisite to its enforcement. In recognizing a judgment, a court acknowledges that a matter has been conclusively adjudicated and that the judgment may have preclusive effect. In enforcing a judgment, a court uses its coercive powers to order the relief granted by the foreign court.

Civil Procedure > Judgments > Enforcement & Execution > Foreign Judgments

Business & Corporate Compliance > Foreign Judgments

HN3 In international diversity cases, enforceability of judgments of courts of other countries is generally governed by the law of the state in which enforcement is sought. In California, the Uniform Foreign-Country Money Judgments Recognition Act regulates enforcement of a foreign damages award. [Cal. Code Civ. Proc. §§ 1713-1724](#).

Civil Procedure > Judgments > Enforcement & Execution > Foreign Judgments

Business & Corporate Compliance > Foreign Judgments

HN4 California's Uniform Foreign-Country Money Judgments Recognition Act provides that the courts of California shall recognize a foreign-country judgment for money damages that is final, conclusive, and enforceable where rendered, except if one or more of the mandatory grounds for non-recognition enumerated in [Cal. Code Civ. Proc. § 1716\(b\)](#), or discretionary grounds for non-recognition enumerated in [§ 1716\(c\)](#), applies. [§ 1716\(a\)](#). The exception in [§ 1716\(c\)\(3\)](#) provides that a court is not required to recognize a foreign-

country judgment if the judgment or the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of California or of the United States. [§ 1716\(c\)\(3\)](#).

Civil Procedure > Judgments > Enforcement & Execution > Foreign Judgments

Business & Corporate Compliance > Foreign Judgments

HN5 See [Cal. Code Civ. Proc. § 1716\(b\)](#).

Civil Procedure > Judgments > Enforcement & Execution > Foreign Judgments

Business & Corporate Compliance > Foreign Judgments

HN6 [Cal. Code Civ. Proc. § 1716\(c\)](#) provides that a court is not required to recognize a foreign-country money judgment if any of the following nine discretionary grounds for non-recognition exists: (1) lack of notice to the defendant; (2) fraud; (3) repugnancy of the foreign judgment or cause of action to public policy; (4) conflict with another final and conclusive judgment; (5) contrariness to an agreement between the parties regarding the resolution of disputes; (6) inconvenience of the foreign forum; (7) doubts about the integrity of the rendering court; (8) incompatibility of the judgment with the requirements of due process of law; and (9) a recovery under defamation law that provides less protection for freedom of speech and the press than is provided under the U.S. and California Constitutions.

Civil Procedure > Judgments > Enforcement & Execution > Foreign Judgments

Business & Corporate Compliance > Foreign Judgments

HN7 Under California's Uniform Foreign-Country

Money Judgments Recognition Act, the party seeking enforcement of a foreign judgment bears the initial burden of establishing that the judgment falls within the scope of the Act. [Cal. Code Civ. Proc. § 1715\(c\)](#). A foreign judgment conforms to the threshold requirements for recognition when it grants recovery of a sum of money, as required by [§ 1715\(a\)\(1\)](#); it is final, conclusive and enforceable in the foreign country, under [§ 1715\(a\)\(2\)](#); and it is not a judgment for taxes, a fine or other penalty, or a judgment in connection with domestic relations, barred from recognition under [§ 1715\(b\)](#).

Civil Procedure > Judgments > Enforcement & Execution > Foreign Judgments

Business & Corporate Compliance > Foreign Judgments

HN8 Once coverage under California's Uniform Foreign-Country Money Judgments Recognition Act is established, the presumption in favor of enforcement applies, and the party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in [Cal. Code Civ. Proc. § 1716\(b\)](#) or [\(c\)](#) exists. [§ 1716\(d\)](#). The repugnancy ground for non-recognition of foreign judgments is therefore an affirmative defense. [§ 1716\(d\)](#). This statutorily specified burden applies equally where the ground of repugnancy is an asserted violation of federal constitutional norms. Thus, the defendant has the burden of establishing the grounds it has raised for non-recognition of the judgment.

Civil Procedure > Judgments > Enforcement & Execution > Foreign Judgments

Business & Corporate Compliance > Foreign Judgments

HN9 Under California's Uniform Foreign-Country Money Judgments Recognition Act, [Cal. Code Civ. Proc. § 1716\(c\)](#), a court that determines a foreign-country money judgment or the cause of action on

which the judgment is based to be repugnant to public policy is not required to recognize the judgment, but, impliedly, may do so at its discretion. Conversely, if the foreign country's judgment is not repugnant to public policy, then, barring any other ground for non-recognition, the district court is required to enforce it.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Civil Rights Law > ... > Section 1983
Actions > Scope > Government Actions

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN10 The free speech provisions in *Cal. Const. art. I* do not always turn on state action. Like the [First Amendment Free Exercise Clause](#), however, the [free exercise clause](#) in *Cal. Const. art I, § 4* protects against only governmental action that burdens religious freedom.

Civil Procedure > Judgments > Enforcement & Execution > Foreign Judgments

Business & Corporate Compliance > Foreign Judgments

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Civil Rights Law > ... > Section 1983
Actions > Scope > Government Actions

HN11 Recognizing and enforcing a foreign-country money judgment is distinct from rendering that judgment in the first instance. A district court, in giving effect to a foreign judgment, has not participated in the action claimed to be unconstitutional. In the absence of such participation, a district court's recognition and enforcement of a foreign damages award does not

transform the underlying foreign court's ruling into domestic "state action" subject to constitutional scrutiny.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN12 Most rights secured by the Constitution are protected only against infringement by governments, so that the conduct allegedly causing the deprivation of a federal right must be fairly attributable to the State. If the action challenged here is not so attributable, then there is no state action and no violation of the [Free Exercise Clause of the U.S. Constitution](#) and the corresponding protections of religious freedom in the California Constitution.

Constitutional Law > Bill of Rights > General Overview

HN13 Foreign governments are not bound by the U.S. or California Constitutions. American notions of due process, for example, do not apply to foreign court proceedings against American citizens who have committed foreign crimes outside the United States. Neither the Fourth nor the [Fourteenth Amendments](#) are directed at foreign officials. Obviously, a foreign government is not bound by the requirements of the United States Constitution even when prosecuting a United States citizen. In particular, it is, of course, a commonplace that the [First Amendment](#) is a guarantee only against abridgment by government, federal or state.

Civil Procedure > Judgments > Enforcement & Execution > Foreign Judgments

Business & Corporate Compliance > Foreign Judgments

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

Constitutional Law > Bill of Rights > General Overview

HN14 As foreign-country court orders, like domestic contracts between private parties, are not, without more, subject to the constraints of American constitutional law, neither the laws of the foreign country nor the decisions of its courts constitute domestic "state action" for the purposes of a constitutional claim in the United States. The success of a defendant's direct constitutional arguments therefore depends upon showing that, through its enforcement by a domestic court, the judgment issued in the foreign country becomes action of the government, and so subject to constitutional scrutiny.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN15 Decisions of a domestic court in the United States do constitute governmental action. State action refers to exertions of state power in all forms, so that state action, for purposes of the Constitution, may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial action. Thus, the action of state courts and of judicial officers in their official capacities has long been regarded as action of the State within the meaning of the [Fourteenth Amendment](#), and so, too, has the action of federal courts.

Civil Rights Law > ... > Elements > Color of State
Law > General Overview

Civil Rights Law > ... > Section 1983
Actions > Scope > Government Actions

HN16 The state action requirement serves to avoid imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. Consistent with this approach, constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.

Civil Rights Law > ... > Elements > Color of State
Law > General Overview

Civil Rights Law > ... > Section 1983
Actions > Scope > Government Actions

HN17 There is a broadly applicable two-prong framework for analyzing when governmental involvement in private action is itself sufficient in character and impact that the government fairly can be viewed as responsible for the harm of which the plaintiff complains. The first prong asks whether the claimed constitutional deprivation resulted from the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. The second prong determines whether the party charged with the deprivation could be described in all fairness as a state actor.

Civil Rights Law > ... > Elements > Color of State
Law > General Overview

Civil Rights Law > ... > Section 1983
Actions > Scope > Government Actions

HN18 A tort action between private parties does not involve state action simply because the court in which the case is pursued is an organ of the state or federal government. Rather, a private tort action initiated in the United States may involve

governmental action subject to constitutional constraints where it is domestic substantive law that allows recovery.

Civil Rights Law > ... > Elements > Color of State
Law > General Overview

Civil Rights Law > ... > Section 1983
Actions > Scope > Government Actions

HN19 It is because tort liability stems from state substantive law that its imposition constitutes state action triggering constitutional scrutiny. Regardless of the form an American state's tort law takes, whether statutory or common law, it relies on the power of state government to regulate conduct. It is for that reason, and not simply because of judicial involvement, that the application of domestic tort law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power.

Civil Rights Law > ... > Elements > Color of State
Law > General Overview

Civil Rights Law > ... > Section 1983
Actions > Scope > Government Actions

HN20 The United States Supreme Court has articulated four tests for determining whether a non-governmental person's actions amount to state action: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test. The public function test treats private actors as state actors when they perform a task or exercise powers traditionally reserved to the government. The joint action test focuses on whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights. Joint action exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party or otherwise has so far insinuated itself into a position of interdependence

with the non-governmental party that it must be recognized as a joint participant in the challenged activity.

Civil Rights Law > ... > Elements > Color of State Law > Joint Ventures

Civil Rights Law > ... > Elements > Color of State Law > Traditional State Functions

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

HN21 The "public function" and "joint action" tests for determining whether a non-governmental person's actions amount to state action largely subsume the state compulsion and governmental nexus tests because they address the degree to which the state is intertwined with the private actor or action. The state compulsion test requires a showing that the state has exercised coercive power or has provided such significant encouragement, either overt or covert, that the private actor's choice must in law be deemed to be that of the State. Under the governmental nexus test, a private party acts under color of state law if there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

Civil Procedure > Judgments > Enforcement & Execution > Foreign Judgments

Business & Corporate Compliance > Foreign Judgments

HN22 A plaintiff's use of California's Uniform Foreign-Country Money Judgments Recognition Act as a litigant does not make her a state actor through the public function test. Although the court assuredly performs a public purpose, a private individual seeking a remedy from a court is seeking gain for him or herself, a purely private act. Merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-

conspirator with the judge.

Civil Procedure > Judgments > Enforcement & Execution > Foreign Judgments

Business & Corporate Compliance > Foreign Judgments

HN23 California law requires a court to recognize a final, conclusive foreign monetary award that is enforceable where rendered, *Cal. Code Civ. Proc. § 1716(a)*, without inquiry into the merits of the underlying judgment, once the court determines that there is no ground for nonrecognition under *§ 1716(b)* or *(c)* of the Uniform Foreign-Country Money Judgments Recognition Act.

Civil Procedure > Judgments > Enforcement & Execution > General Overview

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN24 In the context of *First Amendment* challenges to speech-restrictive provisions in private agreements or contracts, domestic judicial enforcement of terms that could not be enacted by the government has not ordinarily been considered state action. Court enforcement of a private agreement to limit a party's ability to speak or associate does not necessarily violate the *First Amendment*.

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Business & Corporate Compliance > Alternative Dispute Resolution > Judicial Review

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Civil Rights Law > ... > Section 1983
 Actions > Scope > Government Actions

Constitutional Law > ... > Fundamental
 Rights > Procedural Due Process > Scope of
 Protection

HN25 Mere confirmation of a private arbitration award by a district court is insufficient state action to trigger the application of the Due Process Clause.

Civil Procedure > Pretrial Matters > Alternative
 Dispute Resolution > Judicial Review

Business & Corporate Compliance > Alternative
 Dispute Resolution > Judicial Review

Civil Rights Law > ... > Elements > Color of State
 Law > General Overview

Civil Rights Law > ... > Section 1983
 Actions > Scope > Government Actions

Constitutional Law > ... > Fundamental
 Rights > Procedural Due Process > Scope of
 Protection

HN26 A court's mere approval of the use of arbitration does not create any state action lest all arbitrations be subject to due process limitations through the simple act of appealing the arbitrators' decisions to the court system.

Civil Procedure > Pretrial Matters > Alternative
 Dispute Resolution > Judicial Review

Business & Corporate Compliance > Alternative
 Dispute Resolution > Judicial Review

Civil Rights Law > ... > Elements > Color of State
 Law > General Overview

Constitutional Law > ... > Fundamental
 Rights > Procedural Due Process > Scope of
 Protection

HN27 The limited state involvement of converting an arbitration award into a judgment does not engender the same due process incidents required

with respect to an award originally assessed and imposed by a court.

Civil Rights Law > ... > Section 1983
 Actions > Scope > Government Actions

HN28 If, for constitutional purposes, every private right were transformed into governmental action by the mere fact of court enforcement of it, the distinction between private and governmental action would be obliterated.

Civil Procedure > Judgments > Enforcement &
 Execution > Foreign Judgments

Business & Corporate Compliance > Foreign
 Judgments

HN29 California's Uniform Foreign-Country Money Judgments Recognition Act permits, but does not require, courts to deny recognition to foreign monetary awards if either the judgment or the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of California or of the United States. [Cal. Code Civ. Proc. § 1716\(c\)\(3\)](#). Accordingly, courts examine whether either the Japanese law on which the judgment rests or the judgment issued meets the stringent standard for repugnancy under California law.

Civil Procedure > Judgments > Enforcement &
 Execution > Foreign Judgments

Business & Corporate Compliance > Foreign
 Judgments

Civil Procedure > Appeals > Standards of
 Review > De Novo Review

HN30 A court's determination that a foreign country's award of costs and fees was repugnant to American jurisprudence and thus unenforceable under state common law principles of comity, is a legal conclusion, subject to de novo review.

Judgments

Civil Procedure > Judgments > Enforcement &
Execution > Foreign Judgments

Business & Corporate Compliance > Foreign
Judgments

HN31 Absent a demonstrated ground for non-recognition, enforcement of a qualifying foreign-country money judgment is mandatory under California's Uniform Foreign-Country Money Judgments Recognition Act. [Cal. Code Civ. Proc. § 1716\(a\)](#).

Civil Procedure > Judgments > Enforcement &
Execution > Foreign Judgments

Business & Corporate Compliance > Foreign
Judgments

HN32 California courts have set a high bar for repugnancy under California's Uniform Foreign-Country Money Judgments Recognition Act. The standard, rooted in the public policy exception to the comity doctrine at common law, measures not simply whether the foreign judgment or cause of action is contrary to our public policy, but whether either is so offensive to our public policy as to be prejudicial to recognized standards of morality and to the general interests of the citizens. Thus, even where it is agreed that a foreign law offends public policy, it may still be applied in a limited context where the potential harm is minimal. Put another way, the public policy exception codified at [Cal. Code Civ. Proc. § 1716\(c\)\(3\)](#) does not apply unless a foreign-country judgment or the law on which it is based is so antagonistic to California or federal public policy interests as to preclude the extension of comity.

Civil Procedure > Judgments > Enforcement &
Execution > Foreign Judgments

Business & Corporate Compliance > Foreign

HN33 The revised Uniform Foreign-Country Money Judgment Act of 2005, on which California's Uniform Foreign-Country Money Judgments Recognition Act is based, retains the stringent test for finding a public policy violation applied by courts interpreting the previous version of the Act. Uniform Foreign-Country Money Judgments Recognition Act, 13 U.L.A. pt. II, § 4, cmt. 8, at 28 (Supp. 2011). According to that test, the commentary to the model Uniform Act explains, public policy is violated only if recognition or enforcement of the foreign country judgment would tend clearly to injure public health, the public morals, or the public confidence in the administration of law, or would undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel.

Civil Procedure > Judgments > Enforcement &
Execution > Foreign Judgments

Business & Corporate Compliance > Foreign
Judgments

HN34 The public policy inquiry under California's Uniform Foreign-Country Money Judgments Recognition Act rarely results in refusal to enforce a foreign country's judgment unless it is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense.

Civil Procedure > Judgments > Enforcement &
Execution > Foreign Judgments

Business & Corporate Compliance > Foreign
Judgments

HN35 The repugnancy standard under California's Uniform Foreign-Country Money Judgments Recognition Act is high, and infrequently met, applying only in clear-cut cases where the judgment or cause of action on which it is based is

contrary to fundamental notions of what is decent and just.

Civil Procedure > Judgments > Enforcement & Execution > Foreign Judgments

Business & Corporate Compliance > Foreign Judgments

HN36 The level of contravention of state law has to be high for the court to deny recognition of a foreign country's judgment on public policy grounds.

Civil Procedure > Judgments > Enforcement & Execution > Foreign Judgments

Business & Corporate Compliance > Foreign Judgments

HN37 Few judgments fall in the category of foreign country judgments that need not be recognized because they violate the public policy of the forum. It has long been the law that unless a foreign country's judgments are the result of outrageous departures from our own motions of civilized jurisprudence, comity should not be refused.

Civil Procedure > Judgments > Enforcement & Execution > Foreign Judgments

Business & Corporate Compliance > Foreign Judgments

HN38 Simple inconsistency between American state or federal law and foreign law does not render a foreign judgment unenforceable by reason of repugnancy. Foreign judgments are not to be tried afresh in U.S. courts, applying domestic concepts. Courts are not so provincial as to say that every solution of a problem is wrong because courts deal with it otherwise at home.

Civil Procedure > Judgments > Enforcement & Execution > Foreign Judgments

Business & Corporate Compliance > Foreign Judgments

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

HN39 Courts have declined to enforce foreign-country money judgments on grounds of repugnance to the public policy embodied in the [First Amendment](#), but only where there were stark differences between foreign and domestic law.

Civil Procedure > Judgments > Enforcement & Execution > Foreign Judgments

Business & Corporate Compliance > Foreign Judgments

HN40 In evaluating the repugnancy of a foreign cause of action, courts compare the legal basis for liability and the plaintiff's claims for relief in the foreign court with comparable grounds for suit in the United States. If American law recognizes generally parallel causes of action, the foreign cause of action cannot be said to be repugnant to American public policy. This assessment does not depend on whether the standards for evaluating a cause of action or the elements required to state a claim are identical under domestic and foreign law. Instead, courts necessarily focus on the fundamentals of the cause of action underlying the foreign judgment and defenses thereto, not the differences in the bodies of law or in the way in which remedies are afforded. That a particular cause of action does not exist, or that a particular claim would not be cognizable, in California does not obligate us to refuse enforcement of a judgment, as long as the existence of the cause of action is not itself repugnant to California public policy.

Torts > ... > Types of Damages > Compensatory

Damages > General Overview

Torts > Intentional Torts > General Overview

Torts > Negligence > General Overview

[HN41](#) Article 709 of the Japanese Civil Code, Minpō Civ. C. art. 709 (Japan), provides that a person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence.

Constitutional Law > ... > Fundamental

Freedoms > Freedom of Religion > Free Exercise of Religion

Torts > Remedies > Damages > General Overview

Torts > Intentional Torts > General Overview

Torts > Negligence > General Overview

[HN42](#) There is nothing repugnant to California public policy about providing a damages remedy for intentional or negligent injury to others' rights or protected interests. California tort law, and American tort law generally, does exactly that. [Cal. Civ. Code § 1714](#). And, while a party's status as a religious entity or believer may bear on certain relevant inquiries, such as whether the party may assert a defense under the [Free Exercise Clause of the U.S. Constitution](#) and the corresponding protections of religious freedom in the California Constitution, that does not render the party immune from liability under tort law. An entity's status as a news publication may bear on its assertion of a fair use defense but does not entitle it to immunity from liability under intellectual property laws.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Business & Corporate

Compliance > Contracts > Types of Contracts > Quasi Contracts

Contracts Law > Types of Contracts > Quasi Contracts

[HN43](#) The Supreme Court of California and California Courts of Appeal have recognized actions for relief under the equitable doctrine of unjust enrichment. A cause of action for unjust enrichment is recognized upon a showing that the defendant received benefit through another's known mistake, fraud, coercion or other tortious conduct. The doctrine applies where plaintiffs, while having no enforceable contract, nonetheless have conferred a benefit on defendant which defendant has knowingly accepted under circumstances that make it inequitable for the defendant to retain the benefit without paying for its value.

Constitutional Law > ... > Fundamental

Freedoms > Freedom of Religion > Free Exercise of Religion

Torts > General Overview

[HN44](#) American courts can recognize tort liability for acts assertedly motivated by religion. The [Free Exercise Clause of the U.S. Constitution](#) and the corresponding protections of religious freedom in the California Constitution do not bar tort claims against a religious entity or its members, so long as adjudicating the cause of action does not require a court to judge the validity of religious beliefs or interfere with ecclesiastical decisionmaking regarding self-governance or employment.

Constitutional Law > ... > Fundamental

Freedoms > Freedom of Religion > Free Exercise of Religion

Torts > General Overview

[HN45](#) The [Free Exercise Clause of the U.S. Constitution](#) and the corresponding protections of religious freedom in the California Constitution protections embrace two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct, including speech-based conduct such as solicitation, remains subject to regulation for the

protection of society. So recognizing, California courts have entertained claims of fraud, undue influence, and intentional infliction of emotional distress brought against religious entities by former members seeking recovery of donations and damages for harm. Religiously motivated gifts have been set aside on a strong showing of undue influence by religious advisors over the testamentary act.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Religion > Free Exercise of
 Religion

Constitutional Law > ... > Fundamental
 Freedoms > Judicial & Legislative Restraints > Time,
 Place & Manner Restrictions

HN46 With respect to speech related to solicitation for a religious cause, there is no categorical bar under domestic law to a claim in tort. The state is free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience. The preservation of the state's regulatory authority is important, given that speech may be the vehicle through which undue influence is exerted, depending on the context and manner in which it is conveyed.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Religion > Free Exercise of
 Religion

Torts > General Overview

HN47 There are definite limitations on what constitutes under California law a cognizable tort claim arising from facially religious conduct: No cause of action will be recognized where a plaintiff challenges the verity of religious statements or beliefs. Inquiry into the truth or falsity of religious beliefs is foreclosed by constitutional guarantees of religious freedom and that the courts may ask only whether the proponent of a particular religion holds his beliefs honestly and in good faith. And the California Court of Appeal has refused to entertain

actions that require the court to determine whether the actions of an individual not party to the lawsuit were induced by faith or coercive persuasion.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Religion > Free Exercise of
 Religion

Torts > Intentional Torts > Intentional Infliction of
 Emotional Distress > General Overview

HN48 Under the [*Free Exercise Clause of the U.S. Constitution*](#) and the corresponding protections of religious freedom in the California Constitution, claims of intentional infliction of emotional distress against churches or other religious entities based merely on threats of divine retribution will not be allowed to proceed, because such threats, like hell fire and damnation preaching, are protected religious speech and cannot form the basis of a claim for emotional distress.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Religion > Free Exercise of
 Religion

Torts > Intentional Torts > Intentional Infliction of
 Emotional Distress > General Overview

HN49 Under California law, suits alleging purely emotional injury due to such religious expression are not permitted, given that it is one of the functions of many religions to afflict the comfortable.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Religion > Free Exercise of
 Religion

Torts > ... > Types of Negligence Actions > Negligent
 Infliction of Emotional Distress > General Overview

HN50 California courts have declined to recognize a cause of action for negligent infliction of emotional distress as a result of religiously motivated conduct because religious organizations

owe no duty to members or former members with respect to these forms of emotional injury.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Religion > Free Exercise of
 Religion

Torts > ... > Types of Negligence Actions > Negligent
 Infliction of Emotional Distress > General Overview

HN51 The California Court of Appeal has barred recovery from religious entities for the negligent infliction of emotional distress not because liability necessarily offends the [Free Exercise Clause of the U.S. Constitution](#) and the corresponding protections of religious freedom in the California Constitutions, but rather because religious organizations have no duty of care to avoid causing their members emotional injury. If such a duty of care exists under a foreign country's law, this difference from California law does not denote repugnance to a public policy embodied in the Religion Clauses.

Torts > ... > Fraud & Misrepresentation > Actual
 Fraud > Elements

HN52 The tort of fraud under California law requires intent to defraud.

Torts > Intentional Torts > Intentional Infliction of
 Emotional Distress > Elements

HN53 To sustain a claim of intentional infliction of emotional distress in California, a plaintiff must show intent to cause, or reckless disregard for, emotional injury.

Contracts Law > ... > Affirmative
 Defenses > Coercion & Duress > General Overview

Torts > Business Torts > Unfair Business
 Practices > General Overview

HN54 Under California law, undue influence

consists in the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him or taking an unfair advantage of another's weakness of mind. [Cal. Civ. Code § 1575\(1\), \(2\)](#).

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Religion > Free Exercise of
 Religion

Torts > Remedies > Damages > General Overview

HN55 To invoke the protection of the [Free Exercise Clause of the U.S. Constitution](#) and the corresponding protections of religious freedom in the California Constitution against a judgment in tort, a defendant would have to demonstrate that imposing liability in damages substantially burdened its sincerely held religious beliefs or practices and that the state's justifications for that burden did not outweigh any infringement on the defendant's religious freedom, under the applicable standard of scrutiny. The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Religion > Free Exercise of
 Religion

HN56 A valid and neutral state law of general applicability, such as a domestic tort judgment that has the incidental effect of burdening the free exercise of religion, no longer must withstand the compelling interest test to survive constitutional scrutiny.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Religion > Free Exercise of
 Religion

[HN57](#) A religious objector has no federal constitutional right to an exemption from a neutral and valid state law of general applicability on the ground that compliance with that law is contrary to the objector's religious beliefs.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Religion > Free Exercise of
 Religion

[HN58](#) Under strict scrutiny, a law cannot be applied in a manner that substantially burdens a religious belief or practice unless the state shows that the law represents the least restrictive means of achieving a compelling interest.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Religion > Free Exercise of
 Religion

[HN59](#) The threshold requirement for a defense based on the [Free Exercise Clause of the U.S. Constitution](#) and the corresponding protections of religious freedom in the California Constitution is to show that one sincerely holds beliefs as religious views. Courts typically give credence to assertions of sincerely held religious beliefs in absence of any challenge to their sincerity or religious motives, and so long as they are not so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the [Free Exercise Clause](#). Next, the defendant would have to show that the order to pay damages to the plaintiff imposed a substantial or, in other words, legally significant, burden on its exercise of religion. A substantial burden must place more than an inconvenience on religious exercise; it must have a tendency to coerce individuals into acting contrary to their religious beliefs or exert substantial pressure on an adherent to modify his behavior and to violate his beliefs.

Torts > Remedies > Damages > General Overview

[HN60](#) The burden of tort damages is direct. While a tort damages judgment does not criminalize the conduct for which liability is imposed, it effectively makes the challenged actions unlawful.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Religion > Free Exercise of
 Religion

Torts > General Overview

[HN61](#) The United States Supreme Court has rejected the notion that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. Accordingly, that a defendant's conduct may have been motivated by religious convictions does not shield it from tort liability for injuries engendered by its actions.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Religion > Free Exercise of
 Religion

[HN62](#) A law of general application that implicates the [Free Exercise Clause](#) in conjunction with other constitutional protections, such as freedom of speech and of the press, remains subject to strict scrutiny.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Religion > Free Exercise of
 Religion

Torts > General Overview

[HN63](#) Where a defendant contends that the imposition of tort liability burdens its religious speech, a case might qualify as a hybrid one in an American court, triggering strict scrutiny under federal constitutional law.

