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

United States v. Skrmetti

Supreme Court of the United States

December 4, 2024, Argued; June 18, 2025, Decided

No. 23-477.

Reporter

605 U.S. 495 *; 145 S. Ct. 1816 **; 222 L. Ed. 2d 136 ***; 2025 U.S. LEXIS 2377 ****; 2025 LX 124507; 31 Fla. L. Weekly Fed. S 102

UNITED STATES, PETITIONER v. JONATHAN SKRMETTI, ATTORNEY GENERAL AND REPORTER FOR TENNESSEE, ET AL.

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

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

[L.W. v. Skrmetti, 83 F.4th 460, 2023 U.S. App. LEXIS 25697 \(Sept. 28, 2023\)](#)

Disposition: Affirmed.

Core Terms

sex, gender, transgender, puberty, classification, blocker, hormone, dysphoria, classify, female, male, adolescent, minor's, biological, birth, sex-based, medical treatment, the, ban, intermediate scrutiny, heightened scrutiny, basis of sex, guideline, heighten, medical procedure, suspect class, incongruence, testosterone, healthcare, prescribe

Case Summary

Overview

HOLDINGS: [\[1\]-Prohibition on Medical Procedures Performed on Minors Related to Sexual Identity Act \(SB 1\), Tenn. Code Ann. § 68-33-101 et seq.](#), was not subject to heightened scrutiny per the [Equal Protection Clause](#) as its classifications were based on age and medical use, rather than sex. SB 1 did not mask sex-based classifications as it prohibited the administration of puberty blockers or hormones to treat gender dysphoria, gender identity disorder, or gender incongruence to all minors; [2]-Under rational basis review, SB 1 did not violate equal protection as its age- and diagnosis-based classifications were plainly rationally related to the findings about the risks and benefits associated with administering puberty blockers and hormones to treat gender dysphoria, gender identity disorder, and gender incongruence in minors, and the objective of protecting minors' health and welfare.

Outcome

Judgment affirmed. 6-3 decision; 3 concurrences; 2 dissents.

LexisNexis® Headnotes

Constitutional Law > Equal Protection > Judicial Review

Governments > Federal Government > Claims By & Against

Governments > Federal
Government > Employees & Officials

HN1 Equal Protection, Judicial Review

[42 U.S.C.S. § 2000h-2](#) authorizes the Federal Government to intervene in a private equal protection suit if the Attorney General certifies that the case is of general public importance.

Constitutional Law > Equal Protection > Nature & Scope of Protection

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

HN2 Equal Protection, Nature & Scope of Protection

The [Fourteenth Amendment's](#) command that no State shall deny to any person within its jurisdiction the equal protection of the laws, U.S. Const. amend. 14, § 1, must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. The principle of equal protection has been reconciled with the reality of legislative classification: if a law neither burdens a fundamental right nor targets a suspect class, the legislative classification will be upheld so long as it bears a rational relation to some legitimate end. Such laws are generally afforded wide latitude under this rational basis review. The Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

Constitutional Law > Equal
Protection > Gender & Sex

Constitutional Law > Equal
Protection > National Origin & Race

Constitutional Law > Equal
Protection > Judicial Review > Standards of

Review

HN3 Equal Protection, Gender & Sex

Certain legislative classifications prompt heightened review. For example, laws that classify on the basis of race, alienage, or national origin trigger strict scrutiny and will pass constitutional muster only if they are suitably tailored to serve a compelling state interest. Similarly, sex-based classifications warrant heightened scrutiny. While judicial precedent does not make sex a proscribed classification, sex generally provides no sensible ground for differential treatment, and sex-based lines too often reflect stereotypes or overbroad generalizations about the differences between men and women. Accordingly, laws containing sex-based classifications are subject to intermediate scrutiny, under which the State must show that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.

Constitutional Law > Equal
Protection > Gender & Sex

Healthcare Law > Medical
Treatment > Incompetent, Mentally Disabled &
Minors

Constitutional Law > Equal Protection > Nature
& Scope of Protection

HN4 Equal Protection, Gender & Sex

The [Prohibition on Medical Procedures Performed on Minors Related to Sexual Identity Act, Tenn. Code Ann. § 68-33-101 et seq.](#), is not subject to heightened scrutiny under the [Equal Protection Clause](#). That Act does not classify on any bases that warrant heightened review.

Constitutional Law > Equal Protection > Age

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

HN5 Equal Protection, Age

Classifications that turn on age or medical use are
subject to only rational basis review.

Healthcare Law > Medical
Treatment > Incompetent, Mentally Disabled &
Minors

HN6 Medical Treatment, Incompetent, Mentally Disabled & Minors

The [*Prohibition on Medical Procedures Performed
on Minors Related to Sexual Identity Act, Tenn.
Code Ann. § 68-33-101 et seq.*](#), prohibits healthcare
providers from administering puberty blockers and
hormones to minors for certain medical uses,
regardless of a minor's sex.

Constitutional Law > Equal
Protection > Gender & Sex

Constitutional Law > Equal Protection > Nature
& Scope of Protection

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

HN7 Equal Protection, Gender & Sex

The U.S. Supreme Court has never suggested that
mere reference to sex is sufficient to trigger
heightened scrutiny under the [*Equal Protection
Clause*](#). Such an approach would be especially
inappropriate in the medical context.

Constitutional Law > Equal
Protection > Gender & Sex

Constitutional Law > Equal Protection > Nature
& Scope of Protection

HN8 Equal Protection, Gender & Sex

In the medical context, the mere use of sex-based
language does not sweep a statute within the reach
of heightened scrutiny under the [*Equal Protection
Clause*](#).

Business & Corporate
Compliance > Governments > Agriculture &
Food > Federal Food & Drugs Act
Governments > Agriculture & Food > Federal
Food & Drugs Act

Governments > Agriculture & Food > Federal
Food, Drug & Cosmetic Act
Business & Corporate
Compliance > Governments > Agriculture &
Food > Federal Food, Drug & Cosmetic Act

HN9 Agriculture & Food, Federal Food & Drugs Act

The Food and Drug Administration approves drugs
and requires that they be labeled for particular
indications—the diseases or conditions that they
treat, prevent, mitigate, diagnose, or cure. [*21 C.F.R.
§§ 201.57\(c\)\(2\)*](#), 314.50(a)(1) (2024). Different
drugs can be used to treat the same thing (would
you like Advil or Tylenol for your headache?), and
the same drug can treat different things (take
DayQuil to ease your cough, fever, sore throat,
and/or minor aches and pains). For the term
“medical treatment” to make sense of these various
combinations, it must necessarily encompass both a
given drug and the specific indication for which it
is being administered.

Constitutional Law > Equal
Protection > Gender & Sex

Healthcare Law > Medical

Treatment > Incompetent, Mentally Disabled & Minors

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

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN10 Equal Protection, Gender & Sex

When properly understood from the perspective of the indications that puberty blockers and hormones treat, the [*Prohibition on Medical Procedures Performed on Minors Related to Sexual Identity Act \(SB1\)*](#), [*Tenn. Code Ann. § 68-33-101 et seq.*](#), clearly does not classify on the basis of sex. Both puberty blockers and hormones can be used to treat certain overlapping indications (such as gender dysphoria), and each can be used to treat a range of other conditions. These combinations of drugs and indications give rise to various medical treatments. When, for example, a transgender boy (whose biological sex is female) takes puberty blockers to treat his gender incongruence, he receives a different medical treatment than a boy whose biological sex is male who takes puberty blockers to treat his precocious puberty. SB1, in turn, restricts which of these medical treatments are available to minors: Under SB1, a healthcare provider may administer puberty blockers or hormones to any minor to treat a congenital defect, precocious puberty, disease, or physical injury, [*Tenn. Code Ann. § 68-33-103\(b\)\(1\)\(A\)*](#); a healthcare provider may not administer puberty blockers or hormones to any minor to treat gender dysphoria, gender identity disorder, or gender incongruence, [*Tenn. Code Ann. §§ 68-33-102\(1\), 68-33-103\(a\)\(1\), \(b\)\(2\)*](#). The application of that prohibition does not turn on sex.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN11 Equal Protection, Nature & Scope of Protection

A State may not circumvent the [*Equal Protection Clause*](#) by writing in abstract terms.