Civil Procedure > ... > Summary

Judgment > Opposing Materials > Motions for
Additional Discovery

HN64 It is not enough to rely on vague assertions that discovery will produce needed, but unspecified, facts. The evidence sought in a [Fed. R. Civ. P. 56\(f\)](#) motion must be more than the object of mere speculation.

Civil Procedure > Judgments > Enforcement &
Execution > Foreign Judgments

Business & Corporate Compliance > Foreign
Judgments

HN65 When an action is brought in a court of United States, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.

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Judges: Before: Harry Pregerson, Susan P. Graber, and Marsha S. Berzon, Circuit Judges. Opinion by Judge Berzon.

Opinion by: Marsha S. Berzon

Opinion

SUMMARY*

Diversity/California's Uniform Foreign-Country Money Judgments Recognition Act

The panel affirmed the district court's judgment in favor of plaintiff awarding her, pursuant to California's Uniform Foreign-Country Money Judgments Recognition Act, [Cal. Civ. Proc. Code §§ 1713-1724](#), monetary relief ordered by the courts of Japan.

Plaintiff sued Yuko Yasuma and the Saints of Glory Church (collectively, "the Church") in Japan, alleging that they had tortiously induced her to transfer **[**2]** nearly all of her assets to the Church. The Japanese courts awarded plaintiff a \$1.2 million tort judgment. Plaintiff sought enforcement of the judgment in the United States District Court for the Central District of California. The Church asserted that the district court was both constitutionally and statutorily required to refuse recognition of the Japanese judgment because (1) the judgment burdened free exercise of religion in violation of the Religion Clauses; and (2) the judgment was not entitled to recognition or enforcement under the Uniform Act, because it was "repugnant to the public policy" embodied in the Religion Clauses.

The panel held: first, the district court's enforcement of this foreign-country money judgment did not constitute domestic state action

*This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

triggering constitutional scrutiny; and, second, neither the judgment at issue in this particular case nor the cause of action on which it was based was so repugnant to public policy as to qualify for non-enforcement under the Uniform Act.

BERZON, Circuit Judge:

[*986] Our case involves novel issues concerning the enforcement of foreign-country money judgments that assertedly implicate the defendant's freedom of religion. Naoko **[**3]** Ohno sued Yuko Yasuma and the Saints of Glory Church (collectively, "the Church") in Japan, alleging that they had tortiously induced her to transfer nearly all of her assets to the Church. The Japanese courts awarded Ohno a \$1.2 million tort judgment.

The Church contends that the judgment imposes liability for its religious teachings, **[*987]** in violation of its constitutional right to free exercise of religion.¹ The Church makes two principal arguments on appeal: (1) that the district court's recognition and enforcement² of the Japanese

judgment is unconstitutional as a direct violation, by the court, of the [Free Exercise Clause](#) in the U.S. Constitution and the parallel provisions of the California Constitution, [U.S. Const. amend. I](#); [Cal. Const. art. I, § 4](#);³ and (2) that the Japanese judgment is not entitled to recognition or enforcement under California's Uniform Foreign-Country Money Judgments Recognition Act, [Cal. Civ. Proc. Code §§ 1713-1724](#) ("Uniform Act"), because it is "repugnant to the public policy" embodied in the Religion Clauses.

We hold, first, that the district court's recognition and enforcement of the Japanese money judgment does not constitute "state action" triggering direct constitutional scrutiny and, second, that neither the Japanese judgment nor the cause of action on which it was based rises to the level of repugnance to the public policy of California or of the United States that would justify a refusal to enforce the judgment under the Uniform Act. Accordingly, we affirm the district court's judgment in Ohno's favor.

I. BACKGROUND

A. Facts and Procedural History

Ohno, a citizen of Japan, sued the Church in Tokyo District Court. **[**6]** She received a favorable judgment, upheld on appeal to Tokyo's High Court. Ohno then initiated an action for recognition and enforcement of the judgment in the United States District Court for the Central District of California, as Yasuma is a resident of Los Angeles and the Saints of Glory Church ("Saints of Glory") is a registered California religious corporation.

¹Although the Church raises both free speech and free exercise claims, the speech at issue was either religious in content or, allegedly, motivated by **[**4]** religious beliefs. [HN1](#) While "private religious speech . . . is as fully protected under the [Free Speech Clause](#) as secular private expression . . . [it] receives preferential treatment under the [Free Exercise Clause](#)." [Capitol Square Review & Advisory Bd. v. Pinette](#), 515 U.S. 753, 760, 767, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995). Because the right to religious freedom affords a higher degree of protection than would the [Free Speech Clause](#) in this case, we analyze the Church's claims under the [Free Exercise Clause of the U.S. Constitution](#) and corresponding provisions of the [California Constitution, Article I, Section 4](#), not separately under the free speech provisions.

²[HN2](#) The terms "recognition" and "enforcement" are distinct. See [Restatement \(Third\) of Foreign Relations Law § 481 cmt. b](#) (1987). Recognition of a judgment is a prerequisite to its enforcement. In recognizing a judgment, a court acknowledges that a matter has been conclusively adjudicated and that the judgment may have preclusive effect. In enforcing a judgment, a court "uses its coercive powers to order the relief granted by the foreign court." Office of the Chief Counsel for International Commerce, U.S. Dep't of Commerce, *Recognition and Enforcement of Foreign* **[**5]** *Money Judgments* <http://www.osec.doc.gov/ogc/occic/refmj.htm> (last visited May 29, 2013). As the distinction between the two concepts is not pertinent for the purposes of this opinion, we use the terms recognition and

enforcement interchangeably to denote the district court's decision to enter judgment in favor of Ohno, awarding her the monetary relief ordered by the courts of Japan.

³Throughout this opinion, we refer to the [Free Exercise Clause of the U.S. Constitution](#) and the corresponding protections of religious freedom in the California Constitution as "the Religion Clauses."

i. The Japanese Litigation

The following facts are summarized from the findings of the Tokyo trial court, as set forth in its judgment of August 28, 2009:

Ohno joined Saints of Glory in 1994 while working in London. Three years **[*988]** later, Ohno began regularly participating in prayer meetings, bible study, and worship at a branch of Saints of Glory in Tokyo. Part of the Church's program in Tokyo was playing for worshipers there tape recordings of sermons given every Sunday in California by Saints of Glory's principal pastor, Yasuma. Ohno listened to the tapes while attending church in Tokyo. Saints of Glory preached obedience to Jesus Christ and to Yasuma. Members were required to tithe one-tenth of their incomes, which Ohno did.⁴

Ohno was obedient to Yasuma's advice and teachings in various areas of her life. For example, when Ohno learned that her father was terminally ill, Yasuma "stated something negative about [Ohno] going to see her father," so Ohno did not return home to see him before he died and did not attend his funeral. Later, after Ohno informed Yasuma that she had lost her job, the Church convinced Ohno to live with another "church member in the same situation," in what we infer from the record was a Church-owned or Church-affiliated residence in Tokyo. Also, after Yasuma repeatedly made negative statements about medications, Ohno ceased taking the anti-depressants and tranquilizers she had been prescribed when she was diagnosed with depression years earlier. At Yasuma's instruction, Ohno purchased Saints of Glory videos and books, which she began watching and reading repeatedly. Finally, the Church told Ohno not to purchase her own apartment when she tried to do so, and admonished her for negotiating a reduction in her rent.

Following **[**8]** all these events, and while suffering from both depression and general ataxia (a lack of muscle coordination due to damage to the nervous system), Ohno "became obsessed with a sense of guilt that she had not obeyed Jesus Christ." After Yasuma encouraged Ohno to make "givings" in late 2001, Ohno gave Yasuma and another church minister each 800,000 Yen.⁵ Then, on January 2, 2002, Yasuma "took several hours to talk to [Ohno], in a talk referred to as "'Warnings" [or "Reprimands"], pressuring her to tithe" (alteration in original). After the talk, Ohno felt "overcome with terror and compelled to tithe." Over the span of two months, Ohno closed her savings account and transferred 68,678,424 Yen to Saints of Glory, virtually all of Ohno's assets at that time.

A year after these transfers ("the Transfers"), Ohno was told she would be "driven out" of Saints of Glory because she "had not been obedient to Jesus Christ." The following May, the Church ordered her to leave the apartment where she was living. On the advice of her psychiatrist, Ohno then resumed taking medications for her depression. She also began participating in religious **[**9]** services at a different church.

Ohno eventually came to believe that she had been defrauded by the Church. She filed a complaint in 2007 in Tokyo District Court, asserting tort and unjust enrichment claims against Yasuma, Saints of Glory, and two other individual defendants not parties to the present enforcement action. The dispute centered on the circumstances in which Ohno had transferred the approximately \$500,000 to Saints of Glory between January and March 2002, leaving her essentially destitute. Ohno contended that the Transfers took place as a result of the Church's "fraudulent and threatening **[*989]** statements" to her while she was in a vulnerable mental and physical state. The Church argued that the contested Transfers were faith-based donations, and that Ohno sought return of the money because

⁴ In the Japanese lawsuit, Ohno did not contest the voluntariness or seek restitution of these routine **[**7]** tithes. She challenged only the substantial transfers of money that she made to the Church between January and March 2002, referred to in this opinion as "the Transfers."

⁵ Ohno did not contest or seek restitution of these donations.

she no longer believed in the Church's teachings.

The litigation in Japan lasted over two years and involved several hearings, various filings, and a full merits trial, in which Yasuma and Saints of Glory appeared through counsel. The Tokyo District Court's judgment held Yasuma and Saints of Glory liable under Japanese Civil Code articles 709, 719, and 715, for illegally inducing Ohno to tithe **[**10]** "in such a way as to incite anxiety and cause terror to the Plaintiff who was already in [a] state of depression and was suffering from general ataxia." The Tokyo trial court concluded that Ohno's decision to give the Transfers "under such psychological condition" could not be said to have been made of her own free will, and awarded damages, including restitution of the 68,678,424 Yen Ohno had given to Saints of Glory in the disputed Transfers; 3,000,000 Yen for pain and suffering; and 7,200,000 Yen for attorney's fees. The total award was 78,878,424 Yen (\$843,235.66).

As to the grounds for the judgment, article 709 of the Japanese Civil Code, entitled "Damages in Torts," provides: "A person who has intentionally or negligently infringe[d] any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence." Minpō [Civ. C.] art. 709. Article 719 provides for joint and several liability of joint tortfeasors, Minpō [Civ. C.] art. 719, and article 715 provides for an employer's liability for the tortious actions of its employees, Minpō [Civ. C.] art. 715. The Japanese trial court did not specify precisely which right or legally **[**11]** protected interest the Church infringed; it stated only that the solicitation of donations from Ohno was illegal because it exceeded "the scope of what is socially appropriate."

Defendants appealed the judgment to the Tokyo High Court, which affirmed the lower court decision on all counts and dismissed the appeal.

ii. The Enforcement Action in Federal Court

Ohno next brought an international diversity action in the United States District Court for the Central District of California, seeking enforcement of the Japanese judgment against Yasuma and Saints of Glory under California's Uniform Act, [Cal. Civ. Proc. Code §§ 1713-1724](#). In opposition to Ohno's motion for summary judgment, the Church argued that the Religion Clauses bar recovery in tort for the consequences of protected religious speech, including threats of divine retribution, and prohibit a court from judging the validity of the Church's religious teachings. The Japanese judgment, the Church argued, was inconsistent with these principles. The Church further asserted that the Japanese judgment is not entitled to recognition, both because it is "repugnant" to public policy embodied in the Religion Clauses and because it "was obtained **[**12]** through procedures not compatible with the requirements of due process of law." In the alternative, the Church requested that the motion for summary judgment be continued to permit additional discovery relating to the Japanese proceedings.

The district court granted summary judgment in favor of Ohno and entered judgment jointly and severally against Yasuma and Saints of Glory, holding the Japanese judgment not repugnant to the Religion Clauses.⁶ It also denied the Church's request for a continuance under [Federal Rule of Civil Procedure 56\(f\)](#),⁷ **[*990]** citing the failure to identify with any specificity the facts sought through additional discovery and why the evidence to be obtained would preclude summary judgment. This timely appeal followed.

On appeal, the Church contends that the district

⁶The district court also held that the Japanese judgment was not incompatible with due process of law, but the Church has abandoned its due process arguments on appeal.

⁷Former [Rule 56\(f\) of the Federal Rules of Civil Procedure](#) became [Rule 56\(d\)](#) under the 2010 Amendments to the Federal Rules. Because the district court decision, the Church's briefs to this court, and the relevant case law in this circuit all refer to the former [Rule 56\(f\)](#), this opinion **[**13]** as well so refers to the rule currently codified as [Rule 56\(d\)](#).

court was both constitutionally and statutorily required to refuse recognition of the Japanese judgment because the judgment burdens free exercise of religion in violation of the Religion Clauses. As to the constitutional issue, the Church maintains that enforcement in the United States of a foreign-country judgment that would be violative of the Religion Clauses if issued by a domestic court is itself an exercise of state power, directly subject to constitutional constraints. Statutorily, the Church argues that a foreign-country judgment that impinges on American constitutional rights is necessarily repugnant to public policy, making its recognition under California's Uniform Act an abuse of discretion.

B. The Uniform Foreign-Country Money Judgments Recognition Act

HN3 In international diversity cases such as this one, "enforceability of judgments of courts of other countries is generally governed by the law of the state in which enforcement is sought." *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1212 (9th Cir. 2006) (en banc) (per curiam) ("Yahoo! **[**14]** II") (plurality opinion) (citing *Bank of Montreal v. Kough*, 612 F.2d 467, 469-70 (9th Cir. 1980)); see also *id.* at 1239-41 (Fisher, J., concurring in part and dissenting in part). In California, the Uniform Act regulates enforcement of the Japanese damages award at issue here. See *Cal. Civ. Proc. Code* §§ 1713-1724.

The present California foreign judgment enforcement statute was enacted in 2007 to replace the Uniform Foreign Money Judgments Recognition Act, formerly codified at *California Civil Procedure Code sections 1713-1713.8*, and applies to all recognition and enforcement actions commenced on or after January 1, 2008. See § 1724(a); see also *Manco Contracting Co. (W.L.L.) v. Bezdikian*, 45 Cal. 4th 192, 204, 85 Cal. Rptr. 3d 233, 195 P.3d 604 (2008). California's Act was modeled on the 2005 Uniform Foreign-Country Money Judgments Recognition Act, 13 U.L.A. pt.

II, at 18-38 (Supp. 2011), drafted by the National Conference of Commissioners on Uniform State Laws.⁸ See *Manco Contracting Co.*, **[*991]** 45 Cal. 4th at 198 (describing the background and purpose of the Uniform Act); *Lyustiger v. Lysustiger (In re Marriage of Lyustiger)*, 177 Cal. App. 4th 1367, 1369-70, 99 Cal. Rptr. 3d 922 (2009) (recounting the history of the Act in California).

HN4 California's Uniform Act provides that the courts of California "shall recognize **[**16]** a foreign-country judgment" for money damages that is final, conclusive, and enforceable where rendered, except if one or more of the mandatory grounds for non-recognition enumerated in § 1716(b), or discretionary grounds for non-recognition enumerated in § 1716(c), applies.⁹ §

⁸ As of June **[**15]** 2013, nineteen states have enacted the 2005 version of the Uniform Act, or some version thereof, and an additional three states have introduced bills proposing its enactment. See *Foreign-Country Money Judgments Recognition Act*, Uniform Law Commission, The National Conference of Commissioners on Uniform State Laws, <http://uniformlaws.org/Act.aspx?title=Foreign-Country> Money Judgments Recognition Act (last visited May 25, 2013). The earlier version of the Uniform Act, approved in 1962, was adopted by twenty-nine states plus the District of Columbia and the Virgin Islands. See Cedric C. Chao & Christine S. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 *Pepp. L. Rev.* 147, 150 (2001). The state law versions of the Uniform Act do not vary substantially from state to state. The more significant distinction lies between those states that have adopted some version of the Uniform Act and those that follow a common law standard stemming from the Supreme Court's decision in *Hilton v. Guyot*, 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895). See Chao & Neuhoff, 29 *Pepp. L. Rev.* at 148.

⁹ **HN5** Section 1716(b) provides in full:

A court of this state shall not recognize a foreign-country judgment if any of the following apply: (1) The judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law. (2) The foreign court did not have personal jurisdiction over the defendant. (3) The foreign court did not have jurisdiction over the subject matter.

Cal. Civ. Proc. Code § 1716(b).

HN6 Section 1716(c) provides that a court is "not required to

[1716\(a\)](#). The only exception at issue in this appeal is [§ 1716\(c\)\(3\)](#), which provides that a court is "not required to recognize a foreign-country judgment if . . . [t]he judgment or the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of [California] or of the United States." [§ 1716\(c\)\(3\)](#).

HN7 Under the Uniform Act, the party seeking enforcement of a foreign judgment bears the initial burden of establishing that the judgment falls within the scope of the Act. [§ 1715\(c\)](#). The parties here do not dispute that the Japanese judgment conforms to the threshold requirements for recognition: it grants recovery of a sum of money, as required by [§ 1715\(a\)\(1\)](#); it is final, conclusive and enforceable in Japan, under [§ 1715\(a\)\(2\)](#); and it is not a judgment for taxes, a fine or other penalty, or a judgment ****18** in connection with domestic relations, barred from recognition under [§ 1715\(b\)](#).

HN8 Once coverage under the Uniform Act is established, the presumption in favor of enforcement applies, and the party resisting recognition of a foreign-country judgment "has the burden of establishing that a ground for nonrecognition stated in subdivision [\[§ 1716\]\(b\)](#) or [\(c\)](#) exists." [§ 1716\(d\)](#); see also Uniform Foreign-Country Money Judgments Recognition Act, 13 U.L.A. pt. II, at 19 (Supp. 2011) (Prefatory Note). The repugnancy ground for non-recognition of foreign judgments is therefore an affirmative defense. See [§ 1716\(d\)](#). This statutorily specified burden applies equally where, as here, the ground of repugnancy is an asserted violation of federal

constitutional norms. See, e.g., [Sarl Louis Feraud Int'l v. Viewfinder, Inc.](#), 489 F.3d 474, 477-78 (2d Cir. 2007). Thus, the Church has the burden of establishing the grounds it has raised for non-recognition of the judgment.

II. DISCUSSION

This case presents questions of first impression in this circuit, relating to the enforcement ****992** of a foreign-country money judgment challenged on constitutional grounds.¹⁰ Specifically, we must consider the constitutional implications ****19** of enforcing such a judgment if the Religion Clauses would bar a court in the United States from rendering the same judgment in the first instance. Also at issue is whether a foreign-country money judgment that might be inconsistent with the Federal Constitution or a state constitution if issued by a domestic court is repugnant to public policy and therefore can be denied enforcement under the Uniform Act.¹¹

As we explain below, we do not reach the question of whether a domestic tort judgment parallel to the

recognize a foreign-country [money] judgment ****17** if" any of the following nine discretionary grounds for non-recognition exists: (1) lack of notice to the defendant; (2) fraud; (3) repugnancy of the foreign judgment or cause of action to public policy; (4) conflict with another final and conclusive judgment; (5) contrariness to an agreement between the parties regarding the resolution of disputes; (6) inconvenience of the foreign forum; (7) doubts about the integrity of the rendering court; (8) incompatibility of the judgment with the requirements of due process of law; and (9) a recovery under defamation law that provides less protection for freedom of speech and the press than is provided under the U.S. and California Constitutions. *Id.*

¹⁰ The only Ninth Circuit case that involved somewhat similar issues concerned a declaratory judgment action seeking to bar enforcement of a French *injunction*—not a money judgment—requiring an American company, Yahoo!, to restrict French users' access to certain online material on the basis of its content. [Yahoo! II](#), 433 F.3d 1199. The district court had held that enforcement of the order would violate the [First Amendment](#). [Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme](#), 169 F. Supp. 2d 1181, 1192-93 (N.D. Cal. 2001) ("Yahoo! I"), *rev'd en banc on other grounds*, 433 F.3d 1199 (9th Cir. 2006) (per curiam). Unlike here, however, no attempt had been made to enforce the French judgment in the United States. On appeal, a majority of the en banc panel agreed that the case ****20** should be dismissed, for lack of ripeness or lack of personal jurisdiction, and so did not reach the merits of any constitutional or repugnancy questions. [Yahoo! II](#), 433 F.3d at 1224.

¹¹ **HN9** Under the Uniform Act, [§ 1716\(c\)](#), a court that determines a foreign-country money judgment or the cause of action on which the judgment is based to be repugnant to public policy is "not required" to recognize the judgment, but—impliedly—may do so at its discretion. Conversely, if the Japanese judgment is not repugnant to public policy, then, barring any other ground for non-recognition, the district court was *required* to enforce it.

Japanese judgment would have been unconstitutional under the Religion Clauses had Ohno's suit been brought here. Instead, we conclude: first, that enforcement of this foreign-country money judgment by a domestic court does not constitute domestic state action triggering constitutional scrutiny; and, second, that neither the judgment at issue in this particular case nor the cause of action on which it is based is so repugnant to public policy as to qualify for non-enforcement **[**21]** under the Uniform Act.

A. Constitutional Challenge

The Church's direct constitutional challenge turns on whether the district court's enforcement of the damages award issued by a foreign sovereign amounted to domestic governmental action subject to the constraints of the Religion Clauses.¹²

[*993] [HN11](#) *Recognizing and enforcing a foreign-country money judgment is distinct from rendering that judgment in the first instance. The district court, in giving effect to the judgment issued in Japan, has not participated in the action the Church claims is unconstitutional—namely, judging the truth or falsity of the Church's religious*

teachings or imposing liability for the consequences of religious expression. In the absence of such participation, we conclude the district court's recognition and enforcement of the Japanese damages award in this case does not transform the underlying foreign court's ruling into domestic "state action" subject to constitutional scrutiny.

i. State Action

[HN12](#) "[M]ost rights secured by the Constitution are protected only against infringement by governments," so that "the conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State." [Lugar v. Edmondson Oil Co.](#), 457 U.S. 922, 936-37, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) **[**23]** (internal quotation marks omitted). If the action challenged here is not so attributable, then there is no "state action" and no violation of the Religion Clauses.

[HN13](#) Foreign governments, like the government of Japan, are not bound by the U.S. or California Constitutions. "[O]ur notions of due process," for example, do not apply "to foreign court proceedings against American citizens who have committed foreign crimes outside the United States." [United States v. Gecas](#), 120 F.3d 1419, 1430 (11th Cir. 1997) (en banc) (citing [Neely v. Henkel](#), 180 U.S. 109, 123, 21 S. Ct. 302, 45 L. Ed. 448 (1901)); see also [United States v. Ant](#), 882 F.2d 1389, 1395 n.8 (9th Cir. 1989) ("Neither the Fourth nor the [Fourteenth Amendments](#) are directed at Mexican officials") (quoting [Brulay v. United States](#), 383 F.2d 345, 348 (9th Cir. 1967)); [United States v. Peterson](#), 812 F.2d 486, 490 (9th Cir. 1987); [United States v. Rose](#), 570 F.2d 1358, 1361-62 (9th Cir. 1978); [Flynn v. Shultz](#), 748 F.2d 1186, 1197 (7th Cir. 1984) ("Obviously, the Mexican government is not bound by the requirements of our Constitution even when prosecuting a United States citizen"). In particular, "[i]t is, of course, a commonplace that the [First Amendment](#) **[**24]** is a guarantee only against abridgment by government, *federal or*

¹² [HN10](#) The free speech provisions in Article I of the California Constitution do not always turn on state action. See [Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8](#), 55 Cal. 4th 1083, 1093-94, 150 Cal. Rptr. 3d 501, 290 P.3d 1116 (2012); [Fashion Valley Mall, LLC v. NLRB](#), 42 Cal. 4th 850, 858, 870, 69 Cal. Rptr. 3d 288, 172 P.3d 742 (2007); [Robins v. Pruneyard Shopping Ctr.](#), 23 Cal. 3d 899, 910, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), *aff'd*, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980). Like the [First Amendment Free Exercise Clause](#), however, the [free exercise clause](#) in [Article I, section 4 of the California Constitution](#) protects against only governmental action that burdens religious freedom. See [Catholic Charities of Sacramento, Inc. v. Superior Court](#), 32 Cal. 4th 527, 561, 10 Cal. Rptr. 3d 283, 85 P.3d 67 (2004); [Vernon v. City of Los Angeles](#), 27 F.3d 1385, 1392-93 (9th Cir. 1994). Our discussion therefore applies to both the Federal and State Constitutions. We concentrate on federal state action precedents but do so with the understanding that **[**22]** the same state action principles apply under the California Constitution as well. As we conclude that there was no state action subject to constitutional scrutiny, we need not decide whether the California and federal [free exercise clauses](#) are otherwise coterminous.

state." [*Hudgens v. NLRB*, 424 U.S. 507, 513, 96 S. Ct. 1029, 47 L. Ed. 2d 196 \(1976\)](#) (emphasis added).

HN14 As foreign-country court orders, like domestic contracts between private parties, are not, without more, subject to the constraints of our constitutional law, neither the laws of Japan nor the decisions of its courts constitute domestic "state action" for the purposes of a constitutional claim in this country. The success of the Church's direct constitutional arguments therefore depends upon showing that, through its enforcement by a domestic court, the judgment issued in Japan becomes action of the government, and so subject to constitutional scrutiny.

HN15 Decisions of a domestic court in the United States do constitute governmental action. State action "refers to exertions of state power in all forms," [*Shelley v. Kraemer*, 334 U.S. 1, 20, 68 S. Ct. 836, 92 L. Ed. 1161 \(1948\)](#) (emphasis added), so that "[s]tate action, for purposes of the [Constitution], may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial action," [*Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179, 92 S. Ct. 1965, 32 L. Ed. 2d 627 \(1972\)](#) (emphasis added). Thus, "the action of state courts and of judicial [**25] officers in their official capacities [has long been] regarded as action of the State within the meaning of the *Fourteenth Amendment*," [*Shelley*, 334 U.S. at 14](#), [***994**] and so, too, has the action of federal courts, see [*Gathright v. City of Portland*, 439 F.3d 573, 576 n.2 \(9th Cir. 2006\)](#); cf. [*Hurd v. Hodge*, 334 U.S. 24, 31-36, 68 S. Ct. 847, 92 L. Ed. 1187 \(1948\)](#).

So there is no doubt that the district court's decision in this case applying California's Uniform Act—legislation that is itself the result of governmental action—constitutes state action for purposes of constitutional scrutiny. But that truism does not resolve our question, which is: Should the *substance* of the underlying Japanese monetary damages judgment, resulting from a lawsuit in

Japan between two private parties, be ascribed to the district court's enforcement of the judgment under the Uniform Act and so subjected to constitutional scrutiny? "Precisely when . . . judicial involvement in private litigation assumes constitutional dimensions is a problem that has perplexed courts and scholars for decades." [*Dahl v. Akin*, 630 F.2d 277, 280 \(5th Cir. 1980\)](#). Given the parallelism, for constitutional state action purposes, between private domestic action and the [**26] actions of foreign governments, essentially the same perplexities arise with regard to the enforcement of foreign judgments resulting from litigation abroad. We therefore rely on both contexts in our analysis.

a.

We begin our analysis with general state action precepts: At bottom, **HN16** the state action requirement serves to "avoid[] imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." [*Lugar*, 457 U.S. at 936](#). Consistent with this approach, "constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." [*Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S. Ct. 2777, 73 L. Ed. 2d 534 \(1982\)](#).

Lugar, a case concerning a private creditor's use of state courts to effectuate a prejudgment attachment, set forth **HN17** a broadly applicable two-prong framework for analyzing when governmental involvement in private action is itself sufficient in character and impact that the government fairly can be viewed as responsible for the harm of which the plaintiff complains. [*457 U.S. at 937-42*](#). The first prong asks whether the claimed constitutional deprivation resulted from "the exercise of some right or privilege [**27] created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." [*Id. at 937*](#). The second prong determines whether the

party charged with the deprivation could be described in all fairness as a state actor. *Id.* Domestic judicial enforcement of the Japanese judgment in this case satisfies neither prong of the [Lugar](#) framework.

As to the first prong, the Church does not challenge the constitutionality of the Uniform Act, facially or as applied. Instead, it challenges the constitutionality of the Japanese tort judgment Ohno seeks to enforce under the Uniform Act. As the source of the alleged constitutional harm is thus Japanese tort law, created by and enforced through Japanese governmental entities, the claimed constitutional deprivation cannot be traced to a right, privilege, or rule of conduct imposed by a domestic governmental entity or individual. *See id.*

The Church disagrees, relying on [Paul v. Watchtower Bible & Tract Society of New York, Inc.](#), 819 F.2d 875 (9th Cir. 1987). Paul held that the application of Washington tort law to establish damages liability for actions taken in furtherance of religious beliefs constitutes an exercise **[**28]** of state power, subject to constitutional scrutiny. *Id.* at 880-81. The Church's reliance on [Paul](#) is misplaced.

[*995] First, the district court here did not apply tort law; it applied California's Uniform Act, and did not re-try the facts of the case or re-assess the Church's liability for any injury alleged. Second, even if it could be said that the district court's recognition of the Japanese damages award is tantamount to directly imposing liability in the first instance—a proposition that we do not endorse—the tort law applied in this case is the law of Japan, not of California. As such, the *content* of the law is not attributable to a domestic state actor, and so its application to the Church's challenged conduct (all of which was conduct that took place in Japan or was specifically directed at Ohno in Japan) is not an exercise of domestic state power. The same logic applies to private tort suits initiated in the United States: [HN18](#) A tort action between private parties does not involve state action simply because

the court in which the case is pursued is an organ of the state or federal government. Rather, a private tort action initiated in the United States may involve governmental action **[**29]** subject to constitutional constraints where it is domestic substantive law that allows recovery. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 277-78, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

Paul applied an analysis similar to that in *New York Times*, explaining that [HN19](#) it was because tort liability stemmed from *state substantive law* that its imposition constituted state action triggering constitutional scrutiny. [Paul](#), 819 F.2d at 880. Expounding in *Paul*, we clarified that regardless of the form an American state's tort law takes—"whether statutory or common law"—it relies on the power of state government to regulate conduct. *Id.* (citing *New York Times*, 376 U.S. at 265). It is for that reason—and not simply because of judicial involvement—that "the application of [domestic] tort law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power." *Id.* Similarly, *Cohen v. Cowles Media Co.* held that a state court's application of the common law doctrine of promissory estoppel to enforce a newspaper's confidentiality agreement was subject to constitutional scrutiny, as an "application of state rules of law." 501 U.S. 663, 668, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991).

In short, only the tort law of **[**30]** Japan, and not the law of any state or the federal government, underlay the Japanese judgment. The first *Lugar* prong therefore does not apply.

Even if enforcement of the Japanese judgment satisfied the first prong of the [Lugar](#) framework, it would fail the second. Here, "the party charged with the deprivation" is not "a person who may fairly be said to be a state actor," where "state actor" means an actor for whom a domestic governmental entity is in some sense responsible. [Lugar](#), 457 U.S. at 937. Although the Japanese courts are organs of the State of Japan, they are not

organs of the federal or California government. And while the Japanese courts surely perform a public function in Japan, they were not compelled to conclude as they did by American law, or aided in their decision by the participation of an American governmental actor or entity.

Nor can Ohno, in bringing an enforcement suit under California's Uniform Act, be likened to a state actor. [HN20](#) "The Supreme Court has articulated four tests for determining whether a [non-governmental person's] actions amount to state action: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental **[**31]** nexus test." [Tsao v. Desert Palace, Inc.](#), 698 F.3d 1128, 1140 (9th Cir. 2012) (quoting [Franklin v. Fox](#), 312 F.3d 423, 444-45 (9th Cir. 2002)). Most relevant here are the "public function" and "joint action" tests¹³: **[*996]** The former treats private actors as state actors when they perform a task or exercise powers traditionally reserved to the government. See, e.g., [Jackson v. Metro. Edison Co.](#), 419 U.S. 345, 352, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974); [Terry v. Adams](#), 345 U.S. 461, 469-70, 73 S. Ct. 809, 97 L. Ed. 1152 (1953); [Marsh v. Alabama](#), 326 U.S. 501, 507-08, 66 S. Ct. 276, 90 L. Ed. 265 (1946). The latter focuses on "whether state officials and private

parties have acted in concert in effecting a particular deprivation of constitutional rights." [Tsao](#), 698 F.3d at 1140 (quoting [Franklin](#), 312 F.3d at 445). "Joint action" exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party, see, e.g., [Lugar](#), 457 U.S. at 941; [Flagg Bros. v. Brooks](#), 436 U.S. 149, 157, 164-65, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978); [Sniadach v. Family Fin. Corp. of Bay View](#), 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969); [Shelley](#), 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, or otherwise has "so far insinuated itself into a position of interdependence with [the non-governmental party] that it must be recognized **[**32]** as a joint participant in the challenged activity," [Tsao](#), 698 F.3d at 1140 (internal quotation marks omitted).

[HN22](#) Ohno's use of California's Uniform Act as a litigant does not make her a state actor through the public function test. Although the court assuredly performs a public purpose, a private individual seeking a remedy from a court is seeking gain for him or herself, a purely private act. "[M]erely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator . . . with the judge." [Dennis v. Sparks](#), 449 U.S. 24, 28, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980).

Nor does Ohno's invocation of the Uniform Act convert the underlying Japanese judgment into the joint action of Ohno and the State of California or the district court. Again, although California's Uniform Act creates the legal framework that may entitle the holder of a qualifying foreign-country money judgment to recognition and enforcement of that judgment in the courts, the Uniform Act is not the source of the substantive legal rights underlying the judgment enforced.

To be sure, the district court's enforcement order facilitates Ohno's efforts to recover in **[**34]** the United States the sum of money awarded by the Japanese court. But the district court, through its

¹³ [HN21](#) These two tests largely subsume the state compulsion and governmental nexus tests, because they address the degree to which the state is intertwined with the private actor or action. The state compulsion test requires a showing that "the state has 'exercised coercive power or has provided such significant encouragement, either overt or covert, that the [private actor's] choice must in law be deemed to be that of the State.'" [Johnson v. Knowles](#), 113 F.3d 1114, 1119 (9th Cir. 1997) (alteration in original) (quoting [Yaretsky](#), 457 U.S. at 1004). "Under the governmental nexus test, a private party acts under color of state law if 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.'" [Lopez v. Dep't of Health Servs.](#), 939 F.2d 881, 883 (9th Cir. 1991) (per curiam) (quoting [Jackson v. Metro. Edison Co.](#), 419 U.S. 345, 351, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974)). For simplicity, we refer only to the "public function" and "joint action" tests, but intend thereby to incorporate all **[**33]** four tests. Accordingly, our conclusion that Ohno is not a state actor for constitutional purposes encompasses all four state action tests articulated by the Supreme Court.

implementation of the procedures established by the Uniform Act, cannot be said to provide "significant assistance" to the *underlying* acts that the Church contends constituted the core violation of its [First Amendment](#) rights—namely, judicial scrutiny of the content of its religious beliefs and imposition of liability for the consequences of its [*997] religious expression. [HN23](#) California law *requires* a court to recognize a final, conclusive foreign monetary award that is enforceable where rendered, [Cal. Civ. Proc. Code § 1716\(a\)](#), without inquiry into the merits of the underlying judgment, once the court determines that there is no ground for nonrecognition under [§ 1716\(b\)](#) or [\(c\)](#) of the Uniform Act. The court's mandatory indifference to the underlying merits of the judgment Ohno is seeking to enforce refutes any characterization by the Church of Ohno's enforcement effort as a joint action with California or the federal judiciary as to the aspects of the Japanese judgment alleged to compromise the Church's religious freedom.

Notably, the cases in which the Supreme Court has held that private use [**35] of state-created procedures amounts to state action have, by and large, concerned due process challenges to the state procedures themselves or their application. Those cases have not addressed constitutional challenges to the underlying causes of action that prompted the non-governmental party's recourse to the state enforcement procedures. *See, e.g., Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988); *Lugar*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482; *Sniadach*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349.¹⁴

¹⁴In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991), the Court came closer than in the run of cases to imputing the substance behind a private party's use of a state procedure—that of peremptory challenges to strike prospective jurors from a venire—to the state itself. But unlike statutory schemes such as the Uniform Act, which exist to serve private purposes, the entire endeavor at issue in *Edmonson* serves governmental purposes—namely, conducting a civil trial. Through peremptory challenges, the state essentially delegates to private parties in a civil trial part of the public function of selecting a jury. *See id.* at 621-24.

For example, in *Sniadach*, the petitioner challenged the proceedings by which her wages were garnished, arguing that they violated due process. [395 U.S. at 339-40](#). She did not contend that the underlying contractual debt could not ultimately be judicially enforced because there was some aspect of the contract that, if mandated by the government, would constitute unconstitutional state action. *Id.* Here, in contrast, the Church's challenge is not to the procedures used to enforce the underlying Japanese judgment in federal court but to the substantive rights and defenses that gave rise to that judgment—which, for present purposes, is analogous to a private contract or debt, because not attributable to any domestic state action [**36] or state actors.

As to a final joint action consideration, it cannot be said that the federal or California government in any meaningful way accepts benefits derived from the allegedly unconstitutional actions. *See Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 926 (9th Cir. 2011). At most, the United States may gain some diplomatic benefit when it recognizes foreign-country judgments, manifested through increased reciprocity in the treatment of U.S. judgments abroad. But this benefit is, once again, independent of the content of the judgments [**37] recognized and so cannot be said to incorporate the allegedly unconstitutional acts underlying them.

In sum, neither the Uniform Act nor the district court's challenged enforcement at Ohno's behest of the Japanese money judgment meets the standards for state action, under the controlling [Lugar](#) framework, with regard to the substance of the Japanese judicial decision. Both the Act and the court's involvement in implementing it are assuredly governmental actions. But the purposely limited nature of that involvement undermines the attribution to domestic governmental actors of responsibility for the Japanese court's determination [*998] that the Church committed a tort by unfairly inducing Ohno to transfer all of her money to Saints of Glory, and so is liable to her for

damages.

b.

Consideration of the seminal civil rights case, [*Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161](#), does not alter our mode of analysis under the generally applicable [Lugar](#) framework or lead us to conclude otherwise. *Shelley* established that judicial enforcement of a legal right or obligation whose source is not domestic governmental action *can* constitute state action triggering constitutional scrutiny. See [id. at 20](#). Specifically, *Shelley* **[**38]** held that a state court's enforcement of racially restrictive housing covenants entered into between private land owners amounts to state action in violation of the [Equal Protection Clause](#). *Id.* The Court viewed the interposition of judicial coercive power to enforce racially discriminatory private agreements as governmental discrimination on the basis of race. [Id. at 20-21](#); see also [Barrows v. Jackson](#), 346 U.S. 249, 254, 258, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953) (applying the same state action principle to a court's award of damages for violation of a discriminatory private contract).

But *Shelley* has not been interpreted as meaning that domestic judicial enforcement of *any* monetary obligation necessarily transforms the circumstances that gave rise to that obligation into state action for constitutional purposes.¹⁵ Instead, *Shelley's*

attribution of state action to judicial enforcement has generally been confined to the context of discrimination claims under the [Equal Protection Clause](#). [HN24](#) In the context of [First Amendment](#) challenges to speech-restrictive provisions in private agreements or contracts, domestic judicial enforcement of terms that could not be enacted by the government has not ordinarily been considered **[**39]** state action. See, **[*999]** e.g., [Democratic Nat'l Comm. v. Republican Nat'l Comm.](#), 673 F.3d 192, 204-05 (3d Cir. 2012) ("The Supreme Court has declined to find state action where the court action in question is a far cry from the court enforcement in *Shelley*. . . . Court enforcement of a private agreement to limit a party's ability to speak or associate does not necessarily violate the [First Amendment](#)."), cert. denied, 133 S. Ct. 931, 184 L. Ed. 2d 751 (2013). Various state court decisions "enforce restrictions on speech arising from domestic contracts that could not have been enacted into law due to the [First Amendment](#)." Mark D. Rosen, *Exporting the Constitution*, 53 *Emory L.J.* 171, 174, 192-94 & nn.98-111 (2004) (compiling cases).¹⁶

reasoning. [Yahoo! II](#), 433 F.3d at 1201. To the extent that the opinions discussed the merits of the [First Amendment](#) question, a majority of the judges on the en banc panel assumed that the constitutionality of enforcing the challenged foreign judgment would depend on whether compliance with the French court's order would restrict Yahoo!'s dissemination of, and users' access to, speech in the United States. See [id. at 1220-22](#) (plurality opinion); [id. at 1234-35, 1244-45](#) (Fisher, J., concurring in part and dissenting in part).

¹⁵ Looking for precedents applying *Shelley* in the context of domestic enforcement of foreign judgments yields few helpful authorities. The Yahoo! district court, relying on *Shelley's* reasoning, refused to enforce a foreign judgment on [First Amendment](#) grounds, holding that domestic judicial enforcement of a foreign judgment constitutes state action with regard to the underlying foreign order, for constitutional purposes. [Yahoo! I](#), 169 F. Supp. 2d at 1189, rev'd on other grounds, [Yahoo! II](#), 433 F.3d 1199. **[**40]** Yahoo! I concerned a French injunction that imposed viewpoint-based restrictions on speech. As we discuss later, see Parts II.A.i.c, II.B.ii, the state action considerations with respect to enforcement of a foreign injunction differ from those that arise with respect to enforcement of an order to pay a sum of money.

Other courts addressing similar issues have held, without discussing state action directly or otherwise explaining their conclusion, that where a foreign judgment fails to comport with domestic constitutional requirements, "the refusal **[**41]** to recognize the judgment should be, and it is deemed to be, 'constitutionally mandatory.'" [Bachchan v. India Abroad Publ'ns Inc.](#), 154 Misc. 2d 228, 585 N.Y.S.2d 661, 662 (N.Y. Sup. Ct. 1992); see also [Viewfinder](#), 489 F.3d at 480 (holding "unenforceable" judgments that "impinge on [First Amendment](#) rights") (quoting [Bachchan](#), 585 N.Y.S.2d at 662, and [Yahoo! I](#), 169 F. Supp. 2d at 1189-90). Although those rulings may assume that judicial enforcement transforms the underlying foreign judgment into one adopted by and attributable to the domestic court, the opinions do not identify the basis for any such unarticulated assumption.

On appeal, we dismissed the *Yahoo! I* case for lack of personal jurisdiction and ripeness, without mentioning *Shelley* or its

¹⁶ See, e.g., [Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n](#), 26 Cal. 4th 1013, 1033-35, 111 Cal. Rptr. 2d 336, 29 P.3d 797

Similarly, in the context of judicial confirmation of arbitral awards, loosely analogous to recognition of foreign-country money judgments, the Eleventh Circuit has held that [HN25](#) "mere confirmation of a private arbitration award by a district court is insufficient state action to trigger the application of the *Due Process Clause*." [Davis v. Prudential Sec., Inc.](#), 59 F.3d 1186, 1192 (11th Cir. 1995). Other courts agree. [United States v. American Society of Composers, Authors & Publishers](#), 708 F. Supp. 95 (S.D.N.Y. 1989), [****43**] for example, held that [HN26](#) a court's "mere approval . . . of the use of arbitration did not create any state action" lest "all arbitrations . . . be subject to due process limitations through the simple act of appealing the arbitrators' decisions to the court system." *Id. at 97*. And the California Court of Appeal has made clear that [HN27](#) "the limited state involvement of converting the [arbitration] award into a judgment . . . [does] not engender the same due process incidents required with respect to an award originally assessed and imposed by a court." [Rifkind & Sterling, Inc. v. Rifkind](#), 28 Cal. App. 4th 1282, 1292, 33 Cal. Rptr. 2d 828 (1994).¹⁷

(2001) (upholding an injunction enforcing a lease provision prohibiting tenants from distributing unsolicited newspapers on the ground that "judicial enforcement of injunctive relief does not, by itself, constitute state action for purposes of California's free speech clause"); *State v. Noah*, 103 Wash. App. 29, 48-50, 9 P.3d 858 (2000) (judicial enforcement of a voluntary settlement agreement prohibiting public criticism of certain type of psychological therapy was not state action); [Linn Valley Lakes Prop. Owners Ass'n v. Brockway](#), 250 Kan. 169, 172-73, 824 P.2d 948 (1992) [****42**] (judicial enforcement of a restrictive covenant barring the posting of signs was not state action); cf. [CompuServe Inc. v. Cyber Promotions, Inc.](#), 962 F. Supp. 1015, 1026 (S.D. Ohio 1997) ("[T]he mere judicial enforcement of . . . trespass laws [of general application] by the private owner of property does not alone render [the owner] a state actor."); [Commonwealth v. Hood](#), 389 Mass. 581, 587-89, 452 N.E.2d 188 (1983) (holding that judicial enforcement of trespass statute of general application is not state action); but see [W. Hill Baptist Church v. Abbate](#), 261 N.E.2d 196, 200-01 (Ohio 1969) (judicial enforcement of restrictive covenant excluding houses of worship constitutes state action).

¹⁷In citing these cases, we do not mean to adopt or sanction any of their specific holdings. Instead, they are illustrative of the principle that *Shelley* has not been understood as applying generally to judicial enforcement of non-governmental agreements or decisions.

Courts' reluctance, since *Shelley*, to expand that case's holding too far beyond its original context stems from a concern for preserving a sphere for private action and private actors, not subject to the constitutional constraints designed to protect our populace from governmental control and overreaching. [****44**] [HN28](#) "[I]f, for constitutional purposes, every private right were transformed into governmental action by the mere fact of court enforcement of it, the distinction between private and governmental action would be obliterated." [Edwards v. Habib](#), 397 F.2d 687, 691, 130 U.S. App. D.C. 126 [***1000**] (D.C. Cir. 1968). Similarly, extending *Shelley*'s holding to judicial enforcement of foreign-country money judgments would effectively require foreign governments desiring American recognition of their judicial rulings to apply the substantive provisions of the U.S. Constitution in their courts whenever there is a defendant who could be sued for enforcement in the United States, regardless of where the conduct subject to adjudication occurred or who the litigants are. Such wholesale imposition of all aspects of our Constitution abroad is inconsistent with the principles of comity and respect for sovereignty underlying the recognition of foreign judgments.

For all these reasons, the district court's enforcement of the Japanese judgment does not render the substantive law applied by the Japanese court, or the judgment it reached in applying that law, domestic state action directly constrained by the California or U.S. Constitutions. [****45**] Consequently, contrary to the Church's contention, non-recognition of the judgment cannot be constitutionally mandatory.

c.

In so holding, we do not suggest that "all that matters" in the state action inquiry is whether an American entity "is the origin of the legal right" enforced in a domestic court. [Rosen](#), 53 *Emory L.J. at 207*. For example, there may be circumstances in which the nature of the enforcement action requires

the court to take such an active role in, or to exercise sustained supervision of, the underlying legal decision or the resulting allocation of rights that it becomes appropriate to view the court's activities as governmental actions with regard to the substance of the underlying decision or of the resulting order.

Such may well be the case, for example, with regard to the enforcement in a domestic court of some (or all) injunctions issued by foreign countries. Injunctions directly compel or forbid a party's actions, and thus may be seen as placing the domestic court's imprimatur behind the substance of the foreign court's order to that extent. Also, enforcement of injunctions implies the authority to exercise contempt and modification powers after the injunction issues; **[**46]** the exercise of such authority may entangle the enforcing court in the merits of the underlying dispute. Whether or not these aspects of injunctive relief could result in a determination that enforcement by a domestic court of a particular foreign injunction constitutes state action for constitutional purposes, those same considerations are not present where, as here, the enforcement is of an order to pay over a pre-determined amount of money. In the latter instance, the connection between the narrow domestic court order and the asserted violation by the foreign court of substantive rights protected by our Constitution is simply too attenuated, without more, to attribute responsibility for the merits of the underlying judgment to a domestic state actor. And, standing alone, the order—to pay money to someone—does not mandate a constitutionally protected act.

ii. Application of the [First Amendment](#) to the Church's Conduct

Because the Church's constitutional claim fails at the state action stage, we need not decide directly whether the [First Amendment's](#) protections actually do reach the assertedly religious expression at issue in the Japanese suit. As three judges noted in *Yahoo! II*, "[t]he **[**47]** extent of [First Amendment](#)

protection of speech accessible solely by those outside the United States is a difficult and, to some degree, unresolved issue" and "the extent—indeed the very existence—of such an extraterritorial right under the [First Amendment](#) [to publish speech in violation of foreign law] is uncertain." [433 F.3d at 1217, 1221](#) **[*1001]** (plurality opinion). Nor has any court yet decided whether the [First Amendment's Free Exercise Clause](#) applies to religious expression initiated domestically but directed to a foreign audience.

Ohno was in Japan at all relevant times, and the Church communicated with her there.¹⁸ Absent demonstrated impact of the Japanese judgment on conduct in the United States, the only constitutional question we face would "involve a determination whether the [First Amendment](#) has extraterritorial application"—a determination this Court declined to make in [Yahoo! II](#), [433 F.3d at 1217-18, 1222](#) (plurality opinion); see also [id. at 1234-35, 1244-45](#) (Fisher, J., concurring in part and dissenting in part), and which we likewise decline to make here.¹⁹ Having concluded that the enforcement of the judgment does not amount to state action, we reserve for another day the task **[**48]** of tracing the [First Amendment's](#) reach beyond our borders.

¹⁸ The Japanese court's findings indicate that the Church intentionally directed its allegedly religious speech to Ohno in Japan. The court found, for example, that "[o]n January 2, 2002, . . . Yasuma took several hours to talk to Ohno [on January 2, 2002], . . . pressuring her to tithe," (emphasis added) and that this talk ultimately led Ohno to make the contested transfers to Saints of Glory. The findings also show that as a general matter, the Church sent recordings of each of Yasuma's sermons to Japan, to be played to its members there. The Church does not dispute that the events at issue "occurred chiefly in Japan." Although it is not clear whether Yasuma came to Japan or whether, instead, the Church sent a copy of her speech to Japan, we do not see why it matters which is the case.

¹⁹ That the judgment at issue here is an award of monetary damages rather than an injunction, as in *Yahoo!*, could bear on our analysis of the substantive constitutional issue as well as on the state action inquiry. While the imposition of liability in the form of damages can have the effect of chilling protected conduct, that effect is much less **[**49]** direct than is the effect of using the coercive power of a domestic court to ensure that a defendant complies with the terms of an injunction, compelling or forbidding particular conduct.

Our analysis does not, however, foreclose other, non-constitutional bars to enforcement of a foreign-country money judgment, such as repugnancy to public policy. As we discuss next, there can be sound policy justifications for refusing to recognize foreign-country money judgments that the Constitution would forbid a domestic court from rendering in the first instance.

B. Statutory Challenge: Repugnancy to Public Policy

In addition to its constitutional argument, the Church contends that the Japanese judgment is not entitled to recognition and enforcement under California's Uniform Act because it is "repugnant to the public policy" embodied in the Religion Clauses of the Federal and State Constitutions. A foreign judgment that would be unconstitutional if rendered in this country necessarily qualifies as repugnant, the Church maintains, making its recognition an abuse of discretion under California's Uniform Act.

[HN29](#) The Act permits—but does not require—courts to deny recognition to foreign monetary awards **[**50]** if either "[t]he *judgment or the cause of action or claim for relief* on which the judgment is based is repugnant to the public policy of California or of the United States." [§ 1716\(c\)\(3\)](#) (emphases added). Accordingly, we examine whether either the Japanese law on which the judgment rests or the judgment issued meets the stringent standard for repugnancy under California law.

i. The Standard of Review

We first address the proper standard for reviewing a district court's decision **[*1002]** whether to refuse recognition of a foreign-country money judgment under California's Uniform Act or similar state statutes on grounds of repugnancy to public policy. The only case of this court addressing a somewhat similar issue is [Arab Monetary Fund v. Hashim \(In](#)

[re Hashim\)](#), [213 F.3d 1169 \(9th Cir. 2000\)](#). *Hashim* treated [HN30](#) a bankruptcy court's determination that an English award of costs and fees was "repugnant to American jurisprudence" and thus unenforceable under Arizona common law principles of comity, as a legal conclusion, subject to *de novo* review. [Id. at 1172](#).²⁰

[HN31](#) Absent a demonstrated ground for non-recognition, enforcement of a qualifying foreign-country money judgment is mandatory under California's Uniform **[**52]** Act. [§ 1716\(a\)](#). Here, the district court's decision to recognize and enforce the Japanese court's judgment, over the Church's objections, hinged on a preliminary determination that neither the judgment nor the underlying cause of action was fundamentally incompatible with, and therefore repugnant to, the Religion Clauses. Because that determination was a conclusion of law, we, as in [Hashim](#), examine *de novo* the district court's legal evaluation. Given that the Church has asserted no other ground for non-recognition on appeal, if the district court correctly determined that neither the Japanese judgment nor the underlying cause of action is repugnant to public policy, then recognition of the damages award was statutorily required.