Constitutional Law > Equal Protection > Gender & Sex

Healthcare Law > Medical Treatment > Incompetent, Mentally Disabled & Minors

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN12 Equal Protection, Gender & Sex

The [*Prohibition on Medical Procedures Performed on Minors Related to Sexual Identity Act \(SB 1\)*](#), [*Tenn. Code Ann. § 68-33-101 et seq.*](#), does not mask sex-based classifications. The law does not prohibit conduct for one sex that it permits for the other. Under SB1, no minor may be administered puberty blockers or hormones to treat gender dysphoria, gender identity disorder, or gender incongruence; minors of any sex may be administered puberty blockers or hormones for other purposes.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Healthcare Law > Medical Treatment > Incompetent, Mentally Disabled & Minors

HN13 Equal Protection, Nature & Scope of Protection

A prohibition on the prescription of puberty blockers and hormones to enable a minor to identify with, or live as, a purported identity inconsistent with the minor's sex, [*Tenn. Code Ann. § 68-33-103\(a\)\(1\)*](#), is simply a prohibition on the

prescription of puberty blockers and hormones to treat gender dysphoria, gender identity disorder, or gender incongruence. A law prohibiting attendance at a religious service inconsistent with the attendee's religion may trigger heightened scrutiny. A law prohibiting the administration of specific drugs for particular medical uses does not.

Constitutional Law > Equal
Protection > Gender & Sex

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

HN14 Equal Protection, Gender & Sex

A law that classifies on the basis of sex may fail heightened scrutiny if the classifications rest on impermissible stereotypes. But where a law's classifications are neither covertly nor overtly based on sex, contrast, the law is not subjected to heightened review unless it was motivated by an invidious discriminatory purpose.

Constitutional Law > Equal
Protection > Gender & Sex

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

HN15 Equal Protection, Gender & Sex

A State does not trigger heightened constitutional scrutiny by regulating a medical procedure that only one sex can undergo unless the regulation is a mere pretext for invidious sex discrimination.

Constitutional Law > Equal Protection > Nature
& Scope of Protection

HN16 Equal Protection, Nature & Scope of

Protection

Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation on any reasonable basis, just as with respect to any other physical condition.

Constitutional Law > Equal Protection > Nature
& Scope of Protection

Healthcare Law > Medical
Treatment > Incompetent, Mentally Disabled &
Minors

HN17 Equal Protection, Nature & Scope of Protection

[Prohibition on Medical Procedures Performed on Minors Related to Sexual Identity Act \(SB 1\), Tenn. Code Ann. § 68-33-101 et seq.](#), does not exclude any individual from medical treatments on the basis of transgender status but rather removes one set of diagnoses—gender dysphoria, gender identity disorder, and gender incongruence—from the range of treatable conditions. SB1 divides minors into two groups: those who might seek puberty blockers or hormones to treat the excluded diagnoses, and those who might seek puberty blockers or hormones to treat other conditions. [Tenn. Code Ann. § 68-33-103](#). Because only transgender individuals seek puberty blockers and hormones for the excluded diagnoses, the first group includes only transgender individuals; the second group, in contrast, encompasses both transgender and nontransgender individuals. Thus, although only transgender individuals seek treatment for gender dysphoria, gender identity disorder, and gender incongruence—just as only biological women can become pregnant—there is a lack of identity between transgender status and the excluded medical diagnoses.

Labor & Employment Law > ... > Gender &
Sex Discrimination > Scope &
Definitions > Sexual Orientation

HN18 Scope & Definitions, Sexual Orientation

Bostock holds that an employer who fires an employee for being gay or transgender violates Title VII's prohibition on discharging an individual because of their sex. Title VII's "because of" test incorporates the traditional but-for causation standard, which directs the court to change one thing at a time and see if the outcome changes. If it does, a but-for cause is found. Applying that test, for an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. In such a case, the employer has penalized a member of one sex for a trait or action that it tolerates in members of the other.

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

HN19 Judicial Review, Standards of Review

The rational basis inquiry employs a relatively relaxed standard reflecting the U.S. Supreme Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Under this standard, a statutory classification will be upheld so long as there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there exist plausible reasons for the relevant government action, the inquiry is at an end.

Constitutional Law > Equal Protection > Nature
& Scope of Protection

Governments > State & Territorial

Governments > Legislatures

HN20 Equal Protection, Nature & Scope of Protection

States are afforded wide discretion to pass legislation in areas where there is medical and scientific uncertainty. The fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.

Constitutional Law > Equal Protection > Nature
& Scope of Protection

HN21 Equal Protection, Nature & Scope of Protection

Contemporary foreign practice is irrelevant to constitutional interpretation.

Constitutional Law > Equal Protection > Nature
& Scope of Protection

Governments > State & Territorial
Governments > Legislatures

HN22 Equal Protection, Nature & Scope of Protection

Uncertainty as to factual issues affords little basis for judicial responses in absolute terms. And the calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.

Constitutional Law > Equal Protection > Nature
& Scope of Protection

HN23 Equal Protection, Nature & Scope of Protection

The court's role is not to judge the wisdom, fairness, or logic of the law before it, but only to ensure that it does not violate the equal protection

guarantee of the [Fourteenth Amendment](#).

Syllabus

[**1820] [***142] [*495] In 2023, Tennessee joined the growing number of States restricting sex transition treatments for minors by enacting the Prohibition on Medical Procedures Performed on Minors Related to Sexual Identity, Senate Bill 1 (SB1). SB1 prohibits healthcare providers from prescribing, administering, or dispensing puberty blockers or hormones to any minor for the purpose of (1) enabling the minor to identify with, or live as, a purported identity inconsistent with the minor's biological sex, or (2) treating purported discomfort or distress from a discordance between the minor's biological sex and asserted identity. At the same time, SB1 permits a healthcare provider to administer puberty blockers or hormones [**1821] to treat a minor's congenital defect, precocious puberty, disease, or physical injury.

Three transgender minors, their parents, and a doctor challenged SB1 under the [Equal Protection Clause of the Fourteenth Amendment](#). The District Court partially enjoined SB1, finding that transgender individuals constitute a quasi-suspect class, that SB1 discriminates on the basis of sex and transgender status, and that SB1 was unlikely to survive intermediate scrutiny. [****2] The Sixth Circuit reversed, holding that the law did not trigger heightened scrutiny and satisfied rational basis review. This Court granted certiorari to decide whether SB1 violates the [Equal Protection Clause](#).

Held: Tennessee's law prohibiting certain medical treatments for transgender minors is not subject to heightened scrutiny under the [Equal Protection Clause of the Fourteenth Amendment](#) and satisfies rational basis review. Pp. 509-526.

(a) SB1 is not subject to heightened scrutiny because it does not classify on any bases that warrant heightened review. Pp. 510-522.

(1) On its face, SB1 incorporates two classifications: one based on age (allowing certain medical treatments for adults but not minors) and another based on medical use (permitting puberty blockers and hormones for minors to treat certain conditions but not to treat gender dysphoria, gender identity disorder, or gender incongruence). Classifications based on age or medical use are subject to only rational basis [*496] review. See [Massachusetts Bd. of Retirement v. Murgia](#), 427 U. S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 [***143] (*per curiam*); [Vacco v. Quill](#), 521 U. S. 793, 117 S. Ct. 2293, 138 L. Ed. 2d 834.

The plaintiffs argue that SB1 warrants heightened scrutiny because it relies on sex-based classifications. But neither of the above classifications turns on sex. Rather, SB1 prohibits healthcare providers from administering puberty blockers or hormones to *minors* [****3] for certain *medical uses*, regardless of a minor's sex. While SB1's prohibitions reference sex, the Court has never suggested that mere reference to sex is sufficient to trigger heightened scrutiny. And such an approach would be especially inappropriate in the medical context, where some treatments and procedures are uniquely bound up in sex.

The application of SB1, moreover, does not turn on sex. The law does not prohibit certain medical treatments for minors of one sex while allowing those same treatments for minors of the opposite sex. SB1 prohibits healthcare providers from administering puberty blockers or hormones to any minor to treat gender dysphoria, gender identity disorder, or gender incongruence, regardless of the minor's sex; it permits providers to administer puberty blockers and hormones to minors of any sex for other purposes. And, while a State may not circumvent the [Equal Protection Clause](#) by writing in abstract terms, SB1 does not mask sex-based classifications.

Finally, the Court rejects the plaintiffs' argument that, by design, SB1 enforces a government preference that people conform to expectations

about their sex. To start, any allegations of sex stereotyping are misplaced. True, a law [****4] that classifies on the basis of sex may fail heightened scrutiny if the classifications rest on impermissible stereotypes. But where a law's classifications are neither covertly nor overtly based on sex, the law does not trigger heightened review unless it was motivated by an invidious discriminatory purpose. No such argument has been raised here. And regardless, the statutory findings on which SB1 is premised do not themselves evince sex-based stereotyping. Pp. 511-517.