²⁰ Other circuits reviewing recognition of foreign judgments under state statutes similar to California's have applied an abuse of discretion standard. **[**51]** See, e.g., [Banque Libanaise Pour Le Commerce v. Khreich](#), [915 F.2d 1000, 1004-06 \(5th Cir. 1990\)](#) (reviewing for abuse of discretion a district court decision whether to apply a non-mandatory ground of nonrecognition under Texas's Uniform Act); [Ingersoll Milling Mach. Co. v. Granger](#), [833 F.2d 680, 688 \(7th Cir. 1987\)](#) (reviewing for abuse of discretion the district court's refusal to deny recognition on public policy grounds under Illinois's Uniform Act, but evaluating the defendant's principal legal arguments *de novo* "for the sake of completeness"); cf. [Remington Rand Corp.-Del. v. Bus. Sys. Inc.](#), [830 F.2d 1260, 1266 \(3d Cir. 1987\)](#) (citing [ITT Corp. v. Lam \(In re Colo. Corp.\)](#), [531 F.2d 463, 469 \(10th Cir. 1976\)](#) (reviewing for abuse of discretion the extension or denial of comity)). Even if we were to apply a deferential standard of review, a district court "abuses its discretion when it commits an error of law." [AE ex rel. Hernandez v. Cnty. of Tulare](#), [666 F.3d 631, 636 \(9th Cir. 2012\)](#). So the analysis would be the same as the one we conduct.

ii. The Standard for Repugnance

[HN32](#) California courts have set a high bar for repugnancy under the Uniform Act. The standard, rooted in the public policy exception to the comity doctrine at common law, see [Hilton v. Guyot](#), 159 U.S. 113, 205-06, 227-28, 16 S. Ct. 139, 40 L. Ed. 95 (1895), measures not simply whether the foreign judgment or cause of action is contrary to our public policy, but whether either is "so offensive to our public policy as to be 'prejudicial to recognized standards of **[**53]** morality and to the general interests of the citizens.'" [Java Oil Ltd. v. Sullivan](#), 168 Cal. App. 4th 1178, 1189-92, 86 Cal. Rptr. 3d 177 (2008) (emphasis added) (quoting [Wong v. Tenneco, Inc.](#), 39 Cal. 3d 126, 135-36, 216 Cal. Rptr. 412, 702 P.2d 570 (1985)). Thus, "even where it is agreed that a foreign law offends public policy, it may still be applied in a limited context where the potential harm is minimal." [Wong](#), 39 Cal. 3d at 136. Put another way, the public policy exception codified at [§ 1716\(c\)\(3\)](#) does not apply unless a foreign-country judgment or the law on which it is based is "so antagonistic to California [or federal] public policy interests as to preclude the extension of comity." [Crockford's Club Ltd. v. Si-Ahmed](#), 203 Cal. App. 3d 1402, 1406, **[*1003]** 250 Cal. Rptr. 728 (1988) (internal quotation marks omitted).²¹

²¹ [HN33](#) The revised Uniform Foreign-Country Money Judgment Act of 2005, on which the California statute is based, retained "the stringent test for finding a public policy violation applied by courts interpreting the [previous version of the] Act." Uniform Foreign-Country Money Judgments Recognition Act, 13 U.L.A. pt. II, § 4, cmt. 8, at 28 (Supp. 2011). According to that test, the commentary to the model Uniform Act explains, "[p]ublic policy is violated **[**54]** only if recognition or enforcement of the foreign country judgment would tend clearly to injure public health, the public morals, or the public confidence in the administration of law, or would undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel." *Id.* (internal quotation marks omitted); see also [Restatement \(Third\) of Foreign Relations Law of the United States § 482 cmt. f](#) (1987); [Restatement \(Second\) of Conflict of Laws § 117](#) (1971).

Our sister circuits have applied a similarly strict standard to the repugnancy exception of other states' foreign judgment enforcement statutes. See [Viewfinder](#), 489 F.3d at 479-80 ([HN34](#) "The public

In the context of an Arizona enforcement action, construing common law principles of international comity similar to those on which California's Uniform Act is based, see [Manco Contracting Co.](#), 45 Cal. 4th at 198, we observed that [HN37](#) "few judgments fall in the category of judgments that need not be recognized because they violate the public policy of the forum," [In re Hashim](#), 213 F.3d at 1172 (internal quotation marks omitted). "It has long been the law that unless a foreign country's judgments are the result of outrageous departures from our own notions of **[**56]** 'civilized jurisprudence,' comity should not be refused." [British Midland Airways Ltd. v. Int'l Travel, Inc.](#), 497 F.2d 869, 871 (9th Cir. 1974) (quoting [Hilton](#), 159 U.S. at 205).

[HN38](#) Simple inconsistency between American state or federal law and foreign law, then, does not render a foreign judgment unenforceable by reason of repugnancy. See [Yahoo! II](#), 433 F.3d at 1215 (plurality opinion). Foreign judgments are not to be "tried afresh" in U.S. courts, applying domestic concepts. See [Hilton](#), 159 U.S. at 202-03. "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home." [Loucks ex rel. Loucks v. Standard Oil Co. of N.Y.](#), 224 N.Y. 99, 111, 120 N.E. 198 (1918) (Cardozo, J.).

Applying these principles, [HN39](#) courts in other

policy inquiry rarely results in refusal to enforce a judgment unless it is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense." (internal quotation marks omitted); [Ackermann v. Levine](#), 788 F.2d 830, 841 (2d Cir. 1986) (describing [HN35](#) the repugnancy standard as "high, and infrequently met," applying only in "clear-cut" cases where the judgment or cause of action on which it is based is contrary to "'fundamental notions of what is decent and just'" (quoting **[**55]** [Tahan v. Hodgson](#), 662 F.2d 862, 864, 213 U.S. App. D.C. 306 (D.C. Cir. 1981))); [Sw. Livestock & Trucking Co. v. Ramon](#), 169 F.3d 317, 321 (5th Cir. 1999) (noting that [HN36](#) the "level of contravention of Texas law" has to be "high" for the court to deny recognition on public policy grounds); cf. [Andes v. Versant Corp.](#), 878 F.2d 147, 150 (4th Cir. 1989) (holding, without expressly discussing repugnancy to public policy, that a court applying Maryland's Uniform Foreign-Money Judgments Act would not give effect to an English rule of preclusion that is "so much at odds with normal American notions of litigation that no American jurisdiction would readily embrace it").

jurisdictions have declined to enforce foreign-country money judgments on grounds of repugnance to the public policy embodied in the [First Amendment](#), but only where there were stark differences between foreign and domestic law. In [Telnikoff v. Matusevitch](#), 347 Md. 561, 702 A.2d 230 (1997), for example, Maryland's high court declined to enforce an English libel judgment under principles of comity [*1004] because English defamation law "is totally different" [**57] from Maryland defamation law "in virtually every significant respect" and "so contrary . . . to the policy of freedom of the press underlying Maryland law." *Id.* at 598-99. A New York trial court similarly refused recognition of an English libel judgment on the ground that English libel standards are "antithetical to the protections afforded the press by the U.S. Constitution," explaining that the presumptions and burdens of proof under English libel law are the reverse of those under American law, requiring media defendants to prove the truth of speech of public concern, rather obliging plaintiffs to demonstrate falsity. [Bachchan v. India Abroad Publ'ns Inc.](#), 154 Misc. 2d 228, 585 N.Y.S.2d 661, 665 (1992) (emphasis added).²²

²² Federal law now controls domestic actions seeking recognition of foreign defamation judgments. In August 2010, Congress adopted the SPEECH Act ("Securing the Protection of our Enduring and Established Constitutional Heritage Act."), Pub. L. No. 111-223, 124 Stat. 2380 (2010), [28 U.S.C. §§ 4101-4105](#), effectively codifying the approach adopted in *Telnikoff*. The Act was prompted by a perceived increase in the frequency of foreign libel judgments inconsistent with the [First Amendment](#), [**58] Pub. L. No. 111-223, § 2(5), and concern that these suits were "significantly chilling American free speech and restricting both domestic and worldwide access to important information." S. Rep. No. 111-224, at 2 (2010); see also Pub. L. No. 111-223, § 2(3). The new law makes foreign defamation judgments unenforceable in the United States unless it can be shown that such judgments satisfy the protections of freedom of speech and press guaranteed by both the [First Amendment to the United States Constitution](#) and the constitution of the state in which the domestic court is located. See [28 U.S.C. § 4102\(a\)\(1\)](#). Notably, the SPEECH Act does not pertain to all foreign judgments allegedly inconsistent with any part of the [First Amendment](#) but focuses uniquely on defamation actions and the "[First Amendment](#) rights of American authors and publishers." H.R. Rep. No. 111-154, at 5 (2009), reprinted in 2010 U.S.C.C.A.N. 812, 816. California's Uniform Act contains a similar special exception for foreign judgments rendered in defamation actions. See [Cal. Civ. Proc. Code § 1717\(c\)](#).

In *Yahoo! I*, the Northern District of California, in an opinion reversed on jurisdictional grounds, see [Yahoo! II](#), 433 F.3d 1199, [**59] applied similar logic to that in *Telnikoff* and *Bachchan* and barred enforcement of a French injunction requiring the Internet company Yahoo! to block French users' access to Nazi-related website content. See [Yahoo! I](#), 169 F. Supp. 2d at 1184-85. The "content and viewpoint-based regulation" of Internet speech, the district court held, "clearly would be inconsistent with the [First Amendment](#) if mandated by a court in the United States." *Id.* at 1192-93.

These cases do not suggest that a looser standard applies when the asserted repugnancy arises from an inconsistency with U.S. constitutional as opposed to statutory or common law principles. There is no California case so holding and no basis in the statutory language for such a conclusion. Rather, the cases underscore that only judgments presenting a direct and definite conflict with fundamental American constitutional principles will be denied recognition because repugnant.

Such direct conflict is more apt to arise where the foreign-country judgment—or the law underlying it—does not incidentally or indirectly affect conduct that may be protected in the United States, but expressly targets such conduct. [Telnikoff](#), [Bachchan](#), and [Yahoo! \(I & \[**60\] II\)](#), all concerned challenges to enforcement of foreign-country judgments issued on the basis of foreign laws specific to speech or expression—such as libel, defamation and hate speech laws—not laws of general application, such as the Japanese tort laws underlying the judgment at issue here.²³

²³ The same distinction may be drawn between the present case and another circuit court opinion, involving enforcement of a French intellectual property [**61] and copyright judgment, targeting the publication of photographs. See [Viewfinder](#), 489 F.3d 474. The district court had held the French judgment repugnant to public policy on the grounds that it was fundamentally at odds with principles of free expression protected by the U.S. and New York Constitutions. [Sarl Louis Feraud Int'l v. Viewfinder Inc.](#), 406 F. Supp. 2d 274, 285 (S.D.N.Y. 2005). The Second Circuit vacated and remanded for a more thorough comparison of French and U.S. copyright law and the "fair use" exception for [First Amendment](#)-

[*1005] The state courts in *Telnikoff* and *Bachchan*, and the district court in *Yahoo! I*, found repugnancy *not* based on the way that a particular foreign law was applied to the specific facts of the case, but because of fundamental differences in the guiding legal doctrine applied or the procedures used in the foreign-country court as compared to domestic legal principles. The courts concluded that the foreign judgments in question were repugnant to public policy because they would *unquestionably* violate the Constitution were they issued here with respect to domestic activity; those conclusions were not fact-dependent. In other words, it was not debatable whether the orders, if domestically issued and applied, could have survived constitutional scrutiny.

The situation with which we are faced here is quite otherwise. As will appear, it is highly debatable, at least, whether tort liability could be imposed on the Church for inducing Ohno's Transfers, and the ultimate determination of that question would be highly fact-dependent. As the Japanese cause of action and judgment in this case are not *antithetical* to the Religion Clauses, they are not repugnant to California or U.S. public policy in the sense required by the exception in California's Uniform Act.

iii. Repugnancy of the Japanese Cause of Action and Claims

HN40 In evaluating the repugnancy of a foreign cause of action, **[**62]** we compare the legal basis for liability and the plaintiff's claims for relief in the foreign court with comparable grounds for suit in the United States. If American law recognizes generally parallel causes of action, the foreign cause of action cannot be said to be repugnant to American public policy.²⁴

protected activity. [489 F.3d at 484](#).

²⁴ This condition is sufficient but not necessary for non-repugnancy. There could be foreign causes of action that have no parallel in domestic law but are not repugnant to any aspect of domestic law either.

This assessment does not depend on whether the standards for evaluating a cause of action or the elements required to state a claim are *identical* under domestic and foreign law. Instead, we necessarily focus on the *fundamentals* of the cause of action underlying the foreign judgment and defenses thereto, "not the differences in the bodies of law" or in the way in which remedies are afforded. [Soc'y of Lloyd's v. Reinhart](#), [402 F.3d 982, 995 \(10th Cir. 2005\)](#); see also [Soc'y of Lloyd's v. Turner](#), [303 F.3d 325, 332 \(5th Cir. 2002\)](#). That a particular cause of action does not exist, or that a particular claim would not be cognizable, in California does not obligate us to refuse enforcement **[**63]** of a judgment, as long as the existence of the cause of action is not itself repugnant to California public policy. See [Restatement \(Third\) of Foreign Relations Law of the United States § 482 cmt. f](#) (1987); [Restatement \(Second\) of Conflict of Laws § 117](#) (1971).

Here, the Church was held liable under **HN41** article 709 of the Japanese Civil Code, which provides that "[a] person who has intentionally or negligently infringe[d] any right of others, or legally protected interest of others, shall be liable to compensate **[*1006]** any damages resulting in consequence." Minpō [Civ. C.] art. 709 (Japan). **HN42** There is nothing repugnant to California public policy about providing a damages remedy for intentional or negligent injury to others' rights or protected interests. California tort law—and American tort law generally—does exactly that. See, e.g., [Cal. Civ. Code § 1714](#). And, while a party's status as a religious entity or believer may bear on certain relevant inquiries, such as whether the party may assert a Religion Clause defense, that does not render the party *immune* from liability under tort law. Cf. [Viewfinder](#), [489 F.3d at 480-81](#) (explaining that an entity's status as a news publication may bear on its **[**64]** assertion of a "fair use" defense but does not entitle it to immunity from liability under intellectual property laws). Accordingly, the general availability of a tort remedy in Japan for a suit against a church is not, on its face, repugnant to California public policy.

We look next at the particular claims on which the tort cause of action was based. Ohno's claims are analogous to actions for undue influence, fraud, negligent or intentional infliction of emotional distress, and unjust enrichment under California law. See [Cal. Civ. Code §§ 1572](#) (fraud), 1575 (undue influence); 1714 (liability for willful or negligent injury to others).²⁵ The Church maintains that claims of undue influence, fraud, negligent or intentional infliction of emotion distress, or unjust enrichment are not cognizable in California if the defendants' actions giving rise to liability were facially religiously motivated. At the level of generality at which this assertion is made, it is false.

HN44 American courts can recognize tort liability for acts assertedly motivated by religion. The Religion Clauses do not bar tort claims against a religious entity or its members, so long as adjudicating the cause of action does not require a court to judge the validity of religious beliefs or interfere with ecclesiastical decisionmaking regarding self-governance or employment. See, e.g., [United States v. Ballard](#), 322 U.S. 78, 86, 64 S. Ct. 882, 88 L. Ed. 1148 (1944); [Molko v. Holy Spirit Ass'n for Unification of World Christianity](#), 46 Cal. 3d 1092, 1115-16, 252 Cal. Rptr. 122, 762 P.2d 46 (1988); [Elvig v. Calvin Presbyterian Church](#), 375 F.3d 951, 956, 959-62 (9th Cir. 2004) (citing [Bollard v. Cal. Province of Soc'y of Jesus](#), 196 F.3d 940, 945-47 (9th Cir. 1999)).

HN45 The Religion Clause **[**66]** protections

²⁵ **HN43** The Supreme Court of California and California Courts of Appeal have recognized actions for relief under the equitable doctrine of unjust enrichment. See [Ghirardo v. Antonioli](#), 14 Cal. 4th 39, 57 Cal. Rptr. 2d 687, 924 P.2d 996 (1996) (recognizing a cause **[**65]** of action for unjust enrichment upon a showing that the defendant received benefit through another's known mistake, fraud, coercion or other tortious conduct); see also [Hernandez v. Lopez](#), 180 Cal. App. 4th 932, 938, 103 Cal. Rptr. 3d 376 (2009) ("The doctrine applies where plaintiffs, while having no enforceable contract, nonetheless have conferred a benefit on defendant which defendant has knowingly accepted under circumstances that make it inequitable for the defendant to retain the benefit without paying for its value.").

"embrace[] two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." [Cantwell v. Connecticut](#), 310 U.S. 296, 303-04, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); see also [Stormans, Inc. v. Selecky](#), 586 F.3d 1109, 1128 (9th Cir. 2009); [Molko](#), 46 Cal. 3d at 1112. Conduct, including speech-based conduct such as solicitation, "remains subject to regulation for the protection of society." [Cantwell](#), 310 U.S. at 304. So recognizing, California courts have entertained claims of fraud, undue influence, and intentional infliction of emotional distress brought **[*1007]** against religious entities by former members seeking recovery of donations and damages for harm. See, e.g., [Molko](#), 46 Cal. 3d 1092, 252 Cal. Rptr. 122, 762 P.2d 46; [Wollersheim v. Church of Scientology of Cal.](#), 212 Cal. App. 3d 872, 66 Cal. Rptr. 2d 1, 260 Cal. Rptr. 331 (1989) ("Wollersheim I"), vacated and remanded on other grounds, 499 U.S. 914, 111 S. Ct. 1298, 113 L. Ed. 2d 234 (1991), amended by [15 Cal. App. 4th 1426](#), 4 Cal. App. 4th 1074, 6 Cal. Rptr. 2d 532 (Ct. App. 1992) ("Wollersheim II").²⁶ Religiously motivated gifts have been set aside on a strong showing of undue influence by religious advisors over the testamentary act. See [Sunland Home Found., Inc. v. Bourquin \(In re Estate of Bourquin\)](#), 161 Cal. App. 2d 289, 299-300, 326 P.2d 604 (1958).

²⁶ The **[**67]** Supreme Court vacated and remanded [Wollersheim I](#) for reconsideration of the punitive damages award in light of [Pacific Mutual Life Insurance Company v. Haslip](#), 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991). See [Wollersheim](#), 499 U.S. 914, 111 S. Ct. 1298, 113 L. Ed. 2d 234 (1991). On remand, [Wollersheim II](#) "incorporated intact and unaltered" the portion of [Wollersheim I](#) that "dealt exhaustively with the tort [and] freedom of religion" issues. [Wollersheim II](#), 6 Cal. Rptr. 2d at 534 n.1. The California Supreme Court subsequently granted review of [Wollersheim II](#), see 10 Cal. Rptr. 2d 182, 832 P.2d 898 (1992), but, "following the United States Supreme Court's decision in [TXO Production Corp. v. Alliance Resources Corp.](#), 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993), the California Supreme Court dismissed its prior grant of review." [Church of Scientology v. Wollersheim](#), 42 Cal. App. 4th 628, 637, 49 Cal. Rptr. 2d 620 (1996). Accordingly, [Wollersheim II](#) and [Wollersheim I](#)—to the extent the earlier opinion was incorporated into the later one—remain good law.

[HN46](#) With respect to speech related to solicitation for a religious cause, there is no *categorical* bar under domestic law to a claim in tort. The state is "free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort **[**68]** or convenience." [Cantwell, 310 U.S. at 306-07](#). The preservation of this state regulatory authority is important, given that speech may be the vehicle through which undue influence is exerted, depending on the context and manner in which it is conveyed. See, e.g., [Dovydenas v. The Bible Speaks \(In re The Bible Speaks\), 869 F.2d 628, 645-46 \(1st Cir. 1989\)](#) (rejecting a church's *First Amendment* defense against claims that it exerted undue influence to obtain gifts because the court's findings rested on the church's secular statements and actions).

[HN47](#) There are, to be sure, definite limitations on what constitutes under California law a cognizable tort claim arising from facially religious conduct: No cause of action will be recognized where a plaintiff challenges the verity of religious statements or beliefs. "It is settled that inquiry into the truth or falsity of religious beliefs is foreclosed by constitutional guarantees of religious freedom and that the courts may ask only whether the proponent of a particular religion holds his beliefs honestly and in good faith." [Hallinan v. Roman Catholic Archbishop of S.F. \(In re Estate of Supple\), 247 Cal. App. 2d 410, 414, 55 Cal. Rptr. 542 \(1966\)](#) (refusing to pass **[**69]** on the truth of religious statements alleged to have unduly influenced a testator's actions). And the California Court of Appeal has refused to entertain actions that require the court to determine whether the actions of an individual not party to the lawsuit were induced by faith or coercive persuasion. [Katz v. Superior Court, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 \(1977\)](#) (overturning conservatorship orders granted to parents of members of the Unification Church who claimed their children were brainwashed).

Similarly, [HN48](#) under the Religion Clauses, claims of intentional infliction of emotional distress

against churches or other religious entities "based merely on threats of divine **[*1008]** retribution" will not be allowed to proceed, [Molko, 46 Cal. 3d at 1120](#), because such threats, like "hell fire and damnation" preaching, are protected religious speech and cannot form the basis of a claim for emotional distress, [Wollersheim I, 212 Cal. App. 3d at 892-93](#). [HN49](#) Under California law, suits alleging purely emotional injury due to such religious expression are not permitted, given that "[i]t is one of the functions of many religions to 'afflict the comfortable.'" [Id. at 892](#). And [HN50](#) California courts have declined to recognize **[**70]** a cause of action for negligent infliction of emotional distress as a result of religiously motivated conduct because "religious organizations owe no duty to members or former members with respect to these forms of [emotional] injury." [Id. at 901](#).

As noted above, the Japanese law under which the Church was sued permits liability for the infringement of another's rights based either on an intentional or negligent state of mind. See Minpō [Civ. C.] art. 709 (Japan). To the extent that Ohno's claim amounted to one for merely negligent infliction of emotional distress as a result of facially religious conduct, it may not have been cognizable under California law. But California courts have pronounced no bar to claims for negligent infliction of *economic* injury, and Ohno clearly asserted pecuniary losses as well as pain and suffering. Moreover, the reason [HN51](#) the California Court of Appeal has given for barring recovery from religious entities for the negligent infliction of emotional distress is not that such liability necessarily offends the Religion Clauses, but rather that religious organizations have no duty of care to avoid causing their members emotional injury. See [Wollersheim I, 212 Cal. App. 3d at 900-01](#). **[**71]** If such a duty of care exists under Japanese law, this difference from California law does not denote repugnance to a public policy embodied in the Religion Clauses.

Ohno's claims, which relate to economic as well as

emotional injury, do not directly impugn the Church's religious beliefs or teachings. The Japanese trial court rejected the Church's argument that the lawsuit was a purely religious dispute and explicitly disavowed the notion that it was scrutinizing the Church's beliefs, stating that there was no "need to make a judgment about the religious teaching itself, in order to make a determination about the validity of [Ohno's] claim." The court further recognized that solicitation of donations by religious entities is legal and protected from liability in Japan, so long as the methods used are within the scope of what is "socially appropriate." Where inducement of donations incite anxiety, confusion, or terror, however, such that the donation cannot be considered to be based on the individual's free will, then a tort can be established. It was within these parameters that the Japanese court adjudicated Ohno's claims. Far from being so divergent from domestic legal principles **[**72]** as to be repugnant to public policy, the causes of action underlying the Japanese judgment were generally similar to, although possibly broader than, those that would be cognizable under California law.

In other words, had Ohno alleged that she had been tortiously induced to donate hundreds of thousands of dollars to a church in California, she could have sued the religious entity or its officers here, too. Whether she would prevail on the particular facts of her case or whether the defendants could successfully raise constitutional defenses to any of her claims is a separate question, which we address next. We are not persuaded that the cause of action underlying the Japanese judgment is antithetical to California public policy regarding religious freedom.

[*1009] iv. Repugnancy of the Japanese Judgment

We turn next to the repugnancy of the judgment itself. The Church contends that the judgment is repugnant to public policy because it is

incompatible with the Religion Clauses of the California and Federal Constitutions in two respects: First, the judgment necessarily involved an assessment by the court of the validity of the Church's religious teachings; and, second, the imposition of tort liability **[**73]** placed a burden on the Church's exercise of its religion without a compelling state interest in doing so. As will appear, the first contention is unsupported in the record. And the second cannot be grounds for declaring the judgment repugnant to public policy precisely because it presents a close question under California and federal law. In this context, where a repugnancy determination hinges on a definitive finding of conflict between foreign and domestic law, the debatability of the validity of the Church's legal position is its downfall.

a.

Ohno's tort suit rests largely on fact-bound determinations regarding the nature of the actions that gave rise to her asserted injuries. Ohno contends that "the actual [Japanese] judgment was manifestly and explicitly concerned with conduct—the coercion, the overpowering of [her] own will, the deprivation of medications, the destruction of family relations, and the targeted fleecing of [her] assets." The Church, however, characterizes the Japanese judgment as imposing liability for Ohno's reactions to its "protected religious speech about the consequences of disobedience to God's commandments."

By its plain language, the Japanese judgment does **[**74]** appear to attach liability to the speech of a religious entity: The illegal act is described as "inducement" or "solicitation," based on "fraudulent and intimidating *statements*." But the Japanese trial court neither limited its focus to speech that was religious in nature nor rested its ruling on findings regarding the content of any religious speech at issue. The court made findings related to the Church's communications with Ohno regarding her living situation, contact with her

family, and medical care, as well as pressure exerted on her to transfer funds to the Church, any or all of which may have been secular in nature. And while the judgment recounts the substance of some of the Church's teachings, the court's language suggests that it attributed the harms Ohno suffered not to the *content* of the Church's threats, but to the *context* in which they were made—that Ohno was isolated from her family, not taking medication for her depression, and suffering from general ataxia. The judgment states that the Church's conduct in soliciting money from Ohno, who was "under such a psychological condition," "incite[d] anxiety" and "cause[d] terror," such that the Transfers cannot be said to **[**75]** have been made of Ohno's free will. The record does not support an inference that the Japanese court imposed liability because of the "specific motivating ideology," opinion, or perspective behind the Church's communication with Ohno, [*Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 \(1995\)](#), or a finding regarding the truth or falsity of the Church's religious beliefs, see [*Ballard*, 322 U.S. at 87-88](#).

While the facts of Ohno's case may not be as egregious as those in *Wollersheim* and *Molko*, where the plaintiffs alleged they were physically coerced and deceived as to the identity of the church they were joining, the difference is a matter of degree, not kind. To be sure, California tort law would require proof of elements not found in the Japanese judgment. [*HN52*](#) The tort of fraud under California law, for example, **[*1010]** requires intent to defraud. See [*Molko*, 46 Cal. 3d at 1108](#); [*Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 259, 134 Cal. Rptr. 3d 588 \(2011\)](#). Similarly, [*HN53*](#) to sustain a claim of intentional infliction of emotional distress in California, a plaintiff must show intent to cause, or reckless disregard for, emotional injury. [*Wollersheim I*, 212 Cal. App. 3d at 881](#). And [*HN54*](#) under California law, "undue **[**76]** influence" consists in "the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of

such confidence or authority for the purpose of obtaining an unfair advantage over him" or "taking an unfair advantage of another's weakness of mind." [*Cal. Civ. Code § 1575\(1\), \(2\)*](#) (emphasis added).

The Japanese trial court's judgment does not clearly establish either knowledge or intent on the part of Yasuma or Saints of Glory to "incite anxiety" or "cause terror." Facts in the record such as Yasuma's discouragement of the use of medication, Ohno's regular attendance at Church services, and the Church's oversight of her living situation permit an inference that Defendants were aware of Ohno's vulnerable mental and physical condition, and knew or should have known of the likelihood of causing her emotional harm or exerting undue influence. But the record reflects no discrete findings regarding the Church's knowledge of Ohno's depression and ataxia, whether Yasuma held a position of confidence and authority over Ohno, and whether the Church intended to take advantage of her.

For reasons we have surveyed, however, that the Japanese court did not find **[**77]** all the requisite elements of the causes of action for undue influence, fraud, or infliction of emotional distress under California law does not make the judgment *antithetical* to the basic precepts of tort law in this country, or to constitutional principles. Enforcing a defamation or libel judgment absent a finding of malice stands in direct tension with constitutional principles, because it punishes speech on the basis of content. In contrast, imposing tort liability absent a finding of intent, for actions that may or may not constitute protected religious conduct, does not give rise to the same stark clash of legal principles.

b.

Even if a court in the United States could find the requisite elements of Ohno's tort claims, the Church maintains, the Religion Clauses would bar recovery. But the record does not show that the Church has so clearly made out a viable Free

Exercise defense as to render the Japanese judgment antithetical to the fundamental principles underlying American protection of freedom of religion.

HN55 To invoke the protection of the Religion Clauses against a judgment in tort, the Church would have to demonstrate that imposing liability in damages substantially burdened **[**78]** its sincerely held religious beliefs or practices *and* that the state's justifications for that burden did not outweigh any infringement on the Church's religious freedom, under the applicable standard of scrutiny.²⁷ See [*Hernandez \[*1011\] v. Comm'r*, 490 U.S. 680, 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 \(1989\)](#) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."); [*Smith v. Fair Emp't & Hous. Comm'n*, 12 Cal. 4th 1143, 1166-67, 51 Cal. Rptr. 2d 700, 913 P.2d 909 \(1996\)](#).

HN59 The threshold requirement for a defense

²⁷ **HN56** A "valid and neutral [state] law of general applicability," such as a domestic tort judgment similar to the Japanese judgment at issue here, that has the incidental effect of burdening the free exercise of religion no longer must withstand the "compelling interest" test articulated in [*Sherbert v. Verner*, 374 U.S. 398, 403, 83 S. Ct. 1790, 10 L. Ed. 2d 965 \(1963\)](#), to survive constitutional scrutiny. [*Emp't Div. v. Smith*, 494 U.S. 872, 879, 885, 110 S. Ct. 1595, 108 L. Ed. 2d 876 \(1990\)](#); accord [*Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 \(1993\)](#). **HN57** "[A] religious objector has no federal constitutional right to an exemption from a neutral and valid [state] law of general applicability **[**79]** on the ground that compliance with that law is contrary to the objector's religious beliefs." [*N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court*, 44 Cal. 4th 1145, 1155, 81 Cal. Rptr. 3d 708, 189 P.3d 959 \(2008\)](#) (emphasis omitted). As we explain below, however, we presume for purposes of our analysis that the tort judgment at issue here, had it been rendered by a domestic court, would have to survive strict scrutiny. **HN58** "Under strict scrutiny, 'a law could not be applied in a manner that substantially burden[s] a religious belief or practice unless the state show[s] that the law represent[s] the least restrictive means of achieving a compelling interest.'" [*Id.* at 1158](#) (alterations in original) (quoting [*Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 562, 10 Cal. Rptr. 3d 283, 85 P.3d 67 \(2004\)](#))).

based on the Religion Clauses is to show that one sincerely holds beliefs as religious views. [*Malik v. Brown*, 16 F.3d 330, 333 \(9th Cir. 1994\)](#). Courts typically give credence to assertions of sincerely held religious beliefs in absence of any challenge to their sincerity or religious motives, and so long as they are not "so bizarre, so clearly nonreligious in motivation, as not **[**80]** to be entitled to protection under the *Free Exercise Clause*." [*Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715-16, 101 S. Ct. 1425, 67 L. Ed. 2d 624 \(1981\)](#); [*Shakur v. Schriro*, 514 F.3d 878, 885 \(9th Cir. 2008\)](#) (taking the plaintiff's assertion that his dietary needs were religiously motivated as prima facie evidence of sincere religious beliefs); [*Malik*, 16 F.3d at 333](#) (giving credence to the plaintiff's testimony regarding the reasons for his adoption of a Muslim name in absence of anything in the record challenging the sincerity of his religious beliefs). Construing the facts in the light most favorable to the Church, as we must on review of summary judgment, we presume that their actions were based on sincerely held religious beliefs.

Next, the Church would have to show that the order to pay damages to Ohno imposed a "substantial or, in other words, legally significant," [*Smith v. Fair Emp't & Hous. Comm'n*, 12 Cal. 4th at 1166-67](#), burden on its exercise of religion. "[A] substantial burden must place more than an inconvenience on religious exercise"; it must have a "tendency to coerce individuals into acting contrary to their religious beliefs" or "exert[] substantial pressure on an adherent to modify **[**81]** his behavior and to violate his beliefs." [*Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 988 \(9th Cir. 2006\)](#) (internal quotation marks omitted).

To be sure, **HN60** "the burden of tort damages is direct." [*Paul*, 819 F.2d at 881](#). While a tort damages judgment does not criminalize the conduct for which liability is imposed, it effectively makes the challenged actions "unlawful." *Id.*

Here, however, it is questionable whether the Church could demonstrate that the burden imposed

infringes on protected religious beliefs, not merely on conduct accompanied by such beliefs. [HN61](#) [Employment Division v. Smith](#), 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), rejected the notion that "when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation." [Id.](#) at 882. Accordingly, that the Church's conduct may have been motivated by religious [*1012] convictions does not shield it from tort liability for injuries engendered by its actions.

Even if we presume that the Church could show the imposition of tort liability to be a substantial burden on its religious exercise, it would still have to surmount a final hurdle: proving that [**82] its burden outweighed the governmental interest in the regulation of tortious activity. Again, construing the facts in favor of the Church, we presume that strict scrutiny would apply and the judgment could be upheld only upon demonstration that enforcement of tort law serves a compelling state interest. [Paul](#), 819 F.2d at 882-83 & n.6 (citing [Sherbert v. Verner](#), 374 U.S. 398, 403, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963)). This presumption is appropriate, as [HN62](#) a law of general application that implicates "'the [Free Exercise Clause](#) in conjunction with other constitutional protections, such as freedom of speech and of the press'" remains subject to strict scrutiny. [San Jose Christian Coll. v. City of Morgan Hill](#), 360 F.3d 1024, 1031 (9th Cir. 2004) (quoting [Smith](#), 494 U.S. at 881). [HN63](#) Because the Church contends that the imposition of tort liability here burdens its religious speech, this case might qualify as a "hybrid" one in an American court, triggering strict scrutiny under federal constitutional law. See [id.](#) at 1031 (quoting [Miller v. Reed](#), 176 F.3d 1202, 1204 (9th Cir. 1999)).²⁸

²⁸ The California Supreme Court has expressed skepticism about the notion that a "hybrid claim" implicating more than one constitutional right [**83] is entitled to heightened scrutiny under the Federal Constitution. See [N. Coast Women's Care Med. Grp., Inc.](#), 44 Cal. 4th at 1156-57. Regardless, federal law does not control California's

But we are not persuaded that a California court *could not* conclude that "the state's interest in allowing tort liability" as a means of protecting vulnerable individuals against undue influence, abuse of confidence for pecuniary gain, and fraud is compelling enough "to outweigh any burden" imposed on the Church's action. See [Molko](#), 46 Cal. 3d at 1117 (citing [Wisconsin v. Yoder](#), 406 U.S. 205, 221, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)). [**84] Nor are we persuaded that a California court would not deem tort law the least restrictive means of pursuing the state's compelling interests. This result is particularly likely given that the religious expression at issue here was targeted at Ohno specifically, rather than a more general audience. Holding the Church liable in this case may discourage it from soliciting funds in the manner pursued here, from individuals in a comparable psychological or medical state, or from otherwise exerting undue influence to obtain donations in the future. It does not, however, substantially inhibit Yasuma and Saints of Glory from practicing their religion or disseminating their teachings.

Construing the facts in the Church's favor, Ohno may well have failed to prevail in a California court on all her claims. But it is far from "clear-cut," [Ackermann v. Levine](#), 788 F.2d 830, 841 (2d Cir. 1986), and so certainly debatable, whether the Religion Clauses would bar an American [*1013] court from issuing the same judgment had the suit been brought here. Moreover, as we cannot say, on the record before us, that a court in this country could not have rendered the judgment for Ohno had the events occurred entirely [**85] within the United States, then we certainly cannot conclude

interpretation of the State Constitution. The California Supreme Court has not yet determined what standard should apply under the California Constitution to a valid, neutral state law of general applicability that burdens religious exercise. See [id.](#) at 1158. Whatever the California standard might be, it would not be stricter than strict scrutiny. [Id.](#) at 1159-60 (citing [Catholic Charities of Sacramento, Inc.](#), 32 Cal. 4th at 559, 562). For our purposes, we assume that a tort judgment imposing liability for facially religious conduct would need to survive strict scrutiny under either the California or the Federal Constitution, or both.

that a domestic court could not have issued the judgment where, as here, the challenged conduct was directed at an individual in Japan.

In sum, the Japanese award cannot be said to fall into the narrow class of judgments that must be refused enforcement because repugnant to public policy. Neither the law applied nor the particular judgment issued is "so antagonistic" to the public policy embodied in the Religion Clauses, [Crockford's Club Ltd., 203 Cal. App. 3d at 1406](#), or so "inherently vicious, wicked or immoral, and shocking to the prevailing moral sense," [Viewfinder, 489 F.3d at 479-80](#), as to preclude recognition.²⁹

Conclusion

The roots of California's Uniform Act and its presumption that foreign-country money judgments are enforceable lie in principles of international comity:

HN65 When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to

have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity **[**87]** to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.

[Hilton, 159 U.S. at 205-06](#). The Church has not demonstrated any such ground for non-recognition here.

Enforcement, by the district court, of the Japanese damages award did not render the imposition of tort liability domestic state action, subject to constitutional constraints. Thus, the district court's order did not directly violate the Federal or California Constitution. Nor is the Japanese judgment or the underlying cause of action so antithetical to the protections afforded by the Religion Clauses as to permit—let alone require—non-recognition under California's Uniform Act by reason of repugnancy to public policy. For the foregoing **[**88]** **[*1014]** reasons, the judgment of the district court is

AFFIRMED.

End of Document

²⁹We likewise reject the Church's argument that the district court abused its discretion in denying the Church's motion for a continuance for the purpose of developing evidence. The Church's motion under former [Federal Rule of Civil Procedure 56\(f\)](#) was entirely lacking in specificity. As the district court noted, given that "[the Church] vigorously litigated the underlying proceedings in Japan, and even appealed the adverse judgment," counsel should have been able to identify with greater particularity what type **[**86]** of evidence they believed existed in the Japanese court records that could bolster their arguments. [HN64](#) "[I]t is not enough to rely on vague assertions that discovery will produce needed, but unspecified, facts." [Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 535 \(5th Cir. 1999\)](#) (internal quotation marks omitted). The evidence sought in a [Rule 56\(f\)](#) motion must be more than the object of mere speculation. [Margolis v. Ryan, 140 F.3d 850, 854 \(9th Cir. 1998\)](#); see also [Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp., 525 F.3d 822, 827 \(9th Cir. 2008\)](#). The [Rule 56\(f\)](#) motion was therefore properly denied.

Olson v. Cory

Supreme Court of California

December 30, 1983

L.A. No. 31780

Reporter

35 Cal. 3d 390 *; 673 P.2d 720 **; 197 Cal. Rptr. 843 ***; 1983 Cal. LEXIS 274 ****

LESTER E. OLSON et al., Plaintiffs and
Appellants, v. KENNETH CORY, as State
Controller, et al., Defendants and Respondents

pension payments, which were previously awarded,
was without substantial controversy.

Prior History: [****1] Superior Court of Los
Angeles County, No. CA000437, John A. Loomis,
Judge.

Disposition: Let a peremptory writ of mandate
issue, directing the trial court to vacate its order
denying plaintiffs' motion for an order specifying
that plaintiffs' right to interest is an issue without
substantial controversy and to make a different
order consistent with this opinion. The parties shall
bear their own costs.

Core Terms

salary, pension, prevented by law, municipal court,
trial court, final judgment, summary judgment,
substantial controversy, declaratory judgment,
attorney's fees, retirement fund, retirement,
municipal court judge, pension payment, invalid,
decree, trial court's order, court of appeals, writ
petition, county funds, salary claim, pay a debt,
declaratory, injunction, doctrine, withheld

Case Summary

Procedural Posture

Plaintiffs, judges and judicial pensioners, sought
review of an order by the Superior Court of Los
Angeles County (California), which denied
plaintiffs' motion for a determination that their right
to interest on retroactive salary increases and

Overview

In a previous California Supreme Court ruling
plaintiffs, judges and judicial pensioners, were
found entitled to retroactive salary increases in
accordance with [Cal. Const. art. VI, § 1](#), and
retroactive pension increases in accordance with
[Cal. Gov't Code § 75000 et seq.](#) Plaintiffs filed a
motion under [Cal. Civ. Proc. Code § 437\(c\)](#) and
requested an order to determine that there was no
substantial controversy that plaintiffs were entitled
to recover interest on the retroactive payments due.
The trial court denied plaintiffs' motion, a non-
appealable order. On appeal, the court treated the
appeal as a petition for a writ of mandate. The court
granted the writ of mandate and directed the trial
court to vacate its previous order and to render a
new order granting plaintiffs' the requested interest
payments. The court found that plaintiffs were
entitled to interest on the retroactive salary and
pension payments pursuant to [Cal. Civ. Code §
3287](#). The court also held that defendant
governmental controllers were not prevented by [§
3287](#) from paying interest on damages.

Outcome

The court issued a writ of mandate directing the
trial court to vacate its previous order and to enter
an order granting plaintiffs, judges and judicial
pensioners, interest on retroactive salary increases
and pension payments due.

LexisNexis® Headnotes

Governments > Courts > Judges

HN4 Courts, Judges

See [Cal. Gov't Code § 68203](#) (1979).

Civil Procedure > ... > Writs > Common Law
Writs > Mandamus

Civil Procedure > Remedies > Writs > General
Overview

Civil Procedure > Appeals > Reviewability of
Lower Court Decisions > Preservation for
Review

HN1 Common Law Writs, Mandamus

When a trial court's order is not appealable, under unusual circumstances of this the appellate court may reach the merits by treating the appeal as a petition for a writ of mandate.

Governments > Courts > Judges

HN2 Courts, Judges

[Cal. Gov't Code § 68203](#) (1969), provides that salaries of justices of the supreme court and courts of appeal, and of judges of the superior and municipal courts are to be increased on September 1st of each year in accordance with the California consumer price index. [Cal. Gov't Code § 68203](#) (1978), provides that the justices of the Supreme Court and courts of appeal, and of judges of the superior and municipal courts shall be increased according to the consumer price index each July 1, beginning with July 1, 1978, and that each increase shall not exceed 5 percent.

Governments > Courts > Judges

HN3 Courts, Judges

See [Cal. Gov't Code § 68203](#) (1969).

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > General
Overview

Civil Procedure > Special Proceedings > Class
Actions > Notice of Class Action

Civil Procedure > Judgments > Summary
Judgment > General Overview

Civil Procedure > Judgments > Summary
Judgment > Partial Summary Judgment

Civil Procedure > Appeals > Appellate
Jurisdiction > Final Judgment Rule

HN5 Summary Judgment, Burdens of Proof

Cal. Civ. Proc. Code § 437c(f), provides that if it appears that the proof supports the granting of a summary judgment motion as to some but not all the issues involved in the action, the court shall, by order, specify that such issues are without substantial controversy. At the trial of the action the issue so specified shall be deemed established and the action shall proceed as to the issues remaining. *Cal. Civ. Proc. Code § 437c(i)*, provides that except where a separate judgment may properly be awarded in the action, no final judgment shall be entered on a motion for summary judgment prior to the termination of the action, but the final judgment shall, in addition to any matters determined in the action, award judgment as established by the summary proceeding herein provided for.

Civil Procedure > Appeals > Appellate
Jurisdiction > Final Judgment Rule

Civil Procedure > ... > Declaratory

Judgments > State Declaratory
Judgments > General Overview

Civil Procedure > Judgments > Summary
Judgment > Partial Summary Judgment

HN6 Appellate Jurisdiction, Final Judgment Rule

The California Supreme Court has held with respect to the finality, and consequent appealability, of declaratory judgments that as a general test, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the trial court is essential to a final determination of the rights of the parties, the decree is interlocutory.

Civil Procedure > Judgments > Preclusion of
Judgments > Law of the Case

Civil Procedure > Judgments > Preclusion of
Judgments > General Overview

HN7 Preclusion of Judgments, Law of the Case

Generally, the doctrine of law of the case does not extend to points of law which might have been but were not presented and determined in the prior appeal. As an exception to the general rule, the doctrine is held applicable to questions not expressly decided but implicitly decided because they were essential to the decision on the prior appeal.

Civil Procedure > Appeals > Appellate
Jurisdiction > Final Judgment Rule

Civil Procedure > Judgments > Enforcement &
Execution > General Overview

Civil Procedure > Judgments > Enforcement &
Execution > Writs of Execution

HN8 Appellate Jurisdiction, Final Judgment Rule

To be appealable as an order after judgment, the order must either affect the judgment or relate to it by enforcing it or staying its execution.

Civil Procedure > ... > Declaratory
Judgments > State Declaratory
Judgments > General Overview

Civil Procedure > Judgments > Declaratory
Judgments > General Overview

HN9 Declaratory Judgments, State Declaratory Judgments

The purpose of declaratory relief is to enable the parties to shape their conduct so as to avoid a breach.

Civil Procedure > ... > Writs > Common Law
Writs > Mandamus

Criminal Law &
Procedure > Appeals > Appellate
Jurisdiction > Extraordinary Writs

HN10 Common Law Writs, Mandamus

Denial of a motion for summary judgment is reviewable by writ of mandate.

Civil Procedure > Remedies > Judgment
Interest > General Overview

HN11 Remedies, Judgment Interest

See [*Cal. Civil Code § 3287\(a\)*](#).

Civil Procedure > Remedies > Judgment
Interest > General Overview

HN12 Remedies, Judgment Interest

Amounts recoverable as wrongfully withheld payments of salary or pensions are damages within the meaning of [Cal. Civ. Code § 3287\(a\)](#), which provides for interest upon judgments. Interest is recoverable on each salary or pension payment from the date it fell due.

Civil Procedure > Remedies > Judgment
Interest > General Overview

HN13 Remedies, Judgment Interest

The certainty required of [Cal. Civ. Code § 3287\(a\)](#), is absent when the amounts due turn on disputed facts, but not when the dispute is confined to the rules governing liability.

Civil Procedure > Remedies > Judgment
Interest > General Overview

HN14 Remedies, Judgment Interest

The right to interest under [Cal. Civ. Code § 3287\(a\)](#), is subject to an express exception: the right arises except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt.

Governments > State & Territorial
Governments > Finance

HN15 State & Territorial Governments, Finance

See [Cal. Const. art. XVI, § 7](#).

Contracts Law > Standards of
Performance > Creditors & Debtors
Business & Corporate
Compliance > Contracts > Standards of

Performance > Creditors & Debtors

Governments > State & Territorial
Governments > Employees & Officials

HN16 Standards of Performance, Creditors & Debtors

When agreements of employment between the state and public employees have been adopted by governing bodies, such agreements are binding and constitutionally protected.

Civil Procedure > Remedies > Judgment
Interest > General Overview

Governments > State & Territorial
Governments > Finance

HN17 Remedies, Judgment Interest

See [Cal. Civ. Code § 3287\(a\)](#).

Civil Procedure > Remedies > Judgment
Interest > General Overview

HN18 Remedies, Judgment Interest

Nothing in the wording of [Cal. Civ. Code § 3287](#), suggests that the right to recover interest from the state varies in accordance with the particular fund out of which the underlying obligation was payable.

Governments > Local Governments > Finance

Governments > Courts > Judges

Governments > Courts > Justice Courts

HN19 Local Governments, Finance

Salaries of municipal court judges, unlike those of other courts of record, are paid solely out of county funds. [Cal. Gov't. Code § 71220](#).

Governments > Local Governments > General Overview

Governments > Courts > Judges

Governments > Local Governments > Claims By & Against

Governments > Local Governments > Duties & Powers

Governments > Local

Governments > Employees & Officials

Governments > Local Governments > Finance

HN20 Governments, Local Governments

With respect to municipal court judges' compensation, however, counties function solely as legal subdivisions of the state under [Cal. Const. art. XI, § 1\(a\)](#), and [Cal. Gov't Code § 23002](#), having purely ministerial functions. The legislature's power to fix that compensation under [Cal. Const., art. VI, §§ 5\(a\), 19](#), is immune from any interference or modification by county boards of supervisors or county officials, who have no choice but to pay the compensation out of county funds as ordered by the legislature. [Cal. Gov't Code § 71220](#).

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Judges and judicial pensioners who had previously established their entitlement to salary and pension increases in accordance with [Gov. Code, § 68203](#), prior to its amendment in 1976, moved the trial court for a determination that their right to interest on such increases was without substantial controversy (*Code Civ. Proc.*, § 437c, *subd. (f)*). The trial court denied the motion. (Superior Court

of Los Angeles County, No. CA000437, John A. Loomis, Judge.)

Treating the judges' appeal from the denial of their motion as a petition for a writ of mandate, since the trial court order was not an appealable order, the Supreme Court issued a peremptory writ of mandate directing the trial court to vacate the order at issue and to make a different order consistent with its opinion. It held that plaintiffs were entitled to interest on their salary and pension claims, since they were "certain or capable of being made certain by calculation," within the meaning of [Civ. Code, § 3287, *subd. \(a\)*](#) (interest on damages). Uncertainty over whether they were entitled to payment under [Gov. Code, § 68203](#), as it read before or after the 1976 amendment presented questions of law and did not prevent the amounts due from being certain. It also held that an invalid statute voluntarily enacted and promulgated by the state is not a defense to its obligation to pay interest. Accordingly, the claim for interest could not be defeated by the state's assertion that [§ 68203](#), which was found constitutionally defective, prevented it by law from paying the debt owed plaintiffs. Finally, it held that the pensioners' right to interest was not affected by the fact that the pensions were payable entirely out of the Judges' Retirement Fund, since the right to recover interest from the state does not vary on the basis of the particular fund out of which the underlying obligation is payable. (Opinion by Reynoso, J., with Mosk, Richardson, Kaus, Grodin, JJ., and Evans, J., * concurring. Separate concurring opinion by Bird, C. J.)

Headnotes

CA(1) (1)

Appellate Review § 27—Decisions Appealable—Order on Motion for Summary Judgment—Issues Without Substantial Controversy.

* Assigned by the Chairperson of the Judicial Council.

--Since the question of the appealability of an order denying a motion to specify a certain issue as without substantial controversy (*Code Civ. Proc.*, § 437c, *subd. (f)*) went to appellate jurisdiction, the reviewing court was dutybound to consider such question on its own motion.

[CA\(2\)](#) (2)

Appellate Review § 27—Decisions Appealable—Order on Motion for Summary Judgment—Issues Without Substantial Controversy.

--An order denying a motion to specify a certain issue as without substantial controversy (*Code Civ. Proc.*, § 437c, *subd. (f)*) was not a final judgment, so as to permit an appeal therefrom, where no judgment was entered on the trial court order denying the motion and where the record made clear that further proceedings were contemplated.

[CA\(3\)](#) (3)

Appellate Review § 14—Decisions Appealable—Final Judgments and Orders—Declaratory Judgments.

--With respect to the finality, and consequent appealability of declaratory judgments, it may generally be said that when no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final; when anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, then the decree is interlocutory. By this test, a declaratory judgment entitling certain judges and judicial pensioners to certain salary and pension increases was not an appealable judgment, where the trial court expressly reserved jurisdiction to certify the class, award past due salary and interest, and award attorney fees and litigation expenses.

[CA\(4a\)](#) (4a) [CA\(4b\)](#) (4b)

Appellate Review § 157—Review—Successive Appeals and Law of the Case—Questions Concluded—Appealability.

--The proposition that a declaratory judgment was appealable was implicitly decided in a prior appeal therefrom that was decided on the merits without considering the issue of appealability, since it was essential to the decision. Accordingly, the appealability of the declaratory judgment was established under the doctrine of the law of the case.

[CA\(5\)](#) (5)

Appellate Review § 157—Review—Successive Appeals and Law of the Case—Questions Concluded.

--Generally, the doctrine of law of the case does not extend to points of law which might have been but were not presented and determined in a prior appeal. As an exception to the general rule, the doctrine is applicable to questions not expressly decided but implicitly decided because they were essential to the decision on the prior appeal.

[CA\(6a\)](#) (6a) [CA\(6b\)](#) (6b)

Appellate Review § 30—Decisions Appealable—Orders After Judgment.

--To be appealable as an order after judgment (*Code Civ. Proc.*, § 904.1, *subd. (b)*), the order must either affect the judgment or relate to it by enforcing it or staying its execution. Under this rule, an order denying a motion to specify the right to interest on certain judicial salary and pension increases as an issue without substantial controversy (*Code Civ. Proc.*, § 437c, *subd. (f)*) was not an order relating to the enforcement of a judgment, since the underlying declaratory judgment establishing plaintiffs' entitlement to the increases was not in itself enforceable. Hence, the order at issue related not to enforcement of such

judgment but only to whether there should be a new declaration that plaintiffs had further rights in addition to those declared in the judgment.

[CA\(7\)](#) (7)

Declaratory Relief § 3—Nature and Purpose.

--The purpose of declaratory relief is to enable the parties to shape their conduct so as to avoid a breach. However, declaratory relief may properly be accompanied by coercive relief.

[CA\(8\)](#) (8)

Appellate Review § 122—Dismissal—Grounds—Procedural Defects—Treatment of Appeal as Petition for Writ of Mandate.

--A purported appeal from a nonappealable order denying a motion to specify the right to interest on certain judicial salary and pension increases as an issue without substantial controversy (*Code Civ. Proc.*, § 437c, *subd. (f)*) was treated as a petition for a writ of mandate, where the record sufficiently demonstrated the lack of an adequate remedy at law, and where the records and briefs included in substance the elements necessary to a mandamus proceeding. To dismiss the appeal rather than reaching the merits through a mandate proceeding would, under the unusual circumstances at issue, be unnecessarily dilatory and circuitous.

[CA\(9\)](#) (9)

Damages § 8—Compensatory Damages—Interest—On Salary or Pension Payments.

--Amounts recoverable as wrongfully withheld payments of salary or pensions are damages within the meaning of [Civ. Code, § 3287, subd. \(a\)](#) (interest on damages). Interest is recoverable on each salary or pension payment from the date it fell due.