[**1822] (2) SB1 also does not classify on the basis of transgender status. The Court has explained that a State does not trigger heightened constitutional scrutiny by regulating a medical procedure that only one sex can undergo unless the regulation is a mere pretext for invidious sex discrimination. In Geduldig v. Aiello, 417 U. S. 484, 94 S. Ct. 2485, 41 L. Ed. 2d 256, the Court held that a California insurance program that excluded from coverage certain disabilities resulting from pregnancy did not discriminate on the basis of sex. See id., at 486, 492-497, 94 S. Ct. 2485, 41 L. Ed. 2d 256. In reaching that holding, the Court explained that the program did not exclude any individual from benefit eligibility because of the individual's sex but rather "remove[d] one physical condition—pregnancy—from the list of compensable disabilities." [*497] Id., at 496, n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256. The California insurance program, the Court explained, divided potential recipients into two groups: "pregnant women and nonpregnant persons." *Ibid.* Because women fell into both groups, the Court reasoned, the program did not discriminate against women as a [***144] class. See id., at 496, and n. 20. The Court concluded that, even though only biological women can become pregnant, not every legislative classification concerning pregnancy is a sex-based classification. Id., at 496, n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256. As such, "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination

against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation . . . on any reasonable basis, just as with respect to any other physical condition." Id., at 496-497, n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256.

By the same token, SB1 does not exclude any individual from medical treatments on the basis of transgender status. Rather, it removes one set of diagnoses—gender dysphoria, gender identity disorder, and gender incongruence—from the range of treatable conditions. SB1 divides minors into two groups: those seeking puberty blockers or hormones to treat the excluded diagnoses, and those seeking puberty blockers [****5] or hormones to treat other conditions. While the first group includes only transgender individuals, the second encompasses both transgender and nontransgender individuals. Thus, although only transgender individuals seek treatment for gender dysphoria, gender identity disorder, and gender incongruence—just as only biological women can become pregnant—there is a "lack of identity" between transgender status and the excluded diagnoses. Absent a showing that SB1's prohibitions are pretexts designed to effect invidious discrimination against transgender individuals, the law does not classify on the basis of transgender status. Pp. 517-519.

(3) Finally, Bostock v. Clayton County, 590 U. S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218, does not alter the Court's analysis. In Bostock, the Court held that an employer who fires an employee for being gay or transgender violates Title VII's prohibition on discharging an individual "because of" their sex. See id., at 650-652, 654-659, 140 S. Ct. 1731, 207 L. Ed. 2d 218. The Court reasoned that Title VII's "because of" test incorporates the traditional but-for causation standard, which directs courts "to change one thing at a time and see if the outcome changes." Id., at 656, 140 S. Ct. 1731, 207 L. Ed. 2d 218. Applying that test, the Court held that, "[f]or an employer to discriminate against employees for being homosexual or transgender,

the employer must intentionally discriminate against individual men and women in part because of sex.” *Id.*, at 662, 140 S. Ct. 1731, 207 L. Ed. 2d 218. In such a case, the employer has penalized a member of one [**1823] sex for a trait or action that it tolerates in members of the other.

[*498] The [****6] Court declines to address whether *Bostock*’s reasoning reaches beyond the Title VII context—unlike the employment discrimination at issue in *Bostock*, changing a minor’s sex or transgender status does not alter the application of SB1. If a transgender boy seeks testosterone to treat gender dysphoria, SB1 prevents a healthcare provider from administering it to him. If his biological sex were changed from female to male, SB1 would still not permit him the hormones he seeks because he would lack a qualifying diagnosis. The transgender [***145] boy could receive testosterone only if he had a permissible diagnosis (like a congenital defect). And, if he had such a diagnosis, he could obtain the testosterone regardless of his sex or transgender status. Under the reasoning of *Bostock*, neither his sex nor his transgender status is the but-for cause of his inability to obtain testosterone. Pp. 519-522.

(b) SB1 satisfies rational basis review. Under that standard, the Court will uphold a statutory classification so long as there is “any reasonably conceivable state of facts that could provide a rational basis for the classification.” *FCC v. Beach Communications, Inc.*, 508 U. S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211. SB1 clearly meets that standard of review. Tennessee determined that administering [****7] puberty blockers or hormones to minors to treat gender dysphoria, gender identity disorder, or gender incongruence carries risks, including irreversible sterility, increased risk of disease and illness, and adverse psychological consequences. The legislature found that minors lack the maturity to fully understand these consequences, that many individuals have expressed regret for undergoing such treatments as minors, and that the full effects of such treatments may not yet be known. At the same time, the State

noted evidence that discordance between sex and gender can be resolved through less invasive approaches. SB1’s age- and diagnosis-based classifications are rationally related to these findings and the State’s objective of protecting minors’ health and welfare.

The Court also declines the plaintiffs’ invitation to second-guess the lines that SB1 draws. States have “wide discretion to pass legislation in areas where there is medical and scientific uncertainty.” *Gonzales v. Carhart*, 550 U. S. 124, 163, 127 S. Ct. 1610, 167 L. Ed. 2d 480. Recent developments demonstrate the open questions that exist regarding basic factual issues before medical authorities and regulatory bodies in this area, underscoring the need for legislative flexibility. Pp. 522-525.

[****8] (c) This case carries with it the weight of fierce scientific and policy debates about the safety, efficacy, and propriety of medical treatments in an evolving field. The *Equal Protection Clause* does not resolve these disagreements. The Court’s role is not “to judge the wisdom, fairness, or logic” of SB1, *Beach Communications*, 508 U. S., at 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211, but only to ensure that the law does not violate equal protection guarantees. It [*499] does not. Questions regarding the law’s policy are thus appropriately left to the people, their elected representatives, and the democratic process. P. 525.

83 F. 4th 460, affirmed.

Counsel: Elizabeth B. Prelogar argued the cause for petitioner.

Chase B. Strangio argued the cause for respondents L.W., et al., supporting petitioner.

J. Matthew Rice argued the cause for respondents Jonathan Skrmetti, et al.

Judges: ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, GORSUCH,

KAVANAUGH, and BARRETT, JJ., joined, and in which ALITO, J., joined as to Parts I and II-B. THOMAS, J., filed a concurring opinion. BARRETT, J., filed a concurring opinion, in which THOMAS, J., joined. ALITO, J., filed an opinion concurring in part and concurring in the judgment. SOTOMAYOR, J., filed a dissenting opinion, in which JACKSON, J., joined in full, and in which KAGAN, J., joined as to Parts I-IV. KAGAN, J., filed a dissenting opinion.

Opinion by: ROBERTS

Opinion

[1824] [***146] [*500]** CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In this case, we consider whether a Tennessee law banning certain medical care for transgender minors violates the [Equal Protection Clause of the Fourteenth Amendment](#).

[*501] I

A

An estimated 1.6 million Americans over the age of 13 identify as **[****9]** transgender, meaning that their gender identity **[*502]** does not align with their biological sex. See 1 App. 257-259; 2 *id.*, at 827. Some transgender individuals suffer from gender dysphoria, a medical condition characterized by persistent, clinically significant distress resulting from an incongruence **[*503]** between gender identity and biological sex. Left untreated, gender dysphoria may result in severe physical and psychological harms.

In 1979, the World Professional Association for Transgender Health (WPATH) (then known as the Harry Benjamin International Gender Dysphoria Association) published one of the first sets of clinical **[**1825]** guidelines for treating gender dysphoria with sex transition treatments. See P. Walker et al., *Standards of Care: The Hormonal*

and Surgical Sex Reassignment of Gender Dysphoric Persons (1979), reprinted in 14 *Archives of Sexual Behavior* 79 (1985). The standards addressed two treatments in particular: hormonal sex reassignment (the use of hormones to induce the development of physical characteristics of the opposite sex) and surgical sex reassignment (surgery of the genitalia and/or chest to approximate the physical appearance of the opposite sex). See *id.*, at 81, §§3.2-3.3. They recognized the extensive and sometimes irreversible consequences of hormonal therapy and sex reassignment surgery and acknowledged that some **[*504]** individuals who undergo reassignment procedures later regret their decision to do so. See *id.*, at 83, 85-86, §§4.1.1-4.1.3, 4.4.2-4.4.3, 4.5.1. Among other things, the standards of care provided that hormonal and surgical sex reassignment treatments should be administered only to adults. See *id.*, at 89, §4.14.4.