[CA\(10a\)](#) (10a) [CA\(10b\)](#) (10b)

Damages § 8—Compensatory Damages—Interest—On Salary or Pension Payments—Certainty.

--Salary and pension claims successfully asserted by certain judges and judicial pensioners were damages "certain or capable of being made certain by calculation," within the meaning of [Civ. Code, § 3287, subd. \(a\)](#) (interest on damages), where the amount due each member of plaintiff class was either of two readily calculable amounts. Uncertainty over whether plaintiffs were entitled to payment under [Gov. Code, § 68203](#), as it read before a 1976 amendment, or as amended, presented questions of law and did not prevent the amounts due from being certain.

[CA\(11\)](#) (11)

Damages § 8—Compensatory Damages—Interest—Certainty of Amount Due.

--Generally, the certainty requirement of [Civ. Code, § 3287, subd. \(a\)](#) (interest on damages), is absent when the amounts due turn on disputed facts, but not when the dispute is confined to the rules governing liability.

[CA\(12a\)](#) (12a) [CA\(12b\)](#) (12b)

Damages § 8—Compensatory Damages—Interest—"Prevented by Law" Exception.

--The exception to the right to interest on damages during such time as payment of the debt is "prevented by law" ([Civ. Code, § 3287, subd. \(a\)](#)) is applicable only to the debtor. Accordingly, the Controller could not rely on such exception to defeat a claim for interest by certain judges and judicial pensioners on past due salary and pension payments, where the state, not the Controller, was the debtor.

CA(13) (13)**Public Officers and Employees § 25—
Compensation—Fixing and Altering Amount.**

--When agreements of employment between the state and public employees have been adopted by governing bodies, such agreements are binding and constitutionally protected.

CA(14) (14)**Damages § 8—Compensatory Damages—
Interest—"Prevented by Law" Exception—Invalid
Statutes.**

--Under [Civ. Code, § 3287, subd. \(a\)](#), an exception to the right to interest on damages exists during such time as the debtor is prevented by law from paying the debt. However, an invalid statute voluntarily enacted and promulgated by the state is not a defense to its obligation to pay interest. Accordingly, a claim for interest by certain judges and judicial pensioners on past due salary and pension payments could not be defeated by a claim that the state was prevented by law from paying the full amounts due the judges during the period at issue, where the law which purportedly prevented payment ([Gov. Code, § 68203](#), as amended in 1976) was constitutionally defective. However, while component organs of state government, including the Legislature, could have made the payments, it did not necessarily follow that the Controller could have been judicially compelled to make the payments or that he incurred personal liability for failing to do so.

CA(15) (15)**Damages § 8—Compensatory Damages—
Interest—Special Fund Exception.**

--Judicial pensioners were entitled to interest on increases in their pensions mandated by previous litigation, even though such pensions were payable

entirely out of the Judges' Retirement Fund ([Gov. Code, § 75100](#)). The right to recover interest from the state under [Civ. Code, § 3287, subd. \(a\)](#), does not vary on the basis of the particular fund out of which the underlying obligation is payable. (Disapproving statements to the contrary in [Jorgensen v. Cranston \(1962\) 211 Cal.App.2d 292, 300-302 \[27 Cal.Rptr. 297\]](#), [Willens v. Cory \(1975\) 53 Cal.App.3d 104 \[125 Cal.Rptr. 670\]](#), and [Gibbons & Reed Co. v. Dept. of Motor Vehicles \(1963\) 220 Cal.App.2d 277, 289 \[33 Cal.Rptr. 688\]](#)).

CA(16) (16)**Damages § 8—Compensatory Damages—
Interest—"Prevented by Law" Exception.**

--Municipal court judges who successfully asserted claims for past due salary increases were entitled to interest thereon under [Civ. Code, § 3287, subd. \(a\)](#). The right to interest on such claims was barred neither by duties of county fiscal officers to withhold legally questionable payments until the uncertainties were judicially dispelled, nor by the fact that the state had ordered such salaries paid out of county funds. Since the judges' salaries were prescribed exclusively by the Legislature, its amendment of the cost-of-living provision at issue ([Gov. Code, § 68203](#)), insofar as held inoperative in the underlying litigation, could not be deemed a "law" that prevented counties from paying the municipal court judicial salary claims.

CA(17) (17)**Damages § 8—Compensatory Damages—
Interest—"Prevented by Law" Exception.**

--[Civ. Code, § 3287](#), relieves a debtor of the obligation to pay interest on the amount due when payment of the debt was prevented by law, regardless of equitable considerations such as the fact that the debtor had use of the money during the time when payment was prevented.

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Judges: Opinion by Reynoso, J., with Mosk, Richardson, Kaus, Grodin, JJ., and Evans, J., * concurring. Separate concurring opinion by Bird, C. J.

Opinion by: REYNOSO

Opinion

[*395] [**723] [***847] Plaintiff judges and judicial pensioners [****3] claim interest on the salary and pension increases to which this court held them entitled in *Olson v. Cory* (1980) 27 Cal.3d 532 [178 Cal.Rptr. 568, 636 P.2d 532] (*Olson v. Cory I*). They appeal from the trial court's order denying their motion for a determination that their right to the interest is without substantial controversy.

We reach the following conclusions: The plaintiffs are entitled to interest on amounts due as increases in salaries of judges of courts of record (*Cal. Const., art. VI, § 1*) and in pensions payable under the Judges' Retirement [*396] Law (*Gov. Code, [**724] § 75000 et seq.*).¹ *HN1* The trial court's order was not appealable; nonetheless, under the unusual circumstances of this case we reach the merits by treating the appeal as a petition for a writ of mandate.

[****4] Before being amended in 1976, effective January 1, 1977, *HN2 Government Code section 68203* (hereafter *section 68203*) provided that salaries of justices of the Supreme Court and Courts of Appeal and of judges of the superior and municipal courts were to be increased on September 1st of each year in accordance with the California consumer price index.² [****5] The

¹To avoid any possibility of a disqualifying conflict of interest, each member of this court hearing this case has waived all right to receive any of the interest payments sought herein by plaintiffs.

²*HN3* Before the 1976 amendment, *section 68203* provided: ". . . [on] effective date of the 1969 amendments to this section and on September 1 of each year thereafter the salary of each justice and judge named in Sections 68200 and 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year." (Stats. 1969, ch. 1507, § 1.)

* Assigned by the Chairperson of the Judicial Council.

1976 amendment provided that the salaries should be increased according to that index each July 1, beginning with July 1, 1978, and that each increase should not exceed 5 percent.³

[*848]** Plaintiffs brought this action on August 3, 1977, alleging that they were superior and municipal court judges and recipients of pensions under the Judges' Retirement Law and praying for a declaration that the 1976 amendment was unconstitutional and that they therefore were entitled to salary and pension increases in accordance with [section 68203](#) prior to the amendment. The complaint named as defendants the State Controller and the Los Angeles County Auditor-Controller and declared that the action was being brought **[****6]** on behalf of all judges of California courts of record and all retired judges and judges' widows entitled to pensions. By stipulation filed February 17, 1978, the complaint was amended to pray also for damages consisting of salary and retirement benefits due under [section 68203](#) prior to the amendment, together with interest "at the lawful rate" and attorney fees (sought under various theories). On February 21, 1978, the trial court rendered judgment declaring that the 1976 amendment to [section 68203](#) was unconstitutional and reserving jurisdiction over all other matters including class certification, interest, and attorney fees.

[*397] *Olson v. Cory I* was filed March 27, 1980, and, after modification, became final on June 27, 1980. The opinion concluded that the 1976 amendment to [section 68203](#) "cannot be constitutionally applied to (1) a judge or justice during any term of office, or unexpired term of

office of a predecessor, if the judge or justice served some portion thereof (a 'protected term') prior to 1 January 1977, and (2) a judicial pensioner whose benefits are based on some proportionate amount of the salary of the judge or justice occupying that office." (27 **[****7]** *Cal.3d at p. 546*.) To that extent, the judgment was affirmed; in other respects it was reversed.

On April 18, 1980, three municipal court judges filed a complaint in intervention naming as defendants in intervention the auditors or controllers of some thirty counties (in addition to Los Angeles) and asking relief similar to that sought in the principal complaint.

In August and September 1980, at the request of plaintiffs, the trial court enjoined defendants from paying more than 75 percent of the back salaries due under *Olson v. Cory I*. (Such an order is not in **[**725]** the record but is inferred from references in later trial proceedings and in the briefs.) The apparent purpose of the order or orders was to secure payment of plaintiffs' attorney fees.

On October 8, 1980, the Board of Administration of the Public Employees' Retirement System was made a defendant by a stipulation reciting that it had succeeded the Controller, as of July 1, 1979, as administrator of the Judges' Retirement Fund. (See [Gov. Code, § 75005](#), fn. 4, *post*.)

On the same date, October 8, plaintiffs filed a motion for "an order determining that there is no substantial controversy that plaintiffs **[****8]** are entitled to recover interest at the legal rate on the retroactive salary and pension payments due them pursuant to the opinion of the California Supreme Court in this action." The accompanying memorandum stated that the motion was made "pursuant to *Code of Civil Procedure section 437c*, for an order specifying issues without substantial controversy."

On December 12, 1980, the trial court certified plaintiffs' suit as a class action on behalf of all judges of California courts of record and all judicial

³ **HN4** As of January 1, 1977, [section 68203](#) provided: "On July 1, 1978, and on July 1 of each year thereafter the salary of each justice and judge named in Sections 68200 to 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year, but not to exceed five percent (5%)." (Stats. 1976, ch. 1183, § 4.)

pensioners under the Judges' Retirement Law.

The following month, on January 7, 1981, the trial court denied plaintiffs' motion for an order specifying their right to interest as an issue without substantial controversy. It ruled that "no interest is payable for the period prior to June 27, 1980, when [*Olson v. Cory I*] became final" and that "no [*398] interest is due on amounts withheld under the court order of September 1980, which amounts cannot be paid until further order of court."

Plaintiffs filed a timely notice of appeal from the trial court's denial of the motion.

Appealability of Order: Treating Appeal as Petition for Writ of Mandate

Though one of the [****9] briefs suggests that the trial court's ruling was not appealable, all the principal defendants, as well as [***849] plaintiffs, urge that we review the ruling on its merits. CA(1) (1) Nonetheless, since the question of appealability goes to our jurisdiction, we are dutybound to consider it on our own motion. (*Collins v. Corse* (1936) 8 Cal.2d 123 [64 P.2d 137]; *DeGrandchamp v. Texaco, Inc.* (1979) 100 Cal.App.3d 424, 430 [160 Cal.Rptr. 899].)

CA(2) (2) The ruling was not a final judgment. Plaintiffs' motion for the ruling was made explicitly under *Code of Civil Procedure* section 437c, which provides for summary judgments. After prescribing the showing necessary to support a motion for summary judgment, the section provides in HN5 subdivision (f): "[If] it appears that the proof supports the granting of such motion as to some but not all the issues involved in the action, . . . the court shall, by order, specify that such issues are without substantial controversy. . . . At the trial of the action the issue so specified shall be deemed established and the action shall proceed as to the issues remaining." Subdivision (i) provides: "Except where a separate judgment may properly [****10] be awarded in the action, no final judgment shall be entered on a motion for summary judgment prior to the termination of the

action, but the final judgment shall, in addition to any matters determined in the action, award judgment as established by the summary proceeding herein provided for."

No judgment was entered on the trial court's order denying the motion, and the record makes clear that further proceedings were contemplated. Thus, plaintiffs' notice of class action, filed December 30, 1980, explains that the complaint sought not only declaratory relief, but also damages consisting of salary and retirement benefits, interest, and attorney fees. The notice characterizes the trial court's 1978 ruling that the 1976 amendment to section 68203 was unconstitutional as "an interlocutory declaratory judgment" and states that this court subsequently "rendered a decision" in *Olson v. Cory I*, reaching conclusions that are explained in detail. The notice further states: "If you are a member of the class who does not request exclusion and you wish to be included in, obtain the benefits [**726] of, and be [*399] bound by the final judgments entered in this class action, [****11] you need do nothing." (Italics supplied.)

Thus, it is apparent that plaintiffs anticipated entry of one or more final judgments (i.e., final as to various plaintiffs or subclasses) subsequent to the ruling from which the present appeal was taken. The ruling therefore was not a final judgment.

Whether the ruling was appealable as an order after judgment is a closer question. *Code of Civil Procedure* section 904.1, subdivision (b), requires that the order be made after a judgment that was itself appealable. In *Olson v. Cory I*, this court did not consider the appealability of the declaratory judgment that it affirmed in part and reversed in part, and apparently the question of appealability was never raised. CA(3) (3) HN6 This court has held with respect to the finality, and consequent appealability, of declaratory judgments that "[as] a general test, . . . it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything

further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree [****12] is interlocutory." ([Lyon v. Goss \(1942\) 19 Cal.2d 659, 670 \[123 P.2d 11\]](#).) By this test, the judgment in *Olson v. Cory I* was not appealable since the trial court had expressly reserved jurisdiction to certify the plaintiff class, award past due salary and interest, and award attorney fees and litigation expenses to plaintiffs' counsel.

[CA\(4a\)](#) (4a) Appealability appears to have been established, however, under the doctrine of the law of the case. [CA\(5\)](#) (5) "[HN7](#) Generally, the doctrine of law of the case does not extend to points of law which might have been but were not presented and determined in the prior appeal. [Citation.] As an exception to the general rule, the doctrine is . . . held applicable to questions not expressly decided but implicitly decided because they were essential to the decision on the prior appeal [citing [Nevcal Enterprises v. Cal-Neva Lodge, Inc. \(1963\) 217 Cal.App.2d 799, 804 \[***850\] \(32 Cal.Rptr. 106\)](#)]." ([Estate of Horman \(1971\) 5 Cal.3d 62, 73 \[95 Cal.Rptr. 433, 485 P.2d 785\]](#); accord: [Wood v. Elling Corp. \(1977\) 20 Cal.3d 353, 360 \[142 Cal.Rptr. 696, 572 P.2d 755\]](#); [Davis v. Edmonds \(1933\) 218 Cal. 355, 358-359 \[23 P.2d 289\]](#).) [****13] [CA\(4b\)](#) (4b) In *Olson v. Cory I*, the proposition that the declaratory judgment was appealable was "implicitly decided because . . . essential to the decision" and therefore became the law of the case under the foregoing rule.

[CA\(6a\)](#) (6a) Since, for purposes of this case, the declaratory judgment that plaintiffs were entitled to back salary and pension payments was final and appealable, does it follow that the present ruling denying a declaration of [*400] plaintiffs' right to interest on those payments was an "order made after [an appealable final] judgment" (*Code Civ. Proc.*, § 904.1, *subd. (b)*)?

[HN8](#) To be appealable as an order after judgment, the order must either affect the judgment or relate

to it by enforcing it or staying its execution. ([Williams v. Thomas \(1980\) 108 Cal.App.3d 81, 84 \[166 Cal.Rptr. 141\]](#); 6 Witkin, *Cal. Procedure* (2d ed. 1971) *Appeal*, § 81.) Under that rule, an order denying interest on funds paid into court pursuant to a condemnation judgment has been held appealable as "any order relating to enforcement of a judgment" by analogy to a postjudgment order determining costs. ([Redevelopment Agency v. Goodman \(1975\) 53 Cal.App.3d 424, 429 \[125 Cal.Rptr. \[****14\] 818\]](#).)

Here the trial court's refusal to uphold plaintiffs' rights to interest for purposes of subsequent trial (*Code Civ. Proc.*, § 437c, *subds. (f), (i)*) was not an order relating to enforcement of a judgment because the declaratory judgment adjudicated in *Olson v. Cory I* was not in itself enforceable. [CA\(7\)](#) (7) [HN9](#) The purpose of declaratory relief is "to enable the parties to shape their conduct so as to avoid a breach." ([Babb v. Superior Court \(1971\) 3 Cal.3d 841, 848 \[92 Cal.Rptr. 179, 479 P.2d 379\]](#).) Though declaratory relief may properly be accompanied by coercive relief (see, e.g., [Staley v. Board of Medical Examiners \(1952\) 109 Cal.App.2d 1, 6 \[240 P.2d 61\]](#)), the judgment in *Olson v. Cory I* was purely declaratory. [CA\(6b\)](#) (6b) It [**727] contained no enforceable provision, such as one directing a particular party to pay a specified sum to another party. Hence, the trial court's order now before us related not to enforcement of the *Olson v. Cory I* judgment but only to whether there should be a new declaration that plaintiffs have further rights in addition to those declared in the judgment. Accordingly, the order did not affect the judgment or relate [****15] to its enforcement and was not appealable as an order after judgment or on any other basis.

[CA\(8\)](#) (8) It is urged, however, that instead of dismissing the appeal, we treat it as a petition for an extraordinary writ. We are referred to cases in which Courts of Appeal have followed that course. (See [Barnes v. Molino \(1980\) 103 Cal.App.3d 46, 51 \[162 Cal.Rptr. 786\]](#); [People v. Cimarusti \(1978\)](#)

[81 Cal.App.3d 314, 320 \[146 Cal.Rptr. 421\]; Estate of Hearst \(1977\) 67 Cal.App.3d 777, 781 \[136 Cal.Rptr. 821\]; Branham v. State Farm Mut. Auto Ins. Co. \(1975\) 48 Cal.App.3d 27, 32 \[121 Cal.Rptr. 304\]. HN10](#) Denial of a motion for summary judgment is reviewable by writ of mandate. ([Roman Catholic Archbishop v. Superior Court \(1971\) 15 Cal.App.3d 405, 410 \[93 Cal.Rptr. 338\]](#).) To require the parties to wait for resolution of plaintiffs' interest claim until disposition of all matters yet to be resolved by the trial court might lead to unnecessary trial proceedings since, for example, the award of attorney fees might well be influenced by final determination of [*401] the interest claim. Thus, the record sufficiently demonstrates the lack of adequate remedy at [****16] law necessary for issuance of the writ.

The records and briefs before us include in substance the elements necessary to a proceeding for writ of mandate. The record consists of an "Appellant's Appendix in Lieu of Clerk's Transcript," and the provisions for sanctions designed to assure its accuracy ([Cal. Rules of Court, rule 5.1\(i\)](#)) are the functional equivalent of the verification required by [Code of Civil Procedure section 1086](#) and rule 56(a). The fact that the trial court is not a party is not an insuperable obstacle since there is no indication that the court as respondent would appear separately or become more [***851] than a nominal party. ([People v. Cimarusti, supra, 81 Cal.App.3d 314, 320; U.S. Financial v. Sullivan \(1974\) 37 Cal.App.3d 5, 12, fn. 6 \[112 Cal.Rptr. 18\]](#).)

Though we thus have power to treat the purported appeal as a petition for writ of mandate, we should not exercise that power except under unusual circumstances. Such circumstances are present here. Though we have concluded that the trial court's ruling was not appealable, the reasoning that led us to that conclusion demonstrates that the issue of appealability was far from clear in [****17] advance. Moreover, even though the ruling appears from its statutory basis and procedural history to

have been made in anticipation of a subsequent trial and judgment, we are assured by plaintiffs, and by counsel speaking for most of the county defendants, that all issues in this litigation have now been resolved except for the one now presented to this court -- that of plaintiffs' right to interest. That issue has been thoroughly briefed and argued, and all parties strongly urge that we decide it rather than dismiss the appeal. To dismiss the appeal rather than exercising our power to reach the merits through a mandate proceeding would, under the unusual circumstances before us, be "unnecessarily dilatory and circuitous." (See [Shepardson v. McLellan \(1963\) 59 Cal.2d 83, 88 \[27 Cal.Rptr. 884, 378 P.2d 108\]](#).) Accordingly, we treat the appeal as a petition for writ of mandate.

Certainty Requirements of [Civil Code Section 3287, Subdivision \(a\)](#)

Plaintiffs base their claims to interest on [HN11 Civil Code section 3287, subdivision \(a\)](#). It provides: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to [****18] recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable [**728] to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal [*402] corporation, public district, public agency, or any political subdivision of the state."

[CA\(9\) \(9\) HN12](#) Amounts recoverable as wrongfully withheld payments of salary or pensions are damages within the meaning of these provisions. ([Sanders v. City of Los Angeles \(1970\) 3 Cal.3d 252, 262-263 \[90 Cal.Rptr. 169, 475 P.2d 201\]; Benson v. City of Los Angeles \(1963\) 60 Cal.2d 355, 365-366 \[33 Cal.Rptr. 257, 384 P.2d 649\]](#); see also [Tripp v. Swoap \(1976\) 17 Cal.3d 671, 681-683 \[131 Cal.Rptr. 789, 552 P.2d 749\]](#).) Interest is recoverable on each salary or pension

payment from the date it fell due. ([Mass v. Board of Education \(1964\) 61 Cal.2d 612, 624-625 \[39 Cal.Rptr. 739, 394 P.2d 579\]](#).)

CA(10a) (10a) Defendants contend that plaintiffs' salary and pension claims were not "damages certain, [****19] or capable of being made certain by calculation" ([Civ. Code, § 3287, subd. \(a\)](#)). They argue that until *Olson v. Cory I* was filed in its final form, there was uncertainty over (1) the identity of the judges and pensioners entitled to back salary and pension payments and (2) the amounts of each of those payments.

CA(11) (11) Generally, [HN13](#) the certainty required of [Civil Code section 3287, subdivision \(a\)](#), is absent when the amounts due turn on disputed facts, but not when the dispute is confined to the rules governing liability. ([Esgro Central, Inc. v. General Ins. Co. \(1971\) 20 Cal.App.3d 1054, 1060-1063 \[98 Cal.Rptr. 153\]](#); [McConnell v. Pacific Mutual Life Ins. Co. \(1962\) 205 Cal.App.2d 469, 477-480 \[24 Cal.Rptr. 5\]](#).) **CA(10b) (10b)** Here, the amount due each member of the plaintiff class -- judges of courts of record and judicial pensioners -- at any point in time between January 1, 1977, and June 27, 1980 (when *Olson v. Cory I* became final) was either of two readily calculable amounts: (1) the salary or pension due under [section 68203](#) as it read before the 1976 amendment or (2) that due under the section as amended. The question whether to pay any judge or pensioner under [****20] one [***852] version of the statute or the other did not depend on any factual uncertainty or dispute but solely on the proper answers to the questions of law ultimately resolved in *Olson v. Cory I*. Uncertainty over those legal issues did not prevent the amounts due from being "certain or capable of being made certain by calculation" ([Civ. Code, § 3287, subd. \(a\)](#)).

"Prevented By Law" Exception: Appellate and Superior Court Judges

HN14 The right to interest under [Civil Code section 3287, subdivision \(a\)](#), is subject to an express exception: the right arises "except during such time

as the debtor is prevented by law, or by the act of the creditor from paying [*403] the debt." The Controller contends that this exception precludes recovery of any interest on salaries or pensions withheld by him before, and contrary to, this court's 1980 decision in *Olson v. Cory I* that the 1976 amendment to [section 68203](#) was invalid as to certain judges and pensioners during certain periods. He relies on constitutional and statutory limitations on his power as a state official. Thus, [HN15 article XVI, section 7, of the Constitution](#) provides: "Money may be drawn from the Treasury only [****21] through an appropriation made by law and upon a Controller's duly drawn warrant." [Government Code section 12440](#) provides: "The Controller shall draw warrants on the Treasurer for the payment of money directed by law to be paid out of the treasury; but a warrant shall not be drawn unless authorized by law, and unless unexhausted specific appropriations provided by law are available to meet it. "The Controller also contends that he was precluded from giving effect to the 1976 amendment of [section 68203](#) by [article III, section 3.5 of the Constitution](#), adopted June 6, 1978, which provides that an "administrative agency" has no power to refuse to enforce a statute on grounds of constitutional invalidity unless an appellate court has declared it unconstitutional.

CA(12a) (12a) Whatever the effect of these restrictions on the Controller's power to pay salary or pension increases in disregard of a [***729] statute that was subsequently held unconstitutional, the restrictions are not determinative here. The exception provided by [Civil Code section 3287](#), on which he relies, applies only when the "debtor" is prevented by law from paying the debt. The Controller is not the debtor. The 1976 amendment [****22] of [section 68203](#) was held invalid because it violated the contractual rights of judges and pensioners not against the Controller but against the State of California. **CA(13) (13)** **HN16** When agreements of employment between the state and public employees have been adopted by governing bodies, such agreements are binding and constitutionally protected. [Citation.] In the instant

case the Legislature in 1969 adopted the full cost-of-living increase provision, *binding the state* to pay persons employed at the represented compensation for their terms of office." ([Olson v. Cory I, supra, 27 Cal.3d 532, 538](#), italics supplied.)

[CA\(12b\)](#) (12b) The state is therefore the debtor; moreover, it is subject to claims of interest under [HN17 Civil Code section 3287, subdivision \(a\)](#), which states that it "is applicable to recovery of damages and interest from any such debtor, including the state, or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state."

[CA\(14\)](#) (14) The only "law" that might plausibly be claimed to have prevented the state as debtor from paying the debts to plaintiffs on which interest is [*404] now claimed was the 1976 amendment to [****23] [section 68203](#). But the adoption of that amendment was an act of the state itself that conflicted with its constitutional obligations toward plaintiffs. Regardless of the amendment's effect on the duties of the Controller and other public officials, it would be anomalous to hold that legislation voluntarily promulgated by the debtor itself constitutes a "law" by which the debtor is "prevented" from fulfilling its overriding obligations.

[***853] This conclusion is consistent with [Benson v. City of Los Angeles \(1963\) 60 Cal.2d 355 \[33 Cal.Rptr. 257, 384 P.2d 649\]](#), where a claimant to widow's pension benefits was awarded interest notwithstanding the defendant city's contention that a city charter amendment purporting to deny the benefits caused the city to be "prevented by law" from paying them. Emphasizing prejudgment uncertainty over the charter amendment's constitutionality, this court held in effect that the city could not use its own charter provision as a defense to the claim of interest under [Civil Code section 3287](#). Though plaintiffs here cite an Attorney General's opinion ([60 Ops.Cal.Atty.Gen. 153 \(1977\)](#)) to show preexisting doubts over the

validity of the 1976 [****24] amendment to [section 68203](#), plaintiffs' right to interest does not turn on their ability to establish that any such doubts were brought to the attention of one or more state officials. An invalid statute voluntarily enacted and promulgated by the state is not a defense to its obligation to pay interest under [Civil Code section 3287, subdivision \(a\)](#).