In 1998, WPATH revised its standards of care to permit healthcare professionals to administer puberty blockers (designed to delay the development of physical sex characteristics) and hormones to minors in “rar[e]” circumstances. S. Levine et al., *The Standards of Care for Gender Identity Disorders* (5th ed. 1998), reprinted in 11 *J. Psychology & Human Sexuality* 1, 20 (1999). Today, the standards discuss a range of factors regarding the provision of such treatments to minors. E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People*, Version 8, 23 *Int’l J. Transgender Health* S1, S65-S66 (2022). The current standards recognize **[****10]** known risks associated with the provision of sex transition treatments to adolescents, including potential adverse effects on fertility and the possibility that an adolescent will later wish to detransition. See *id.*, at S47, S57, S61-S62. They further state that there is “limited data on the optimal timing” of sex transition treatments or “the long-term physical, psychological, and neurodevelopmental outcomes in youth,” *id.*, at S65, and note **[***147]** that “[o]ur understanding of gender identity development in adolescence is

continuing to evolve,” *id.*, at S44.

In recent years, the number of minors requesting sex transition treatments has increased. See 2 App. 644, 827-828. This increase has corresponded with rising debates regarding the relative risks and benefits of such treatments. Compare, *e.g.*, Brief for State of California et al. as *Amici Curiae* 1-13, with Brief for Alabama as *Amicus Curiae* 1-9. In the last three years, more than 20 States have enacted laws banning the provision of sex transition treatments to minors, while two have enacted near total bans.

[*505] Meanwhile, health authorities in a number of European countries have raised significant concerns regarding the potential harms associated with using puberty blockers and hormones to treat transgender minors. In 2020, Finland’s Council for Choices in Health Care found that “gender reassignment of minors is an experimental practice” and that “the reliability of the existing **[****11]** studies” is “highly uncertain.” 2 App. 583-584 (alterations omitted); see *id.*, at 715-722, 727-729. That same year, England’s National Institute for Health and Care Excellence published reports finding that the evidence for using puberty blockers to treat transgender adolescents is of “very low certainty” and that the long-term risks associated with using hormones to treat adolescents with gender dysphoria are “largely unknown.” *Id.*, at 588-589. In 2022, Sweden’s National Board of Health and Welfare found that “the evidence on treatment efficacy and safety is still insufficient and inconclusive” and that the **[**1826]** “risks” of puberty blockers and hormones “currently outweigh the possible benefits.” 1 *id.*, at 339-340; see 2 *id.*, at 584-587. And in 2023, the Norwegian Healthcare Investigation Board concluded that the “research-based knowledge” for hormonal sex transition treatments for minors is “insufficient,” while the “long-term effects are little known.” 1 *id.*, at 341-342.

B

In March 2023, Tennessee joined the growing number of States restricting sex transition

treatments for minors by enacting the Prohibition on Medical Procedures Performed on Minors Related to Sexual Identity, S. B. 1, 113th Gen. Assem., 1st Extra. Sess.; [Tenn. Code Ann. §68-33-101 et seq.](#) (SB1). While the State’s legislature acknowledged that discordance between a minor’s gender identity and biological sex can cause “discomfort or distress,” [§68-33-101\(c\)](#), it identified concerns regarding the use of puberty blockers and hormones to treat gender dysphoria in minors. In particular, the legislature found **[****12]** that such treatments “can lead to **[*506]** the minor becoming irreversibly sterile, having increased risk of disease and illness, or suffering from adverse and sometimes fatal psychological consequences,” [§68-33-101\(b\)](#), and that minors “lack the maturity to fully understand and appreciate” these consequences and may later regret undergoing the treatments, [§68-33-101\(h\)](#). The legislature further found that sex transition treatments were “being performed on and administered to minors in th[e] state with rapidly increasing frequency,” [§68-33-101\(g\)](#), notwithstanding the fact that the full range of harmful effects associated with the treatments were likely not yet known, see [§68-33-101\(b\)](#). The legislature also noted that **[***148]** guidelines regarding sex transition treatments for minors had “changed substantially in recent years,” [§68-33-101\(g\)](#), and that health authorities in Sweden, Finland, and the United Kingdom had “placed severe restrictions” on such treatments after determining that there was “no evidence” that their benefits outweigh their risks, [§68-33-101\(e\)](#); see *supra*, at 505. Finally, the legislature determined that there is evidence that gender dysphoria “can be resolved by less invasive approaches that are likely to result in better outcomes.” [§68-33-101\(c\)](#).

SB1 responds to these concerns by banning the use of certain medical procedures for treating transgender minors. In **[****13]** particular, the law prohibits a healthcare provider from “[s]urgically removing, modifying, altering, or entering into tissues, cavities, or organs of a human being,” or “[p]rescribing, administering, or dispensing any

puberty blocker or hormone,” [§68-33-102\(5\)](#), for the purpose of (1) “[e]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor’s sex,” or (2) “[t]reating purported discomfort or distress from a discordance between the minor’s sex and asserted identity,” [§68-33-103\(a\)\(1\)](#). Among other things, these prohibitions are intended to “protec[t] minors from physical and emotional harm” by “encouraging minors to appreciate,” rather than “become disdainful of,” their sex. [§68-33-101\(m\)](#).

[*507] SB1 is limited in two relevant ways. First, SB1 does not restrict the administration of puberty blockers or hormones to individuals 18 and over. [§68-33-102\(6\)](#). Second, SB1 does not ban fully the administration of such drugs to minors. A healthcare provider may administer puberty blockers or hormones to treat a minor’s congenital defect, precocious (or early) puberty, disease, or physical injury. [§68-33-103\(b\)\(1\)\(A\)](#). The law defines the term “[c]ongenital defect” to include an “abnormality [**1827] present in a minor that is inconsistent with [****14] the normal development of a human being of the minor’s sex,” [§68-33-102\(1\)](#), but excludes from the definitions of “[c]ongenital defect” and “disease” “gender dysphoria, gender identity disorder, [and] gender incongruence,” [§§68-33-102\(1\), 68-33-103\(b\)\(2\)](#).

SB1 contains three primary enforcement mechanisms. The law authorizes Tennessee’s attorney general to bring against any person who knowingly violates SB1 an action “to enjoin further violations, to disgorge any profits received due to the medical procedure, and to recover a civil penalty of [\$25,000] per violation.” [§68-33-106\(b\)](#). SB1 further permits the relevant state regulatory authorities to discipline healthcare providers who violate the law’s prohibitions. [§68-33-107](#). Finally, SB1 creates a private right of action that enables an injured minor or nonconsenting parent of an injured minor to sue a healthcare provider for violating the law. [§68-33-105](#).

C

Three transgender minors, their parents, and a doctor (plaintiffs) brought a pre-enforcement challenge to SB1. Among other things, the plaintiffs asserted that SB1 violates the [Equal Protection Clause of the Fourteenth Amendment](#). They moved for a preliminary injunction preventing the law’s bans on sex transition treatments for minors from going into effect. [HN1](#) The United States intervened under [42 U. S. C. §2000h-2](#), [***149] which authorizes the Federal Government to intervene in a private equal protection suit “if the Attorney [*508] General certifies that the case is of general public importance.” See [Memorandum Opinion and Order in No. 23-cv-00376, 2023 U.S. Dist. LEXIS 86406 \(MD Tenn., May 16, 2023\)](#), ECF Doc. 108.

The District Court partially enjoined enforcement of SB1’s prohibitions. See [L. W. v. Skrmetti, 679 F. Supp. 3d 668, 677 \(MD Tenn. 2023\)](#). The court concluded that the plaintiffs lacked standing to challenge the law’s ban [****15] on sex transition surgery for minors. [Id., at 681-682](#). But the court held, as relevant, that the United States and plaintiffs were likely to succeed on their equal protection challenge to the law’s prohibitions on puberty blockers and hormones. [Id., at 682-712](#). The court found that transgender individuals constitute a quasi-suspect class, that SB1 discriminates on the basis of sex and transgender status, and that SB1 was unlikely to survive intermediate scrutiny. [Id., at 686-687, 698, 712](#). Having concluded that SB1 was likely unconstitutional on its face, the District Court issued a statewide injunction enjoining enforcement of all provisions of SB1 except for the private right of action and the law’s ban on sex transition surgery. See [id., at 680-681, 716-718](#). Tennessee appealed, and the Sixth Circuit stayed the preliminary injunction pending appeal. [L. W. v. Skrmetti, 83 F. 4th 460, 469 \(CA6 2023\)](#).

The Sixth Circuit reversed. As relevant, the Sixth Circuit held that the United States and plaintiffs were unlikely to succeed on the merits of their equal protection claim. See [id., at 479-489](#). The

court first found that SB1 does not classify on the basis of sex because the law “regulate[s] sex-transition treatments for all minors, regardless of sex,” by prohibiting all minors from “receiv[ing] puberty blockers or hormones or surgery in order to transition from one sex to another.” *Id.*, at 480. The court next declined to recognize transgender individuals as a suspect class, finding that transgender individuals are neither politically powerless nor a discrete group defined by obvious, [****16] immutable, or distinguishing characteristics. *Id.*, at 486-487. Finally, the court [*509] concluded that the United States and plaintiffs had failed to [**1828] establish that animus toward transgender individuals as a class was the operative force behind SB1. See *id.*, at 487-488. The Sixth Circuit held that SB1 was subject to and survived rational basis review, finding that Tennessee had offered “considerable evidence” regarding the risks associated with the banned medical treatments and the flaws in existing research. *Id.*, at 489.

Judge White dissented. Judge White would have held that the United States and plaintiffs were likely to succeed on the merits of their equal protection claim. *Id.*, at 498. In her view, SB1 triggered heightened scrutiny because it “facially discriminate[s] based on a minor’s sex as assigned at birth and on a minor’s failure to conform with societal expectations concerning that sex.” *Ibid.* Judge White would have held that Tennessee had failed to “show an exceeding[ly] persuasive justification or close means-ends fit” for the law’s sex-based classifications. *Ibid.*

We granted certiorari to decide whether SB1 violates the [Equal Protection Clause of the Fourteenth Amendment](#). ¹ [***150] 602 U. S. —

¹ Following oral argument, the United States submitted a letter to the Court representing that the United States “has now determined that SB1 does not deny equal protection on account of sex or any other characteristic” but “believes that the confluence of several factors counsels against seeking to dismiss its case in this Court.” Letter from C. Gannon, Deputy Solicitor General, to S. Harris, Clerk of Court (Feb. 7, 2025). The plaintiffs remain adverse to the state

(2024).

II

HN2 The [Fourteenth Amendment’s](#) command that no State shall “deny to any person within its jurisdiction the equal protection of the laws,” U. S. Const., Amdt. 14, §1, “must coexist with the practical [****17] necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons,” [Romer v. Evans](#), 517 U. S. 620, 631, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). We have reconciled the principle of [*510] equal protection with the reality of legislative classification by holding that, “if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.” *Ibid.* We generally afford such laws “wide latitude” under this rational basis review, acknowledging that “the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.” [Cleburne v. Cleburne Living Center, Inc.](#), 473 U. S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

HN3 Certain legislative classifications, however, prompt heightened review. For example, laws that classify on the basis of race, alienage, or national origin trigger strict scrutiny and will pass constitutional muster “only if they are suitably tailored to serve a compelling state interest.” *Ibid.* We have similarly held that sex-based classifications warrant heightened scrutiny. See [United States v. Virginia](#), 518 U. S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). While our precedent does not make sex a “proscribed classification,” *ibid.*, we have explained that sex “generally provides no sensible ground for differential [****18] treatment,” [Cleburne](#), 473 U. S., at 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313, and that sex-based lines too often reflect stereotypes or overbroad generalizations about the differences between men and women, see [Sessions v. Morales-](#)

respondents.

[Santana, 582 U. S. 47, 62, 137 S. Ct. 1678, 198 L. Ed. 2d 150 \(2017\)](#). We accordingly subject laws containing sex-based classifications to intermediate scrutiny, under which the State must show that the “classification [****1829**] serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” [Virginia, 518 U. S., at 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735](#) (internal quotation marks omitted).

A

[HN4](#) We are asked to decide whether SB1 is subject to heightened scrutiny under the [Equal Protection Clause](#). We hold it is not. SB1 does not classify on any bases that warrant heightened review.

[*511] 1

On its face, SB1 incorporates two classifications. First, SB1 classifies on the basis of age. Healthcare providers may administer certain medical treatments [*****151**] to individuals ages 18 and older but not to minors. Second, SB1 classifies on the basis of medical use. Healthcare providers may administer puberty blockers or hormones to minors to treat certain conditions but not to treat gender dysphoria, gender identity disorder, or gender incongruence. [HN5](#) Classifications that turn on age or medical use are subject to only rational basis review. See [Massachusetts Bd. of Retirement v. Murgia, 427 U. S. 307, 312-314, 96 S. Ct. 2562, 49 L. Ed. 2d 520 \(1976\)](#) ([******19**] *per curiam*) (rational basis review applies to age-based classification); [Vacco v. Quill, 521 U. S. 793, 799-808, 117 S. Ct. 2293, 138 L. Ed. 2d 834 \(1997\)](#) (state laws outlawing assisted suicide “neither infringe fundamental rights nor involve suspect classifications”).

The plaintiffs argue that SB1 warrants heightened scrutiny because it relies on sex-based classifications. See Brief for Respondents in Support of Petitioner 20-37. We disagree.

Neither of the above classifications turns on sex. Rather, [HN6](#) SB1 prohibits healthcare providers from administering puberty blockers and hormones to *minors* for certain *medical uses*, regardless of a minor’s sex. Cf. [Vacco, 521 U. S., at 800, 117 S. Ct. 2293, 138 L. Ed. 2d 834](#) (“On their faces, neither New York’s ban on assisting suicide nor its statutes permitting patients to refuse medical treatment treat anyone differently from anyone else or draw any distinctions between persons. *Everyone*, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; *no one* is permitted to assist a suicide.”).

The plaintiffs resist this conclusion, arguing that SB1 creates facial sex-based classifications by defining the prohibited medical care based on the patient’s sex. See Brief for Respondents in Support of Petitioner 22. This argument takes two forms. At times, the plaintiffs suggest [******20**] that SB1 classifies [***512**] on the basis of sex because its prohibitions reference sex. Alternatively, the plaintiffs contend that SB1 works a sex-based classification because application of the law turns on sex. Neither argument is persuasive.

[HN7](#) This Court has never suggested that mere reference to sex is sufficient to trigger heightened scrutiny. See, e.g., [Tuan Anh Nguyen v. INS, 533 U. S. 53, 64, 121 S. Ct. 2053, 150 L. Ed. 2d 115 \(2001\)](#) (“The issue is not the use of gender specific terms instead of neutral ones. Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction.”). Such an approach, moreover, would be especially inappropriate in the medical context. Some medical treatments and procedures are uniquely bound up in sex. The Food and Drug Administration itself recognizes that “[r]esearch has shown that biological differences between men and women (differences due to sex chromosome or sex hormones) may contribute to variations seen in the safety and efficacy of drugs, biologics, [****1830**] and medical devices.” FDA, Sex as a Biological Variable (Jan. 30, 2025) (online source archived at

<https://www.supremecourt.gov>). Indeed, the agency frequently approves drugs for use by only one sex. See, e.g., FDA, FDA in Brief: FDA Encourages Inclusion of Male Patients in Breast Cancer Clinical Trials (Aug. 26, 2019) (online source archived at <https://www.supremecourt.gov>) (“many” breast cancer [***152] treatments approved for women only); FDA, FDA Approves Second Drug To Prevent HIV Infection as Part of Ongoing Efforts To End the HIV Epidemic (Oct. 3, 2019) (online source archived at <https://www.supremecourt.gov>) (drug to prevent HIV not approved for women). [HN8](#) In the medical context, the mere use of sex-based language does not sweep a statute within the reach of heightened scrutiny.

We also reject the argument that the application of SB1 turns on sex. The plaintiffs and the dissent contend that an adolescent whose biological sex is female cannot receive puberty blockers or testosterone to live and present as a [*513] male, but an adolescent whose biological sex is male can, while an adolescent whose biological sex is male cannot receive puberty blockers or estrogen [****21] to live and present as a female, but an adolescent whose biological sex is female can. See Brief for Respondents in Support of Petitioner 22; *post*, at 587-591 (SOTOMAYOR, J., dissenting). So conceived, they argue, SB1 prohibits certain treatments for minors of one sex while allowing those same treatments for minors of the opposite sex.

The plaintiffs and the dissent, however, contort the meaning of the term “medical treatment.” Notably absent from their framing is a key aspect of any medical treatment: the underlying medical concern the treatment is intended to address. [HN9](#) The Food and Drug Administration approves drugs and requires that they be labeled for particular indications—the diseases or conditions that they treat, prevent, mitigate, diagnose, or cure. See [21 CFR §§201.57\(c\)\(2\), 314.50\(a\)\(1\) \(2024\)](#). Different drugs can be used to treat the same thing (would you like Advil or Tylenol for your headache?), and

the same drug can treat different things (take DayQuil to ease your cough, fever, sore throat, and/or minor aches and pains). For the term “medical treatment” to make sense of these various combinations, it must necessarily encompass both a given drug and the specific indication for which it is being administered. See Brief for Respondents in Support of Petitioner 5 (noting that “*treatments*” for adolescents with gender dysphoria include “puberty-delaying medication and hormone therapy” (emphasis added)).