The Controller expresses concern that to exclude a constitutionally defective statute as the source of a "prevented-by-law" defense to a claim for interest accruing against the state prior to the final judicial determination of unconstitutionality may put him in the untenable position of having to foresee at his own risk what that determination will be. But questions of the Controller's duties to pay the disputed amounts during that period are distinct from the obligation of the *state* to make such payments. A parallel distinction was made in [California State Employees' Assn. v. Cory \(1981\) 123 Cal.App.3d 888 \[176 Cal.Rptr. 904\]](#). There, state employees sought a writ of mandate to compel the Controller to pay interest on lump sum salary payments that had accrued while the constitutionality of the bill appropriating funds [****25] for the payments was litigated and finally upheld by this court (see [Jarvis v. Cory \(1980\) 28 Cal.3d 562 \[170 Cal.Rptr. 11, 620 P.2d 598\]](#)). The Controller conceded, and the Court of Appeal apparently agreed, that the plaintiff employees had a right to the interest under [Civil Code section 3287](#). ([123 Cal.App.3d at pp. 891, 895](#).) Nonetheless, it was held that the Controller could [***730] not be compelled by mandate to pay the interest in the absence of a legislative appropriation of the amount required. So here, we have concluded that the plaintiffs' rights to interest under [Civil Code section 3287](#) cannot be defeated by a claim that the State of California was prevented [*405] by law from paying the full amounts due plaintiffs during that period. That conclusion implies that component organs of state government, including the Legislature, could have made the payments. It does not necessarily follow that the Controller during that period could have

been judicially compelled to make the payments or that he incurred personal liability for failing to do so.

Interest on Judicial Pensioners' Claims

CA(15) (15) Defendants contend that plaintiffs are not entitled to interest on [****26] the increases in judicial pensions mandated by *Olson v. Cory I* because those pensions were and are payable entirely out of the Judges' Retirement Fund (*Gov. Code, § 75100*). They rely on *Jorgensen v. Cranston* (1962) 211 Cal.App.2d 292 [**731] [27 Cal.Rptr. 297], and *Willens v. Cory* (1975) 53 Cal.App.3d 104 [125 Cal.Rptr. 670], holding that the right to interest against the state or its subdivisions under *Civil Code section 3287* does not apply to "claims against public retirement funds [such as the Judges' Retirement Fund] reasonably challenged by the State Controller" (*Jorgensen*, 211 Cal.App.2d at p. 302, quoted and followed in *Willens*, 53 Cal.App.3d at p. 106). A legislative intent to exclude such claims from *Civil Code section 3287* was inferred from the perceived duty of the Controller, as trustee of the Judges' Retirement Fund, to resolve any doubts about claims against the fund before making payment (citing *Rest.2d Trusts, § 207, com. c*, at p. 470).⁴

[****27] [****854] This court, however, has not adopted any such special-fund exception to the right of interest under *Civil Code section 3287*. In *Benson v. City of Los Angeles*, *supra*, 60 Cal.2d 355, 365, we simply distinguished *Jorgensen* as inapplicable to salary or pension obligations payable out of the public debtor's general fund by observing that "the judges' retirement fund is a special trust fund and as such *may* not fall within the meaning of *section 3287*" (italics added). In *Mass v. Board of Education*, *supra*, 61 Cal.2d 612, we upheld a claim for interest on wrongfully

withheld salary "since it involves recovery upon a general underlying monetary obligation" (*id. at p. 626*) and noted that *Jorgensen* and other cases "may be distinguished on the narrow ground that they involved mandamus actions against a trustee of a special fund." (*Id., at p. 625, fn. 8*.) Recoverability of interest on judicial pension claims under *Civil Code section 3287* was thus left an open question in this court.

[*406] **HN18** Nothing in the wording of *Civil Code section 3287* suggests that the right to recover interest from the state varies in accordance with the particular fund [****28] out of which the underlying obligation was payable. As explained, we have concluded that even the right to interest on salary increases payable out of the state's general fund is not nullified or diminished by any obligation that the Controller may have to refrain from paying apparent debts of the state that are clouded by legal uncertainties until those uncertainties are removed. Thus, the existence of such an obligation with respect to the Judges' Retirement Fund, relied on in *Jorgensen*, does not establish any difference between the right to interest on debts payable out of that fund and the right to interest on debts payable out of the state's general fund. Accordingly, plaintiffs are entitled to interest on judicial pension payments adjudged in *Olson v. Cory I*. Statements to the contrary in *Jorgensen v. Cranston*, *supra*, 211 Cal.App.2d 292, 300-302, *Willens v. Cory*, *supra*, 53 Cal.App.3d 104, and *Gibbons & Reed Co. v. Dept. of Motor Vehicles* (1963) 220 Cal.App.2d 277, 289 [33 Cal.Rptr. 688], are disapproved.

Interest on Municipal Court Judicial Salary Claims

HN19 Salaries of municipal court judges, unlike those of other courts of record, are [****29] paid solely out of county funds. (*Gov. Code, § 71220*.) The county-auditor defendants contend that therefore the increases in municipal court salaries ordered in *Olson v. Cory I* were county obligations on which the county need not pay prejudgment interest accruing before that decision was rendered

⁴ As of July 1, 1979, most of the Controller's responsibilities for the fund were assumed by the Board of Administration of the Public Employees' Retirement Fund. All payments from the fund are "made upon warrants drawn by the State Controller upon demands by" that board. (*Gov. Code, § 75005*.)

because during that time they were "prevented by law" ([Civ. Code, § 3287](#)) from paying the increases. They rely on [Sonoma County Organization of Public Employees v. County of Sonoma \(1979\) 23 Cal.3d 296 \[152 Cal.Rptr. 903, 591 P.2d 1\]](#).

In *Sonoma*, this court held that a statute that purported to nullify wage increase agreements between local public entities (including counties) and their employees was an unconstitutional impairment of the obligation of contract, and we ordered the increases paid. The plaintiffs' claim to interest on those payments, however, was denied on the ground that the local entities were "prevented by law . . . from paying the debt" ([Civ. Code, § 3287](#)) on account of the serious financial hardship, through withholding of state funds, provided by the unconstitutional statute as a penalty for exceeding its guidelines.

The present case resembles [****30] *Sonoma* in that the counties were powerless to contravene an invalid statute in order to pay the debts in question before the statute's invalidity was judicially determined. But in *Sonoma* the debts were created by contracts independently entered into by the counties, whereas here the municipal court judges' salary claims were based wholly on state [*407] statutes ([Gov. Code, §§ 68202- 68203](#)) enacted pursuant to the Legislature's sole constitutional power to prescribe the number and compensation of municipal court judges ([Cal. Const., art. VI, §§ 5, 19](#)). The increases in such compensation, on which interest is now claimed, were held owing in *Olson v. Cory I* because [section 68202](#) prior [***855] to its 1976 amendment constituted a contract between municipal court judges and the *state*.

"A county is the largest political division of the State having corporate powers." ([Gov. Code, § 23000](#).) Counties have corporate powers conferred by the Constitution (e.g., art. XI, §§ 1, subd. (b), 3, 4) and by statute (e.g., [Gov. Code, § 23003 et seq.](#)). Thus, in *Sonoma* the wage increase claims on which interest was denied emanated from the powers of the counties' governing [****31] bodies

to provide for the compensation of county employees ([Cal. Const., art. XI, § 1, subd. \(b\)](#)) through collective bargaining contracts with employee organizations ([Gov. Code, § 3500 et seq.; Sonoma, 23 Cal.3d at p. 304](#)).

HN20 With respect to municipal court judges' compensation, however, counties function solely as "legal subdivisions of the State" ([Cal. Const., art. XI, § 1, subd. \(a\)](#); [Gov. Code, § 23002](#)) having purely ministerial functions. The Legislature's power to fix that compensation ([Cal. Const., art. VI, §§ 5, subd. \(a\), 19](#)) is immune from any interference or modification by county boards of supervisors or county officials, who have no choice but to pay the compensation out of county funds as ordered by the Legislature ([Gov. Code, § 71220](#)).

CA(16) (16) Earlier in this opinion, we concluded that the liability for interest on state-paid judicial salary claims is not barred by any right or duty of the Controller to withhold payments that are clouded by legal uncertainty, and that such liability for interest on judicial pensioners' claims is not barred by the fact that the pensions are payable out of a special retirement fund. In light of those conclusions, we hold that the right [****32] to interest on municipal court judges' salary claims is barred neither by duties of county fiscal officers to withhold legally questionable payments until the uncertainties are judicially dispelled nor by [**732] the fact that the state has ordered the salaries paid out of county funds. Since the salaries are prescribed exclusively by the Legislature, the Legislature's 1976 amendment of [section 68203](#), insofar as held inoperative in *Olson v. Cory I*, cannot be deemed a "law" that prevented counties from paying the municipal court judicial salary claims.

Effect of Preliminary Injunction

As noted earlier the trial court granted plaintiffs a preliminary injunction by which the Controller and county auditors were ordered to withhold 25 [*408] percent of the payments due under *Olson v. Cory I*, apparently to secure plaintiffs' attorney

fees. As to this 25 percent, the state and counties clearly were "prevented by law," i.e., the injunction, from making such payments and so cannot be held liable for interest accruing while the injunction is in effect. [CA\(17\) \(17\)](#) Plaintiffs contend they are equitably entitled to such interest because the debtors have had use of the money. [****33] [Civil Code section 3287](#), however, relieves debtors of the obligation for interest when payment is prevented by law, regardless of such equitable considerations. Plaintiffs, of course, do not and could not dispute the validity of the injunction which they themselves obtained.

Let a peremptory writ of mandate issue, directing the trial court to vacate its order denying plaintiffs' motion for an order specifying that plaintiffs' right to interest is an issue without substantial controversy and to make a different order consistent with this opinion.

The parties shall bear their own costs.

Concur by: BIRD

Concur

BIRD, C. J. Under the compulsion of [Olson v. Cory \(1980\) 27 Cal.3d 532 \[178 Cal.Rptr. 568, 636 P.2d 532\]](#) (*Olson v. Cory I*), I concur in Justice Reynoso's well-reasoned opinion in this case.

However, I believe that *Olson v. Cory I* was wrongly decided, and I view that opinion as a legal disaster. My concurrence in this opinion is not meant to imply my approval of any portion of the decision in *Olson v. Cory I*.



Caution

As of: October 18, 2026 7:03 AM Z

Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.

Supreme Court of California

July 11, 1968

S. F. No. 22580

Reporter

69 Cal. 2d 33 *; 442 P.2d 641 **; 69 Cal. Rptr. 561 ***; 1968 Cal. LEXIS 225 ****; 40 A.L.R.3d 1373

PACIFIC GAS AND ELECTRIC COMPANY,
Plaintiff and Respondent, v. G. W. THOMAS
DRAYAGE & RIGGING COMPANY, INC.,
Defendant and Appellant

Prior History: [****1] APPEAL from a judgment of the Superior Court of the City and County of San Francisco. William A. O'Brien, Judge.

Action for damages for injury to property under an indemnity clause of a contract.

Disposition: Reversed. Judgment for plaintiff reversed.

Core Terms

repair, extrinsic evidence, invoice, written instrument, intent of a party, indemnity clause, contractual, susceptible, turbine, hearsay, verbal

Case Summary

Procedural Posture

Defendant contractor appealed from a judgment of the Superior Court of the City and County of San Francisco (California), holding that an indemnity clause covered damages to all property, regardless of ownership, in plaintiff utility company's action to recover damages to property under the indemnity clause.

Overview

Defendant contractor appealed from a judgment for

plaintiff utility company in an action to collect damages under an indemnity clause of a contract. Defendant contracted to repair plaintiff's steam turbine, promising to indemnify plaintiff for all property damage. The turbine was damaged during repairs. Defendant argued that the parties intended that defendant would indemnify plaintiff only for damage to the property of third parties. Relying on the plain meaning of the contract language, the trial court concluded that defendant was liable. Defendant appealed. The court reversed the judgment, holding that looking only at the plain meaning of contractual language ignored the possibility that the parties had contrary intentions. The court therefore held that parol evidence was admissible to ascertain the true intent of the contractual parties even where the writing seemed clear and unambiguous.

Outcome

The court reversed the judgment, holding that parol evidence was admissible to ascertain the true intent of the contractual parties even where the writing seemed clear and unambiguous.

LexisNexis® Headnotes

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Evidence > Admissibility > Statements as Evidence > Parol Evidence

HN1 The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN2 A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.

Contracts Law > Contract Interpretation > Intent

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN3 In the State of California, the intention of the parties as expressed in the contract is the source of contractual rights and duties. A court must ascertain and give effect to this intention by determining what the parties meant by the words they used. Accordingly, the exclusion of relevant, extrinsic, evidence to explain the meaning of a written instrument could be justified only if it were feasible to determine the meaning the parties gave to the words from the instrument alone.

Contracts Law > Contract Interpretation > General Overview

HN4 A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.

Contracts Law > Contract Interpretation > General Overview

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

HN5 If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents. A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry. The meaning of particular words or groups of words varies with the verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

HN6 The meaning of a writing can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN7 Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose. The fact that the terms of an instrument

appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms. That possibility is not limited to contracts whose terms have acquired a particular meaning by trade usage, but exists whenever the parties' understanding of the words used may have differed from the judge's understanding.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN8 Rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties. Such evidence includes testimony as to the circumstances surrounding the making of the agreement, including the object, nature and subject matter of the writing, so that the court can place itself in the same situation in which the parties found themselves at the time of contracting. If the court decides, after considering this evidence, that the language of a contract, in the light of all the circumstances, is fairly susceptible of either one of the two interpretations contended for, extrinsic evidence relevant to prove either of such meanings is admissible.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Objections

Evidence > Admissibility > Statements as Evidence > Parol Evidence

HN9 When objection is made to any particular item of evidence offered to prove the intention of the parties, the trial court may not yet be in a position to determine whether in the light of all of the offered evidence, the item objected to will turn out to be admissible as tending to prove a meaning of which the language of the instrument is reasonably susceptible or inadmissible as tending to prove a

meaning of which the language is not reasonably susceptible. In such case the court may admit the evidence conditionally by either reserving its ruling on the objection or by admitting the evidence subject to a motion to strike.

Business & Corporate
Compliance > Contracts > Contract Conditions & Provisions > Indemnity Clauses

Contracts Law > Contract Conditions & Provisions > Indemnity Clauses

Torts > ... > Defenses > Exculpatory Clauses > Interpretation

Torts > ... > Multiple Defendants > Indemnity > General Overview

HN10 An indemnity clause phrased in general terms will not be interpreted to provide indemnity for consequences resulting from the indemnitee's own actively negligent acts.

Evidence > ... > Exceptions > Business Records > General Overview

HN11 Since invoices, bills, and receipts for repairs are hearsay, they are inadmissible independently to prove that liability for the repairs was incurred, that payment was made, or that the charges were reasonable. If, however, a party testifies that he incurred or discharged a liability for repairs, any of these documents may be admitted for the limited purpose of corroborating his testimony, and if the charges were paid, the testimony and documents are evidence that the charges were reasonable.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses

HN12 An expert must base his opinion either on facts personally observed or on hypotheses that find support in the evidence.

Headnotes/Summary

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1) (1)

Evidence—Extrinsic Evidence—Evidence in Aid of Interpretation—Evidence of Meaning of Instrument.

--The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.

CA(2) (2)

Contracts—Interpretation and Effect—Intention of Parties.

--The intention of the parties as expressed in the contract is the source of contractual rights and duties, and a court must ascertain and give effect to this intention by determining what the parties meant by the words they used; the exclusion of relevant, extrinsic evidence to explain the meaning of a written instrument is justified only if it is feasible to determine the meaning the parties gave to the words from the instrument alone.

CA(3) (3)

Words and Phrases—"Word."

--A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry.

CA(4) (4)

Contracts—Interpretation and Effect—Surrounding Circumstances.

--The meaning of a writing can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words; and the exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended.

CA(5) (5)

Id.—Interpretation and Effect—Intention of Parties.

--Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose; and rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties, including testimony as to the circumstances surrounding the making of the agreement, including the object, nature and subject matter of the writing, so that the court can place itself in the same situation in which the parties found themselves at the time of contracting.

CA(6) (6)

Id.—Interpretation and Effect—Functions of Court—Ambiguities.

--If the court decides, after considering all credible evidence offered to prove the intention of the parties, that the language of a contract, in the light of all the circumstances, is fairly susceptible of either one of the two interpretations contended for, extrinsic evidence relevant to prove either of such

meanings is admissible.

CA(7) (7)

Indemnity—Actions—Evidence.

--In an indemnitee's action against his indemnitor for damages for injury to plaintiff's property under the indemnity clause of a contract, the court committed reversible error in refusing to consider extrinsic evidence offered by defendant to show that the indemnity clause in the contract was not intended to cover plaintiff's property, where, although that evidence was not necessary to show that the indemnity clause was reasonably susceptible of the meaning contended for by defendant, it was nevertheless relevant and admissible on that issue, and where, since the indemnity clause was reasonably susceptible of that meaning, the offered evidence was also admissible to prove that the clause had that meaning and did not cover injuries to plaintiff's property.

CA(8) (8)

Id.—Actions—Defenses.

--An indemnity clause phrased in general terms will not be interpreted to provide indemnity for consequences resulting from the indemnitee's own actively negligent acts, and if an indemnitee's own active negligence is a cause of the harm, the indemnitor is relieved of liability.

CA(9) (9)

Evidence—Hearsay—Declarations in Papers and Documents—Invoices, Bills and Receipts.

--Invoices, bills, and receipts for repairs are hearsay and are inadmissible independently to prove that liability for the repairs was incurred, that payment was made, or that the charges were reasonable; but if a party testifies that he incurred or discharged a liability for repairs, such documents

may be admitted for the limited purpose of corroborating his testimony, and if the charges were paid, the testimony and documents are evidence that the charges were reasonable.

CA(10) (10)

Indemnity—Actions—Evidence.

--In an indemnitee's action against his indemnitor for damages for injury to its property under an indemnity clause of a contract, use of invoices for repairs to the damaged property to prove that the specific repairs had been made was error, where no qualified witness was called to testify that the invoices accurately recorded the work done on the property, and there was no other evidence as to what repairs were made.

CA(11) (11)

Id.—Actions—Evidence.

--An expert must base his opinion either on facts personally observed or on hypotheses that find support in the evidence; thus in an indemnitee's action against his indemnitor for damages for injury to its property under the indemnity clause of a contract, defendant's objections to the testimony of plaintiff's expert as to the reasonableness of charges for repairs to the property should have been sustained where the testimony was based on hearsay evidence inadmissible to prove that the repairs had been made.

Counsel: Miller, Van Dorn, Hughes & O'Connor, Richard H. McConnell and Daniel C. Miller for Defendant and Appellant.

Richard H. Peterson, Gilbert L. Harrick and Donald Mitchell for Plaintiff and Respondent.

Judges: In Bank. Traynor, C. J. Peters, J., Mosk, J., Burke, J., Sullivan, J., and Peek, J., * concurred.

*Retired Associate Justice of the Supreme Court sitting under

McComb, J., dissented.

Opinion by: TRAYNOR

Opinion

[*35] [643] [***563]** Defendant appeals from a judgment for plaintiff in an action for damages for injury to property under an indemnity clause of a contract.

[*36] In 1960 defendant entered into a contract with plaintiff to furnish the labor and equipment necessary to remove and replace the upper metal cover of plaintiff's steam turbine. Defendant agreed to perform the work "at [its] own risk and expense" and to "indemnify" plaintiff "against all [****2] loss, damage, expense and liability resulting from . . . injury to property, arising out of or in any way connected with the performance of this contract." Defendant also agreed to procure not less than \$ 50,000 insurance to cover liability for injury to property. Plaintiff was to be an additional named insured, but the policy was to contain a cross-liability clause extending the coverage to plaintiff's property.

During the work the cover fell and injured the exposed rotor of the turbine. Plaintiff brought this action to recover \$ 25,144.51, the amount it subsequently spent on repairs. During the trial it dismissed a count based on negligence and thereafter secured judgment on the theory that the indemnity provision covered injury to all property regardless of ownership.

Defendant offered to prove by admissions of plaintiff's agents, by defendant's conduct under similar contracts entered into with plaintiff, and by other proof that in the indemnity clause the parties meant to cover injury to property of third parties only and not to plaintiff's property.¹ Although the

trial court observed that the language used was "the classic language for a third party indemnity provision" **[****3]** and that "one could very easily conclude that . . . its whole intendment is to indemnify third parties," it nevertheless held that the "plain language" of the agreement also required defendant to indemnify plaintiff for injuries to plaintiff's property. Having determined that the contract had a plain meaning, the court refused to admit any extrinsic evidence that would contradict its interpretation.

[**4]** When the court interprets a contract on this basis, it determines **[*37]** the meaning of the instrument in accordance with the ". . . extrinsic evidence of the judge's own linguistic education and experience." (3 Corbin on Contracts (1960 ed.) [1964 Supp. § 579, p. 225, fn. 56].) The exclusion of testimony that might contradict the linguistic background of the judge reflects a judicial belief in the possibility of perfect verbal expression. (9 Wigmore on Evidence (3d ed. 1940) § 2461, p. 187.) This belief is a remnant of a primitive faith in the inherent potency² **[****5]** and inherent **[**644] [***564]** meaning of words.³

Beneficial etc. Ins. Co. v. Kurt Hitke & Co. (1956) 46 Cal.2d 517, 522 [297 P.2d 428]; *Stickel v. San Diego Elec. Ry. Co.* (1948) 32 Cal.2d 157, 162-164 [195 P.2d 416]; *Douillard v. Woodd* (1942) 20 Cal.2d 665, 670 [128 P.2d 6]), since the court repeatedly ruled that it would not admit extrinsic evidence to interpret the contract and sustained objections to all questions seeking to elicit such evidence, no formal offer of proof was required. (*Evid. Code, § 354, subd. (b)*; *Beneficial etc. Ins. Co. v. Kurt Hitke & Co., supra*, 46 Cal.2d 517, 522; *Estate of Kearns* (1950) 36 Cal.2d 531, 537 [225 P.2d 218].)

²E.g., "The elaborate system of taboo and verbal prohibitions in primitive groups; the ancient Egyptian myth of Khern, the apotheosis of the words, and of Thoth, the Scribe of Truth, the Giver of Words and Script, the Master of Incantations; the avoidance of the name of God in Brahmanism, Judaism and Islam; totemistic and protective names in mediaeval Turkish and Finno-Ugrian languages; the misplaced verbal scruples of the 'Precieuses'; the Swedish peasant custom of curing sick cattle smitten by witchcraft, by making them swallow a page torn out of the psalter and put in dough. . . .' from Ullman, *The Principles of Semantics* (1963 ed.) 43. (See also Ogden and Richards, *The Meaning of Meaning* (rev. ed. 1956) pp. 24-47.)

³"Rerum enim vocabula immutabilia sunt, homines mutabilia," (Words are unchangeable, men changeable) from Dig. XXXIII, 10, 7, § 2, *de sup. leg.* as quoted in 9 Wigmore on Evidence, *op. cit. supra*, § 2461, p. 187.

assignment by the Chairman of the Judicial Council.

¹Although this offer of proof might ordinarily be regarded as too general to provide a ground for appeal (*Evid. Code, § 354, subd. (a)*;

CA(1) (1) HN1 The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 520-521 [67 Cal.Rptr. 761, 439 P.2d 889]; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 [44 Cal.Rptr. 767, 402 P.2d 839]; *Hulse v. Juillard Fancy Foods Co.* (1964) 61 Cal.2d 571, 573 [39 Cal.Rptr. 529, 394 P.2d 65]; *Nofziger v. Holman* (1964) 61 Cal.2d 526, 528 [39 Cal.Rptr. 384, 393 P.2d 696]; *Coast Bank v. Minderhout* (1964) 61 Cal.2d 311, 315 [38 Cal.Rptr. 505, 392 P.2d 265]; *Imbach v. Schultz* (1962) 58 Cal.2d 858, 860 [27 Cal.Rptr. 160, 377 P.2d ****6] 272]; *Reid v. Overland Machined Products* (1961) 55 Cal.2d 203, 210 [10 Cal.Rptr. 819, 359 P.2d 251].)

HN2 A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.

[*38] Some courts have expressed the opinion that contractual obligations are created by the mere use of certain words, whether or not there was any intention to incur such obligations.⁴ Under this view, contractual obligations flow, not from the intention of the parties but from the fact that they used certain magic words. Evidence of the parties' intention therefore becomes irrelevant.

[**7] CA(2) (2) HN3** In this state, however, the intention of the parties as expressed in the contract is the source of contractual rights and duties.⁵ A court must ascertain and give effect to this intention by determining what the parties meant by the words they used. Accordingly, the exclusion of relevant, extrinsic, evidence to explain the meaning of a written instrument could be justified only if it were feasible to determine the meaning the parties gave to the words from the instrument alone.

HN5 If words had absolute and constant referents, it might be possible to discover contractual intention in **[****8]** the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents. **CA(3) (3)** "A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry, . . ." (*Pearson v. State Social Welfare Board* (1960) 54 Cal.2d 184, 195 [5 Cal.Rptr. 553, 353 P.2d 33].) The meaning of particular words or groups of words varies with the ". . . verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). . . . A word has no meaning apart from these factors; much less does it have an objective **[**645] [****565]** meaning, one true meaning." (Corbin, *The Interpretation of Words and the Parol Evidence Rule* (1965) 50 Cornell L.Q. 161, 187.) **CA(4) (4)** Accordingly, **HN6** the meaning of a writing ". . . can only be found by interpretation **[*39]** in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to

⁴"A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent." (*Hotchkiss v. National City Bank of New York* (S.D.N.Y. 1911) 200 F. 287, 293. See also *C. H. Pope & Co. v. Bibb Mfg. Co.* (2d Cir. 1923) 290 F. 586, 587; see 4 Williston on Contracts (3d ed. 1961) § 612, pp. 577-578, § 613, p. 583.)

⁵"A **HN4** contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (*Civ. Code, § 1636*; see also *Code Civ. Proc., § 1859*; *Universal Sales Corp. v. California Press Mfg. Co.* (1942) 20 Cal.2d 751, 760 [128 P.2d 665]; *Lemm v. Stillwater Land & Cattle Co.* (1933) 217 Cal. 474, 480 [19 P.2d 785].)

the attribution [****9] to a written instrument of a meaning that was never intended. [Citations omitted.]” (*Universal Sales Corp. v. California Press Mfg. Co.*, *supra*, 20 Cal.2d 751, 776 (concurring opinion); see also, e.g., *Garden State Plaza Corp. v. S. S. Kresge Co.* (1963) 78 N.J. Super. 485 [189 A.2d 448, 454]; *Hurst v. W. J. Lake & Co.* (1932) 141 Ore. 306, 310 [16 P.2d 627, 629, 89 A.L.R. 1222]; 3 Corbin on Contracts (1960 ed.) § 579, pp. 412-431; Ogden and Richards, *The Meaning of Meaning*, *op.cit supra* 15; Ullmann, *The Principles of Semantics*, *supra*, 61; McBaine, *The Rule Against Disturbing Plain Meaning of Writings* (1943) 31 Cal.L.Rev. 145.)

CA(5) (5) HN7 Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose. The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms. That possibility is not limited to contracts whose terms have acquired a particular meaning [****10] by trade usage,⁶ but exists whenever the parties' understanding of the words used may have differed from the judge's understanding.