[HN10](#) When properly understood from the perspective of the indications that puberty blockers and hormones treat, SB1 clearly does not classify on the basis of sex. Both puberty blockers and hormones can be used to treat certain overlapping indications (such as gender dysphoria), and each can be used to treat a range of other conditions. *Id.*, at 6-7. These combinations of drugs and indications give rise to various medical treatments. When, for example, a transgender [*514] boy (whose biological sex is female) takes puberty blockers to treat his gender incongruence, he receives a different [****22] medical treatment than a boy whose biological sex is male who takes puberty blockers to treat his precocious puberty.² SB1, in turn, restricts which of these medical treatments are available to minors: Under SB1, a healthcare provider [**1831] may administer puberty blockers or hormones to any minor to [***153] treat a congenital defect, precocious puberty, disease, or physical injury, [Tenn. Code Ann. §68-33-103\(b\)\(1\)\(A\)](#); a healthcare provider may not administer puberty blockers or hormones to any minor to treat gender dysphoria, gender identity disorder, or gender incongruence, see [§§68-33-102\(1\), 68-33-103\(a\)\(1\), \(b\)\(2\)](#). The application of that prohibition does not turn on sex.

[HN11](#) Of course, a State may not circumvent the

² We use “transgender boy” to refer to an individual whose biological sex is female but who identifies as male, and “transgender girl” to refer to an individual whose biological sex is male but who identifies as female.

Equal Protection Clause by writing in abstract terms. See Personnel Administrator of Mass. v. Feeney, 442 U. S. 256, 274, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979) (explaining that both overt and covert sex-based classifications are subject to heightened review). The antimiscegenation law that this Court struck down in Loving v. Virginia, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), would not have shed its race-based classification had it, for example, prohibited “any person from marrying an individual of a different race.” Such a law would still have turned on a race-based classification: It would have prohibited Mildred Jeter (a black woman) from marrying Richard Loving (a white man), while permitting a white woman to do so. The law, in [****23] other words, would still “proscribe generally accepted conduct if engaged in by members of different races.” *Id.*, at 11, 87 S. Ct. 1817, 18 L. Ed. 2d 1010.

HN12 Here, however, SB1 does not mask sex-based classifications. For reasons we have explained, the law does not prohibit [*515] conduct for one sex that it permits for the other. Under SB1, no minor may be administered puberty blockers or hormones to treat gender dysphoria, gender identity disorder, or gender incongruence; minors of any sex may be administered puberty blockers or hormones for other purposes.

Nor are we persuaded that SB1’s prohibition on the prescription of puberty blockers and hormones to “[e]nabl[e] a minor to identify with, or live as, a purported identity inconsistent with the minor’s sex” or to “[t]rea[t] purported discomfort or distress from a discordance between the minor’s sex and asserted identity,” Tenn. Code Ann. §68-33-103(a), reflects a sex-based classification, contra, *post*, at 587-591 (opinion of SOTOMAYOR, J.). In the dissent’s view, this language “plainly classifies on the basis of sex” because it “turns on inconsistency with a protected characteristic.” *Post*, at 588. The dissent analogizes to a hypothetical law that “prohibit[s] minors from attending any services, rituals, or assemblies if done for the purpose of allowing the minor to identify with a purported

identity inconsistent with the minor’s religion.” *Ibid.* (internal quotation marks omitted; emphasis deleted). Such a law, the dissent argues, would plainly classify on the basis of religion. “Whether the law prohibits a minor from attending any particular religious service turns on the minor’s religion: A Jewish child can visit a synagogue but not a church, while a Christian child can attend church but not the synagogue.” *Ibid.*

HN13 But a prohibition on the prescription of puberty blockers and hormones to “[e]nabl[e] a minor to identify with, or live as, a purported identity inconsistent with the minor’s sex,” Tenn. Code Ann. §68-33-103(a)(1), is simply a prohibition on the prescription of puberty [****24] blockers and hormones to treat gender dysphoria, [***154] gender identity disorder, or gender incongruence. A law prohibiting attendance at a religious service “inconsistent with” the attendee’s religion may trigger [*516] heightened scrutiny. A law prohibiting the administration of specific drugs for particular medical uses does not. See Vacco, 521 U. S., at 799-808, 117 S. Ct. 2293, 138 L. Ed. 2d 834.

[**1832] Finally, we reject the plaintiffs’ argument that, “by design, SB1 enforces a government preference that people conform to expectations about their sex.” Brief for Respondents in Support of Petitioner 23. The plaintiffs note that SB1’s statutory findings state that Tennessee has a compelling interest in “encouraging minors to appreciate their sex” and in prohibiting medical care “that might encourage minors to become disdainful of their sex.” *Ibid.* (quoting Tenn. Code Ann. §68-33-101(m)). They argue that these findings reveal that the law operates to force conformity with sex. See Brief for Respondents in Support of Petitioner 23; see also *id.*, at 52 (“SB1’s purpose is . . . to force . . . boys and girls to *look and live* like boys and girls.” (internal quotation marks omitted)).

To start, the plaintiffs’ allegations of sex stereotyping are misplaced. **HN14** True, a law that

classifies on the basis of sex may fail heightened scrutiny if the classifications rest on impermissible stereotypes. [****25] See *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 139, n. 11, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). But where a law’s classifications are neither covertly nor overtly based on sex, contrast, *e.g.*, *post*, at 589-590, n. 8 (opinion of SOTOMAYOR, J.) (referencing a hypothetical requirement that all children wear “sex-consistent clothing”), we do not subject the law to heightened review unless it was motivated by an invidious discriminatory purpose, see *Personnel Administrator of Mass.*, 442 U. S., at 271-274; *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 264-266, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). No such argument has been raised here. See Tr. of Oral Arg. 57-59.

Regardless, the statutory findings to which the plaintiffs point do not themselves evince sex-based stereotyping. The plaintiffs fail to note that Tennessee also proclaimed a “legitimate, substantial, and compelling interest in protecting minors [*517] from physical and emotional harm.” *Tenn. Code Ann. §68-33-101(m)*. And they similarly fail to acknowledge that Tennessee found that the prohibited medical treatments are experimental, can lead to later regret, and are associated with harmful—and sometimes irreversible—risks. *§§68-33-101(b)-(e)*, *(h)*. Tennessee’s stated interests in “encouraging minors to appreciate their sex” and in prohibiting medical care “that might encourage minors to become disdainful of their sex,” *§68-33-101(m)*, simply reflect the State’s concerns regarding the use of puberty blockers and hormones to treat gender [****26] dysphoria, gender identity disorder, and gender incongruence, see Brief for Respondents 26-27 (“Given high desistance rates among youth and the tragic ‘regret’ of detransitioners, it was not improper to conclude that kids benefit from additional time to ‘appreciate their sex’ before embarking on body-altering paths. Nor is it improper for the State to protect minors from procedures that ‘encourage them to become

disdainful of their [***155] sex’—and thus at risk for serious psychiatric conditions.” (citations and alterations omitted)); *L. W.*, 83 F. 4th, at 485 (“A concern about potentially irreversible medical procedures for a child is not a form of stereotyping.”).

2

The plaintiffs separately argue that SB1 warrants heightened scrutiny because it discriminates against transgender individuals, who the plaintiffs assert constitute a quasi-suspect class. See Brief for Respondents in Support of Petitioner 37-38. This Court has not previously held that transgender individuals are a suspect or quasi-suspect class. And this case, in any event, does not raise that question because [**1833] SB1 does not classify on the basis of transgender status. As we have explained, SB1 includes only two classifications: healthcare providers may not administer puberty blockers or hormones to minors (a classification based on age) to treat gender dysphoria, gender identity disorder, or gender incongruence (a classification based on medical use). [*518] The plaintiffs do not argue [****27] that the first classification turns on transgender status, and our case law forecloses any such argument as to the second.

HN15 We have explained that a State does not trigger heightened constitutional scrutiny by regulating a medical procedure that only one sex can undergo unless the regulation is a mere pretext for invidious sex discrimination. In *Geduldig v. Aiello*, 417 U. S. 484, 94 S. Ct. 2485, 41 L. Ed. 2d 256 (1974), for example, we held that a California insurance program that excluded from coverage certain disabilities resulting from pregnancy did not discriminate on the basis of sex. See *id.*, at 486, 492-497, 94 S. Ct. 2485, 41 L. Ed. 2d 256. In reaching that holding, we explained that the program did not exclude any individual from benefit eligibility because of the individual’s sex but rather “remove[d] one physical condition—pregnancy—from the list of compensable

disabilities.” *Id.*, at 496, n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256. We observed that the “lack of identity” between sex and the excluded pregnancy-related disabilities became “clear upon the most cursory analysis.” *Id.*, at 497, n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256. The California insurance program, we explained, divided potential recipients into two groups: “pregnant women and nonpregnant persons.” *Ibid.* Because women fell into both groups, the program did not discriminate against women as a class. See *id.*, at 496, and n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256. We thus concluded that, even though only biological women can become pregnant, not every legislative classification concerning pregnancy is a sex-based classification. *Id.*, at 496, n. 20, and n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256. **HN16** As such, “[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation . . . on any reasonable basis, just as with respect to any other physical condition.” *Id.*, at 496-497, n. 20, and n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256.

By the same token, **HN17** SB1 does not exclude any individual from medical treatments on the basis of transgender status but rather removes one set of diagnoses—gender dysphoria, [*519] gender identity disorder, and gender [***156] incongruence—from the range of treatable conditions. SB1 divides minors into two groups: those who might seek puberty blockers or hormones to treat the excluded diagnoses, and those who might seek puberty blockers or hormones to treat other conditions. See *Tenn. Code Ann. §68-33-103*. Because only transgender individuals seek puberty blockers and hormones for the excluded diagnoses, the first group includes only transgender individuals; [****28] the second group, in contrast, encompasses both transgender and nontransgender individuals. Thus, although only transgender individuals seek treatment for gender dysphoria, gender identity disorder, and gender

incongruence—just as only biological women can become pregnant—there is a “lack of identity” between transgender status and the excluded medical diagnoses. The plaintiffs, moreover, have not argued that SB1’s prohibitions are mere pretexts designed to effect an invidious discrimination against transgender individuals. Under these circumstances, we decline to find that SB1’s prohibitions on the use of puberty blockers and hormones exclude any individuals on [**1834] the basis of transgender status.³

3

Finally, *Bostock v. Clayton County*, 590 U. S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020), does not alter our analysis. **HN18** In *Bostock*, we held that an employer [*520] who fires an employee for being gay or transgender violates Title VII’s prohibition on discharging an individual “because of ” their sex. See *id.*, at 650-652, 654-659, 140 S. Ct. 1731, 207 L. Ed. 2d 218. We reasoned that Title VII’s “because of ” test incorporates the traditional but-for causation standard, which “directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.” *Id.*, at 656, 140 S. Ct. 1731, 207 L. Ed. 2d 218. Applying that test, we held that, “[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex.” *Id.*, at 662, 140 S. Ct. 1731, 207 L. Ed. 2d 218. In such a case, the

³The dissent argues that our analysis “may well suggest that a law depriving all individuals who ‘have ever, or may someday, menstruate’ of access to health insurance would be sex neutral merely because not all women menstruate.” *Post*, at 600 (opinion of SOTOMAYOR, J.). But such a law is different from both SB1 and the law at issue in *Geduldig*. As we have explained, SB1 regulates certain medical treatments, see *Tenn. Code Ann. §68-33-103(a)(1)*; *Geduldig* involved a state disability insurance system that excluded certain pregnancy-related disabilities from coverage, see 417 U. S., at 487-489, 94 S. Ct. 2485, 41 L. Ed. 2d 256. The dissent’s hypothetical law, in contrast, does not regulate a class of treatments or conditions. Rather, it regulates a class of *persons* identified on the basis of a specified characteristic. Neither our analysis nor *Geduldig* speaks to a law that classifies on such a basis.

employer has penalized a member of one sex for a trait or action that it tolerates in members of the other. *Ibid.*

The plaintiffs urge us to apply *Bostock*'s reasoning to this case. In their view, SB1 violates the [Equal Protection Clause](#) because it prohibits a minor whose biological sex is female from receiving testosterone to live as [****29] a male but allows a minor whose biological sex is male to receive testosterone for the same purposes (and vice versa). Applying *Bostock*'s reasoning, they argue that SB1 discriminates on the basis of sex because it intentionally penalizes members of [***157] one sex for traits and actions that it tolerates in another. See Brief for Respondents in Support of Petitioner 24-25.

We have not yet considered whether *Bostock*'s reasoning reaches beyond the Title VII context, and we need not do so here. For reasons we have already explained, changing a minor's sex or transgender status does not alter the application of SB1. If a transgender boy seeks testosterone to treat his gender dysphoria, SB1 prevents a healthcare provider from administering it to him. See [Tenn. Code Ann. §68-33-103\(a\)](#). If you change his biological sex from female to male, SB1 would still not permit him the hormones he seeks because he would lack a qualifying diagnosis for the testosterone—such as a congenital defect, precocious puberty, disease, or physical injury. The transgender boy [*521] could receive testosterone only if he had one of those permissible diagnoses. And, if he had such a diagnosis, he could obtain the testosterone regardless of his sex or transgender [****30] status. Under the reasoning of *Bostock*, neither his sex nor his transgender status is the but-for cause of his inability to obtain testosterone.

The dissent counters that, whatever causal factors are at play, sex is at least one but-for cause of SB1's operation. See *post*, at 595-597 (opinion of SOTOMAYOR, J.). To illustrate this argument, the dissent posits a minor girl with facial hair

inconsistent with her sex. Under SB1, the [***1835] dissent notes, a healthcare provider can prescribe puberty blockers or hormones to the minor to suppress her hair growth. *Post*, at 596. Change the minor's sex to male, the dissent reasons, and SB1 prevents the minor from obtaining the same drugs for the same purpose. *Ibid.* Any corresponding change in diagnosis, the dissent concludes, simply reveals that both sex and diagnosis are causal factors at “play.” *Post*, at 597 (quoting [Bostock, 590 U. S., at 661, 140 S. Ct. 1731, 207 L. Ed. 2d 218](#)).

The dissent's reasoning overlooks a key distinction between the operation of SB1 and the logic of [Bostock](#). Under *Bostock*'s reasoning, an employer who fires a homosexual male employee for being attracted to men while retaining the employee's straight female colleague has discriminated on the basis of sex because it has penalized the male employee for a trait (attraction to men) that it tolerates in the female employee. See *id.*, at 660, [140 S. Ct. 1731, 207 L. Ed. 2d 218](#). *Bostock* held that, in such a circumstance, sex is the but-for cause of the employer's decision—change the homosexual male employee's sex and he becomes a straight female whose attraction to men the employer tolerates.

Not so with SB1. Consider again the minor girl with unwanted facial hair inconsistent with her sex. If she [****31] has a diagnosis of hirsutism (male-pattern hair growth), a healthcare provider may, consistent with SB1, prescribe her puberty blockers or hormones. But changing the minor's sex to [*522] male does not automatically change the operation of SB1. If hirsutism is replaced with gender dysphoria, the now-male minor may not receive puberty blockers or hormones; but if hirsutism is replaced with precocious puberty, SB1 does not bar either treatment. Unlike the homosexual male employee whose sexuality automatically switches to straight when his sex is changed from male to female, there is no reason why [***158] a female minor's diagnosis of hirsutism automatically changes to gender

dysphoria when her sex is changed from female to male. Under the logic of [Bostock](#), then, sex is simply not a but-for cause of SB1’s operation.

B

[HN19](#) The rational basis inquiry “employs a relatively relaxed standard reflecting the Court’s awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one.” [Massachusetts Bd. of Retirement](#), 427 U. S., at 314, 96 S. Ct. 2562, 49 L. Ed. 2d 520. Under this standard, we will uphold a statutory classification so long as there is “any reasonably conceivable state of facts that could provide a rational basis for the classification.” [FCC v. Beach Communications, Inc.](#), 508 U. S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). Where there [****32] exist “plausible reasons” for the relevant government action, “our inquiry is at an end.” [Id.](#), at 313-314, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (internal quotation marks omitted).

SB1 clearly meets this standard. Tennessee determined that administering puberty blockers or hormones to a minor to treat gender dysphoria, gender identity disorder, or gender incongruence “can lead to the minor becoming irreversibly sterile, having increased risk of disease and illness, or suffering from adverse and sometimes fatal psychological consequences.” [Tenn. Code Ann. §68-33-101\(b\)](#). It further found that it was “likely that not all harmful effects associated with these types of medical procedures when performed on a minor are yet fully known, as many of these procedures, when performed on a minor for such purposes, [*523] are experimental in nature and not supported by highquality, long-term medical studies.” [Ibid.](#) Tennessee determined that “minors lack the maturity to fully understand and appreciate [**1836] the life-altering consequences of such procedures and that many individuals have expressed regret for medical procedures that were performed on or administered to them for such purposes when they were minors.” [§68-33-101\(h\)](#). At the same time, Tennessee noted evidence that

discordance between sex and gender [****33] “can be resolved by less invasive approaches that are likely to result in better outcomes for the minor.” [§68-33-101\(c\)](#). SB1’s age- and diagnosis-based classifications are plainly rationally related to these findings and the State’s objective of protecting minors’ health and welfare. [§68-33-101\(a\)](#).