[****11] Accordingly, HN8 rational

interpretation requires at least a preliminary consideration of all credible evidence offered to [****40] prove the intention of the parties.⁷ (*Civ. Code*, § 1647; *Code Civ. Proc.*, § 1860; see also 9 Wigmore on Evidence, *op. cit. supra*, § 2470, fn. 11, p. 227.) Such evidence includes testimony as to the "circumstances surrounding the making of the agreement . . . including the object, nature and subject matter of the writing . . ." so that the court can "place itself in the same situation in which the parties found themselves at the time of contracting." (*Universal Sales Corp. v. California Press Mfg. Co.*, *supra*, 20 Cal.2d 751, 761; *Lemm v. Stillwater Land & Cattle Co.*, *supra*, 217 Cal. 474, 480-481.) CA(6) (6) If the court decides, [****646] [****566] after considering this evidence, that the language of a contract, in the light of all the circumstances, "is fairly susceptible of either one of the two interpretations contended for . . ." (*Balfour v. Fresno C. & I. Co.* (1895) 109 Cal. 221, 225 [41 P. 876]; see also, *Hulse v. Juillard Fancy Foods Co.*, *supra*, 61 Cal.2d 571, 573; *Nofziger v. Holman*, *supra*, 61 Cal.2d 526, [****12] 528; *Reid v. Overland Machined Products*, *supra*, 55 Cal.2d 203, 210; *Barham v. Barham* (1949) 33 Cal.2d 416, 422-423 [202 P.2d 289]; *Kenney v. Los Feliz Investment Co.* (1932) 121 Cal.App. 378, 386-387 [9 P.2d 225]), extrinsic evidence relevant to prove either of such meanings is admissible.⁸

[****13] CA(7) (7) In the present case the court

⁶Extrinsic evidence of trade usage or custom has been admitted to show that the term "United Kingdom" in a motion picture distribution contract included Ireland (*Ermolieff v. R.K.O. Radio Pictures, Inc.* (1942) 19 Cal.2d 543, 549-552 [122 P.2d 3]); that the word "ton" in a lease meant a long ton or 2,240 pounds and not the statutory ton of 2,000 pounds (*Higgins v. California Petroleum etc. Co.* (1898) 120 Cal. 629, 630-632 [52 P. 1080]); that the word "stubble" in a lease included not only stumps left in the ground but everything "left on the ground after the harvest time" (*Callahan v. Stanley* (1881) 57 Cal. 476, 477-479); that the term "north" in a contract dividing mining claims indicated a boundary line running along the "magnetic and not the true meridian" (*Jenny Lind Co. v. Bower* (1858) 11 Cal. 194, 197-199) and that a form contract for purchase and sale was actually an agency contract. (*Body-Steffner Co. v. Flotill Products* (1944) 63 Cal.App.2d 555, 558-562 [147 P.2d 84]). See also *Code Civ. Proc.*, § 1861; Annot., 89 A.L.R. 1228; Note (1942) 30 Cal.L.Rev. 679.)

⁷HN9 When objection is made to any particular item of evidence offered to prove the intention of the parties, the trial court may not yet be in a position to determine whether in the light of all of the offered evidence, the item objected to will turn out to be admissible as tending to prove a meaning of which the language of the instrument is reasonably susceptible or inadmissible as tending to prove a meaning of which the language is not reasonably susceptible. In such case the court may admit the evidence conditionally by either reserving its ruling on the objection or by admitting the evidence subject to a motion to strike. (See *Evid. Code*, § 403.)

⁸Extrinsic evidence has often been admitted in such cases on the stated ground that the contract was ambiguous (e.g., *Universal Sales Corp. v. California Press Mfg. Co.*, *supra*, 20 Cal.2d 751, 761). This statement of the rule is harmless if it is kept in mind that the ambiguity may be exposed by extrinsic evidence that reveals more than one possible meaning.

erroneously refused to consider extrinsic evidence offered to show that the indemnity clause in the contract was not intended to cover injuries to plaintiff's property. Although that evidence was not necessary to show that the indemnity clause was reasonably susceptible of the meaning contended for by defendant, it was nevertheless relevant and admissible on that issue. Moreover, since that clause was reasonably susceptible of that meaning, [*41] the offered evidence was also admissible to prove that the clause had that meaning and did not cover injuries to plaintiff's property.⁹ Accordingly, the judgment must be

⁹The court's exclusion of extrinsic evidence in this case would be error even under a rule that excluded such evidence when the instrument appeared to the court to be clear and unambiguous on its face. The controversy centers on the meaning of the word "indemnify" and the phrase "all loss, damage, expense and liability." The trial court's recognition of the language as typical of a third party indemnity clause and the double sense in which the word "indemnify" is used in statutes and defined in dictionaries demonstrate the existence of an ambiguity. (Compare [Civ. Code, § 2772](#), "Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person," with [Civ. Code, § 2527](#), "Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability, arising from an unknown or contingent event." Black's Law Dictionary (4th ed. 1951) defines "indemnity" as "A collateral contract or assurance, by which one person engages to secure another against an anticipated loss or to prevent him from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person." Stroud's Judicial Dictionary (2d ed. 1903) defines it as a "Contract . . . to indemnify against a liability. . . ." One of the definitions given to "indemnify" by Webster's Third New International Dict. (1961 ed.) is "to exempt from incurred liabilities.")

Plaintiff's assertion that the use of the word "all" to modify "loss, damage, expense and liability" dictates an all inclusive interpretation is not persuasive. If the word "indemnify" encompasses only third-party claims, the word "all" simply refers to all such claims. The use of the words "loss," "damage," and "expense" in addition to the word "liability" is likewise inconclusive. These words do not imply an agreement to reimburse for injury to an indemnitee's property since they are commonly inserted in third-party indemnity clauses, to enable an indemnitee who settles a claim to recover from his indemnitor without proving his liability. ([Carpenter Paper Co. v. Kellogg \(1952\) 114 Cal.App.2d 640, 651 \[251 P.2d 40\]](#). [Civ. Code, § 2778](#), provides: "1. Upon an indemnity against liability . . . the person indemnified is entitled to recover upon becoming liable; 2. Upon an indemnity against claims, or demands, or damages, or costs . . . the person indemnified is not entitled to recover without payment

reversed.

[****14] [**647] [***567] [CA\(8\)](#) (8) Two questions remain that may arise on retrial. On the theory that the indemnity clause covered plaintiff's property, the trial court instructed the jury that plaintiff was entitled to recover unless all of ". . . the following conditions [were found] to exist:

"1. That Pacific Gas and Electric Company continued to [*42] maintain independent operation on the premises whereon the installation of the cover was in progress;

"2. That the damage to the turbine was unrelated to the Defendant G. W. Thomas Drayage & Rigging Company, Inc.'s performance;

"3. That the plaintiff was guilty of active, affirmative negligence; and

"4. That such active negligence related to a matter over which the plaintiff exercised exclusive control."

The instruction was based on certain guidelines discussed in [Goldman v. Ecco-Phoenix Elec. Corp. \(1964\) 62 Cal.2d 40, 45-46 \[41 Cal.Rptr. 73, 396 P.2d 377\]](#); [Harvey Machine Co. v. Hatzel & Buehler, Inc. \(1960\) 54 Cal.2d 445, 448 \[6 Cal.Rptr. 284, 353 P.2d 924\]](#); and [Safeway Stores, Inc. v. Massachusetts Bonding & Ins. Co. \(1962\) 202 Cal.App.2d 99, 112-113 \[20 Cal.Rptr. 820\]](#). Those cases do not hold, [****15] however, that all four conditions specified in the instruction must exist for the indemnitor to be relieved of liability. It is sufficient if the indemnitee's own active

thereof; . . .")

The provision that defendant perform the work "at his own risk and expense" and the provisions relating to insurance are equally inconclusive. By agreeing to work at its own risk defendant may have released plaintiff from liability for any injuries to defendant's property arising out of the contract's performance, but this provision did not necessarily make defendant an insurer against injuries to plaintiff's property. Defendant's agreement to procure liability insurance to cover damages to plaintiff's property does not indicate whether the insurance was to cover all injuries or only injuries caused by defendant's negligence.

negligence is a cause of the harm. As stated in *Markley v. Beagle* (1967) 66 Cal.2d 951, 952 [59 Cal.Rptr. 809, 429 P.2d 129], **HN10** "An indemnity clause phrased in general terms will not be interpreted . . . to provide indemnity for consequences resulting from the indemnitee's own actively negligent acts."

To prove the amount of damages sustained, plaintiff presented invoices received from Ingersoll-Rand, the manufacturer and repairer of the turbine, the drafts by which plaintiff had remitted payment, and testimony that payment had been made. Defendant objected to the introduction of the invoices on the ground that they were hearsay. Subsequently, plaintiff called a mechanical engineer who qualified as an expert witness on the repair of turbines. On the basis of photographs of the damage after the accident, he testified that to repair the turbine it was reasonable and necessary to dismantle it completely, magnaflux all parts, replace all blades in wheels that had been damaged, reassemble the rotor, balance [****16] it, "indicate" it and centrifugate it. Similar repairs were listed in the invoices, and over objection the witness was allowed to testify that the amounts charged therefor were reasonable.

CA(9) (9) HN11 Since invoices, bills, and receipts for repairs are hearsay, they are inadmissible independently to prove that liability for the repairs was incurred, that payment was made, or [*43] that the charges were reasonable. (*Plonley v. Reser* (1960) 178 Cal.App.2d Supp. 935, 937-939 [3 Cal.Rptr. 551, 80 A.L.R. 2d 911]; *Menefee v. Raisch Improvement Co.* (1926) 78 Cal.App. 785, 789 [248 P. 1031].) If, however, a party testifies that he incurred or discharged a liability for repairs, any of these documents may be admitted for the limited purpose of corroborating his testimony (*Bushnell v. Bushnell* (1925) 103 Conn. 583 [131 A. 432, 436, 44 A.L.R. 788]; *Cain v. Mead* (1896) 66 Minn. 195 [68 N.W. 840, 841]), and if the charges were paid, the testimony and documents are evidence that the charges were reasonable. (*Dewhirst v. Leopold* (1924) 194 Cal. 424, 433 [229 P. 30]; *Smith v. Hill*

(1965) 237 Cal.App.2d 374, 388 [47 Cal.Rptr. 49]; *Meier v. [****17] Paul X. Smith Corp.* (1962) 205 Cal.App.2d 207, 222 [22 Cal.Rptr. 758]; *Malinson v. Black* (1948) 83 Cal.App.2d 375, 379 [188 P.2d 788]; *Laubscher v. Blake* (1935) 7 Cal.App.2d 376, 383 [***568] [**648] [46 P.2d 836]. See also *Gimbel v. Laramie* (1960) 181 Cal.App.2d 77, 81 [5 Cal.Rptr. 88].) Since there was testimony in the present case that the invoices had been paid, the trial court did not err in admitting them.

CA(10) (10) The individual items on the invoices, however, were read, not to corroborate payment or the reasonableness of the charges, but to prove that these specific repairs had actually been made. No qualified witness was called to testify that the invoices accurately recorded the work done by Ingersoll-Rand, and there was no other evidence as to what repairs were made. This use of the invoices was error. (*California Steel Buildings, Inc. v. Transport Indemnity Co.* (1966) 242 Cal.App.2d 749, 759 [51 Cal.Rptr. 797]. Accord, *Bushnell v. Bushnell, supra*, 103 Conn. 583 [131 A. 432, 436]; *Ferraro v. Public Service Ry. Co.* (1928) 6 N.J. Misc. 463 [141 A. 590]; *Nock v. Lloyd* (1911) 32 R.I. 313 [79 A. 832, [****18] 833].) An invoice submitted by a third party is not admissible evidence on this issue unless it can be admitted under some recognized exception to the hearsay rule.¹⁰

CA(11) (11) Since plaintiff's expert's testimony as to the reasonableness of the charges was based on hearsay evidence inadmissible to prove that the repairs had been made, defendant's [*44] objections to it should have been sustained. **HN12** "[An] expert must base his opinion either on facts personally observed or on hypotheses that find support in the evidence." (*George v. Bekins Van & Storage Co.* (1949) 33 Cal.2d 834, 844 [205 P.2d

¹⁰ It might come in under the business records exception (*Evid. Code, § 1271*) if ". . . supported by the testimony of a witness qualified to testify as to its identity and the mode of its preparation." (*California Steel Buildings, Inc. v. Transport Indemnity Co., supra*, 242 Cal.App.2d 749, 759.)

69 Cal. 2d 33, *44; 442 P.2d 641, **648; 69 Cal. Rptr. 561, ***568; 1968 Cal. LEXIS 225, ****18

1037]. See also *Kastner v. Los Angeles Metropolitan Transit Authority* (1965) 63 Cal.2d 52, 58 [45 Cal.Rptr. [****19] 129, 403 P.2d 385]; *Commercial Union Assur. Co. v. Pacific Gas & Electric Co.* (1934) 220 Cal. 515, 524 [31 P.2d 793]; *Behr v. County of Santa Cruz* (1959) 172 Cal.App.2d 697, 709 [342 P.2d 987]; 2 Jones on Evidence (5th ed. 1958) § 416, pp. 782-783.)

The judgment is reversed.



Caution

As of: October 18, 2026 7:03 AM Z

Palmore v. Sidoti

Supreme Court of the United States

February 22, 1984, Argued ; April 25, 1984, Decided

No. 82-1734

Reporter

466 U.S. 429 *; 104 S. Ct. 1879 **; 80 L. Ed. 2d 421 ***; 1984 U.S. LEXIS 69 ****; 52 U.S.L.W. 4497

PALMORE v. SIDOTI

Prior History: [****1] CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT.

Disposition: 426 So. 2d 34, reversed.

Core Terms

custody, racial prejudice, natural mother, classification

Case Summary

Procedural Posture

Certiorari was granted to the District Court of Appeal of Florida, Second District, which affirmed without opinion an order of a trial court divesting petitioner mother of the custody of her child and awarding custody of the child to respondent father because of the mother's remarriage to a member of a minority. The mother appealed.

Overview

A mother challenging a state court order divesting her of custody of her child contended that, contrary to the trial court's findings, it was not in her pre-school child's best interests to be removed from her custody, while the father alleged that the child would be damaged by being raised in a racially mixed household. The mother was remarried to a man of a different race. The trial court determined that there was no question as to the parental

qualifications of the mother or her new husband and was entirely forthcoming as to race being the rationale for its holding. The United States Supreme Court reversed, holding that the [Fourteenth Amendment](#) would not brook such governmentally-imposed discrimination based on race. While the Court found that the State of Florida had a substantial governmental interest for purposes of the [Equal Protection Clause](#) in protecting the interests of children, such an interest could not support the State's toleration of prejudices based on race. The reality of private biases and the possible injury such biases could inflict on a child were determined by the Court not to be permissible considerations for removal of an infant child from its mother.

Outcome

The Court reversed the judgment upholding an order divesting the mother of custody of her child.

LexisNexis® Headnotes

Constitutional Law > Equal
Protection > National Origin & Race

Constitutional Law > Substantive Due
Process > Scope

Constitutional Law > Equal
Protection > Judicial Review > Standards of
Review

[HN1](#) Equal Protection, National Origin & Race the [Equal Protection Clause](#).

A core purpose of [U.S. Const. amend. XIV](#) is to do away with all governmentally imposed discrimination based on race. Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be necessary to the accomplishment of their legitimate purpose.

Constitutional Law > Equal Protection > Nature & Scope of Protection

[HN2](#) Equal Protection, Nature & Scope of Protection

The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the [Fourteenth Amendment](#).

Constitutional Law > Equal Protection > Nature & Scope of Protection

Family Law > ... > Custody
Awards > Standards > Best Interests of Child

Family Law > Child Custody > Custody
Awards > General Overview

[HN3](#) Equal Protection, Nature & Scope of Protection

The State has a duty of the highest order to protect the interests of minor children, particularly those of tender years. Florida law mandates that custody determinations be made in the best interests of the children involved. [Fla. Stat. Ann. § 61.13\(2\)\(b\)\(1\)](#) (1983). The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of

Civil Rights Law > ... > Elements > Color of
State Law > General Overview

Constitutional Law > Equal
Protection > National Origin & Race

[HN4](#) Elements, Color of State Law

Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.

Civil Rights Law > ... > Elements > Color of
State Law > General Overview

Constitutional Law > Equal
Protection > National Origin & Race

Family Law > Child Custody > General
Overview

Family Law > Child Custody > Custody
Awards > General Overview

[HN5](#) Elements, Color of State Law

The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.

[Lawyers' Edition Display](#)**Decision**

Remarriage to person of different race held not sufficient to justify divesting mother of child custody.

Summary

A Caucasian couple were divorced in Florida and custody of their 3-year-old daughter was awarded to the mother. Subsequently, the father sought modification of the custody award on the grounds that the child's mother was then cohabitating with a Negro, whom she later married. The Florida trial court awarded custody to the father, holding that the best interests of the child would be served thereby and that there would be a damaging impact on the child if she remained in a racially mixed household. The Florida District Court of Appeal affirmed without opinion (426 So 2d 34).

On certiorari, the United States Supreme Court reversed. In an opinion by Burger, Ch. J., expressing the unanimous view of the court, it was held that the effects of racial prejudice, however real, can not justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody. The court pointed out that while the United States Constitution cannot control such prejudice, neither can it tolerate it, and that although private biases may be outside the reach of the law, the law cannot, directly or indirectly, give them effect.

Headnotes

CONSTITUTIONAL LAW §316 > CIVIL RIGHTS
§4.5 > DIVORCE AND SEPARATION
§9.5 > miscegenation -- child custody -- > Headnote:
[LEdHN\[1A\]](#) [1A][LEdHN\[1B\]](#) [1B]

The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother because of the mother's remarriage to a person of a different race.

CIVIL RIGHTS §2 > purpose of Fourteenth

Amendment -- racial discrimination -- > Headnote:
[LEdHN\[2\]](#) [2]

A core purpose of the [Fourteenth Amendment](#) is to do away with all governmentally imposed discrimination based on race.

CONSTITUTIONAL LAW §319 > classification based on race -- compelling governmental interest --
> Headnote:
[LEdHN\[3\]](#) [3]

A classification of persons according to their race is subject to the most exacting scrutiny, and to pass constitutional muster, such classification must be justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose.

CONSTITUTIONAL LAW §319 > CIVIL RIGHTS
§4.5 > DIVORCE AND SEPARATION §9.5 > child custody -- discrimination -- equal protection --
> Headnote:
[LEdHN\[4\]](#) [4]

The goal of granting custody based on the best interests of the child is a substantial governmental interest for purposes of the [equal protection clause](#).

CONSTITUTIONAL LAW §316 > CIVIL RIGHTS
§4.5 > DIVORCE AND SEPARATION
§9.5 > miscegenation -- child custody -- prejudices and private biases -- > Headnote:
[LEdHN\[5A\]](#) [5A][LEdHN\[5B\]](#) [5B]

Although there is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the

child were living with parents of the same racial or ethnic origin, nevertheless the reality of private biases and the possible injury they might inflict are not permissible considerations for removal of an infant child from the custody of its natural mother; the United States Constitution can not control such prejudices and neither can it tolerate them; private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Syllabus

When petitioner and respondent, both Caucasians, were divorced in Florida, petitioner, the mother, was awarded custody of their 3-year-old daughter. The following year respondent sought custody of the child by filing a petition to modify the prior judgment because of changed conditions, namely, that petitioner was then cohabiting with a Negro, whom she later married. The Florida trial court awarded custody to respondent, concluding that the child's best interests would be served thereby. Without focusing directly on the parental qualifications of petitioner, her present husband, or respondent, the court reasoned that although respondent's resentment at petitioner's choice of a black partner was insufficient to deprive petitioner of custody, there would be a damaging impact on the child if she remained in a racially mixed household. The Florida District Court of Appeal affirmed.

Held: The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother. The Constitution cannot control [****2] such prejudice, but neither can it tolerate it. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. Pp. 431-434.

Counsel: Robert J. Shapiro argued the cause and filed a brief for petitioner.

John E. Hawtrey argued the cause and filed a brief

for respondent. *

Judges: BURGER, C. J., delivered the opinion for a unanimous Court.

Opinion by: BURGER

Opinion

[*430] [***424] [**1880] CHIEF JUSTICE BURGER delivered the opinion of the Court.

LEdHN[1A] [1A]We granted certiorari to [****3] review a judgment of a state court divesting a natural mother of the custody of her infant child because of her remarriage to a person of a different race.

I

When petitioner Linda Sidoti Palmore and respondent Anthony J. Sidoti, both Caucasians, were divorced in May 1980 in Florida, the mother was awarded custody of their 3-year-old daughter.

In September 1981 the father sought custody of the child by filing a petition to modify the prior judgment because of changed conditions. The change was that the child's mother was then cohabiting with a Negro, Clarence Palmore, Jr., whom she married two months later. Additionally, the father made several allegations of instances in which the mother had not properly cared for the child.

After hearing testimony from both parties and considering a court counselor's investigative report,

*Briefs of amici curiae urging reversal were filed for the United States by Solicitor General Lee, Assistant Attorney General Reynolds, Deputy Solicitor General Wallace, Deputy Assistant Attorney General Cooper, Kathryn A. Oberly, and Brian K. Landsberg; for the American Civil Liberties Union Foundation et al. by Burt Neuborne, William D. Zabel, Marcia Robinson Lowry, Thomas I. Atkins, Ira G. Greenberg, and Samuel Rabinove; for Leigh Earls et al. by Jay L. Carlson, James P. Tuite, Roderic V. O. Boggs, James D. Weill, Justin J. Finger, Jeffrey P. Sinensky, Leslie K. Shedlin, and Marc D. Stern; and for the Women's Legal Defense Fund et al. by Sally Katzen, Lynn Bregman, and Nancy Polikoff.

the court noted that the father had made allegations about the **[**1881]** child's care, but the court made no findings with respect to these allegations. On the contrary, the court made a finding that "there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent." App. to **[****4]** Pet. for Cert. 24.

The court then addressed the recommendations of the court counselor, who had made an earlier report "in [another] case coming out of this circuit also involving the social consequences of an interracial marriage. *Niles v. Niles*, 299 So. 2d 162." *Id.*, at 25. From this vague reference to that earlier case, the court turned to the present case and noted the counselor's recommendation for a change in custody because **[*431]** "[the] wife [petitioner] has chosen for herself and for her child, a life-style unacceptable to the father *and to society*. . . . The child . . . is, or at school age will be, subject to environmental pressures not of choice." Record 84 (emphasis added).

The court then concluded that the best interests of the child would be served by awarding custody to the father. The court's rationale is contained in the following:

"The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. **[****5]** Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. *This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.*" App. to Pet. for Cert. 26-27 (emphasis added).

The Second District Court of Appeal **[***425]**

affirmed without opinion, 426 So. 2d 34 (1982), thus denying the Florida Supreme Court jurisdiction to review the case. See *Fla. Const., Art. V, § 3(b)(3)*; *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980). We granted certiorari, 464 U.S. 913 (1983), and we reverse.

II

The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court. However, the court's opinion, after stating that the "father's evident resentment of the mother's choice of a black partner is not sufficient" to deprive her of custody, then turns to what **[****6]** it regarded as the damaging impact **[*432]** on the child from remaining in a racially mixed household. App. to Pet. for Cert. 26. This raises important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race.

The Florida court did not focus directly on the parental qualifications of the natural mother or her present husband, or indeed on the father's qualifications to have custody of the child. The court found that "there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent." *Id.*, at 24. This, taken with the absence of any negative finding as to the quality of the care provided by the mother, constitutes a rejection of any claim of petitioner's unfitness to continue the custody of her child.

The court correctly stated that the child's welfare was the controlling factor. But that court was entirely candid and made no effort to place its holding on any ground other than race. Taking the court's findings and rationale at face value, it is clear that the outcome would have been different had petitioner married a Caucasian male of similar **[****7]** respectability.

[LEdHN\[2\]](#) [2][LEdHN\[3\]](#) [3][HN1](#) A core purpose

of the [Fourteenth Amendment](#) was to do away with all governmentally **[**1882]** imposed ¹ discrimination based on race. See [Strauder v. West Virginia, 100 U.S. 303, 307-308, 310 \(1880\)](#). Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. See *Personnel Administrator of Mass. v. Feeney*, [442 U.S. 256, 272 \(1979\)](#). Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be "necessary . . . to the accomplishment" of their **[*433]** legitimate purpose, [McLaughlin v. Florida, 379 U.S. 184, 196 \(1964\)](#). See [Loving v. Virginia, 388 U.S. 1, 11 \(1967\)](#).

[**8]** [LEdHN\[4\]](#) [4][HN3](#) The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. In common with most states, Florida law mandates that custody determinations be made in the best interests of **[***426]** the children involved. [Fla. Stat. § 61.13\(2\)\(b\)\(1\)](#) (1983). The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the [Equal Protection Clause](#).

[LEdHN\[5A\]](#) [5A] It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.

[LEdHN\[5B\]](#) [5B] The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible

considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. ² The Constitution cannot control such prejudices but neither can it tolerate them. **[****9]** Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "[HN4](#) Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held." [Palmer v. Thompson, 403 U.S. 217, 260-261 \(1971\)](#) (WHITE, J., dissenting).

This is by no means the first time that acknowledged racial prejudice has been invoked to justify racial classifications. In [Buchanan v. Warley, 245 U.S. 60 \(1917\)](#), for example, **[*434]** this Court invalidated a Kentucky law forbidding Negroes to buy homes in white neighborhoods.

"It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and **[****10]** important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." [Id., at 81](#).

[LEdHN\[1B\]](#) [1B] Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. [HN5](#) The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody **[**1883]** of its natural mother found to be an appropriate person to have

¹ [HN2](#) The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the [Fourteenth Amendment](#). [Shelley v. Kraemer, 334 U.S. 1 \(1948\)](#); [Ex parte Virginia, 100 U.S. 339, 346-347 \(1880\)](#).

² In light of our holding based on the [Equal Protection Clause](#), we need not reach or resolve petitioner's claim based on the [Fourteenth Amendment's Due Process Clause](#).

such custody.³

[****11] [***427] The judgment of the District Court of Appeal is reversed.

It is so ordered.

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8A Am Jur Pl & Pr Forms (Rev), Divorce and Separation Forms 861-878; 19 Am Jur Pl & Pr Forms (Rev), Parent and Child, Forms 1-34

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Modern status of maternal preference rule or presumption in child custody cases. [70 ALR3d 262](#).

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³This conclusion finds support in other cases as well. For instance, in [Watson v. Memphis, 373 U.S. 526 \(1963\)](#), city officials claimed that desegregation of city parks had to proceed slowly to "prevent interracial disturbances, violence, riots, and community confusion and turmoil." [Id., at 535](#). The Court found such predictions no more than "personal speculations or vague disquietudes," [Id., at 536](#), and held that "constitutional rights may not be denied simply because of hostility to their assertion or exercise," [Id., at 535](#). In [Wright v. Georgia, 373 U.S. 284 \(1963\)](#), the Court reversed a Negro defendant's breach-of-peace conviction, holding that "the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the [Equal Protection Clause](#)) to be present." [Id., at 293](#).