The plaintiffs argue that SB1 fails even rational basis review because the law’s classifications are “so far removed from [Tennessee’s] asserted justifications that it is impossible to credit those interests.” Brief for Respondents in Support of Petitioner 51 (internal quotation marks and alterations omitted). In their view, Tennessee has failed to explain why it has banned access to puberty blockers and hormones “only where they would allow a transgender minor to ‘identify’ or ‘live’ in a way ‘inconsistent’ with their ‘sex.’” [Id.](#), at 52.

This argument fails. As we have explained, there is a rational basis for SB1’s classifications. Tennessee concluded that there is an ongoing debate among medical experts regarding the risks and benefits associated with administering puberty blockers and hormones to treat gender dysphoria, gender identity disorder, and gender incongruence. SB1’s ban on such [***159] treatments responds directly to that uncertainty. Contrast [Cleburne](#), 473 U. S., at 448, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (record did not reveal “any rational basis” for city [****34] zoning ordinance); [Romer](#), 517 U. S., at 632, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (“sheer breadth” of law was “so discontinuous with the reasons offered for it that the [law] seem[ed] inexplicable by anything but animus toward the class it affect[ed]”).

[*524] We also decline the plaintiffs’ invitation to second-guess the lines that SB1 draws. It may be true, as the plaintiffs contend, that puberty blockers and hormones carry comparable risks for minors no matter the purposes for which they are administered. But it may also be true, as Tennessee determined, that those drugs carry greater risks

when administered to treat gender dysphoria, gender identity disorder, and gender incongruence. [HN20](#) We afford States “wide discretion to pass legislation in areas where there is medical and scientific uncertainty.” [Gonzales v. Carhart](#), 550 U. S. 124, 163, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007). “[T]he fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.” [Railroad Retirement Bd. v. Fritz](#), 449 U. S. 166, 179, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980); see [Dandridge v. Williams](#), 397 U. S. 471, 485, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970) (“In the area of economics and social welfare, a State does not violate the [Equal Protection Clause](#) merely because the classifications made by its laws are imperfect.”); [Lindsley v. Natural Carbonic Gas Co.](#), 220 U. S. 61, 78, 31 S. Ct. 337, 55 L. Ed. 369 (1911) (“A classification having some reasonable basis does not offend against [the [Equal Protection Clause](#)] merely because it is not made with mathematical nicety or because in practice it results in some inequality.”).

Recent developments only underscore the need for legislative flexibility in this area. After Tennessee enacted SB1, a report commissioned by England’s National Health Service (NHS England) characterized the evidence concerning the use of puberty blockers and hormones to treat transgender minors as “remarkably weak,” concluding that there is “no good evidence [[**1837](#)] on the long-term outcomes of interventions to manage gender-related distress.” H. Cass, Independent Review of Gender Identity Services for Children and Young People: Final Report 13 (Apr. 2024). [[****35](#)] The report cautioned that “results of studies are exaggerated or misrepresented by people on all sides of the debate to support their viewpoint,” *ibid.*, and concluded that the “current understanding of the long-term health impacts of hormone interventions is [[*525](#)] limited and needs to be better understood,” *id.*, at 22. In response to the report, NHS England enacted prohibitions on the administration of puberty blockers to new patients under the age of 18 outside of research settings and

instituted a process for reviewing referrals for hormones for adolescents under the age of 16. See NHS England, Children and Young People’s Gender Services: Implementing the Cass Review Recommendations 6-7 (Aug. 2024); Tr. of Oral Arg. 14-18.

We cite this report and NHS England’s response not for guidance they might provide on the ultimate question [[***160](#)] of United States law, see [Schriro v. Summerlin](#), 542 U. S. 348, 356, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) ([HN21](#) contemporary foreign practice is “irrelevant” to constitutional interpretation), but to demonstrate the open questions regarding basic factual issues before medical authorities and other regulatory bodies. [HN22](#) Such uncertainty “afford[s] little basis for judicial responses in absolute terms.” [Marshall v. United States](#), 414 U. S. 417, 427, 94 S. Ct. 700, 38 L. Ed. 2d 618 (1974). And “[t]he calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial [[****36](#)] responsibility.” [Personnel Administrator of Mass.](#), 442 U. S., at 272, 99 S. Ct. 2282, 60 L. Ed. 2d 870.

This case carries with it the weight of fierce scientific and policy debates about the safety, efficacy, and propriety of medical treatments in an evolving field. The voices in these debates raise sincere concerns; the implications for all are profound. The [Equal Protection Clause](#) does not resolve these disagreements. Nor does it afford us license to decide them as we see best. [HN23](#) Our role is not “to judge the wisdom, fairness, or logic” of the law before us, [Beach Communications](#), 508 U. S., at 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211, but only to ensure that it does not violate the equal protection guarantee of the [Fourteenth Amendment](#). Having concluded it does not, we leave questions regarding its policy to the people, their elected representatives, and the democratic process.

[[*526](#)] The judgment of the United States Court of Appeals for the Sixth Circuit is affirmed.

It is so ordered.

Concur by: ALITO; THOMAS; BARRETT

Concur

JUSTICE THOMAS, concurring.

A Tennessee law prevents children from receiving certain medical interventions if administered to treat gender dysphoria. See Prohibition on Medical Procedures Performed on Minors Related to Sexual Identity, S. B. 1, 113th Gen. Assem., 1st Extra. Sess.; [Tenn. Code Ann. §68-33-101 et seq.](#) (2023) (SB1). The United States and private plaintiffs challenged the law on [Equal Protection Clause](#) grounds, arguing that it discriminates based on sex and fails heightened scrutiny. Today, the Court correctly concludes that SB1 does not classify on the basis of sex and thus is subject only to rational-basis review. I join the Court’s [****37] opinion in full. I write separately to address some additional arguments made in defense of Tennessee’s law.

I

Before this Court, the United States and the private plaintiffs asserted that, under [**1838] the reasoning of [Bostock v. Clayton County](#), 590 U. S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020), SB1 discriminates on the basis of sex. See Brief for United States 22, 27-28; ¹ Brief for Respondents in Support of Petitioner 18, 24-25. In *Bostock*, the Court held that, in the context of Title VII of the Civil Rights Act of 1964, [***161] “homosexuality and transgender status are inextricably bound up with sex,” such that discriminating on the basis of either characteristic amounts to discrimination “because of ” sex under that statute. [590 U. S., at 660-661, 665, 140 S. Ct. 1731, 207 L. Ed. 2d 218](#). The United States and the private plaintiffs have argued that *Bostock*’s “fundamental insight about the nature of sex

discrimination applies in the equal-protection [**527] context” too. Brief for United States 27. I would reject that argument for several reasons.

While I continue to think that the *Bostock* majority’s logic “fails on its own terms,” see [590 U. S., at 689-699, 140 S. Ct. 1731, 207 L. Ed. 2d 218](#) (ALITO, J., dissenting), I see in any event no reason to import *Bostock*’s Title VII analysis into the [Equal Protection Clause](#). The *Bostock* Court recognized that “other federal . . . laws that prohibit sex discrimination” were not before it, [id., at 681, 140 S. Ct. 1731, 207 L. Ed. 2d 218](#) (majority opinion), and thus [****38] rested its analysis on what it took to be the ordinary meaning of the relevant statutory terms—“because of,” “otherwise . . . discriminate against,” and “individual”—within the context of Title VII, [id., at 656-659, 140 S. Ct. 1731, 207 L. Ed. 2d 218](#); see [42 U. S. C. §2000e-2\(a\)\(1\)](#).

The [Equal Protection Clause](#) includes none of this language. See Amdt. 14, §1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws”). “That such differently worded provisions should mean the same thing is implausible on its face.” [Students for Fair Admissions, Inc. v. President and Fellows of Harvard College](#), 600 U. S. 181, 308, 143 S. Ct. 2141, 216 L. Ed. 2d 857 (2023) (GORSUCH, J., concurring); cf. [Department of Ed. v. Louisiana](#), 603 U. S. 866, 867, 144 S. Ct. 2507, 219 L. Ed. 2d 1189 (2024) (*per curiam*) (unanimously holding that “preliminary injunctive relief ” was warranted to enjoin a rule extending *Bostock*’s reasoning to Title IX of the Education Amendments of 1972). ²

² JUSTICE SOTOMAYOR acknowledges that “the [Equal Protection Clause](#) and Title VII use different words,” but deems this an irrelevant “difference in wording” because the Court’s equal protection precedents and Title VII both prohibit sex discrimination. *Post*, at 591, n. 9 (dissenting opinion). An abstract similarity between the purposes of the Constitution and a statute is not a license to import the statute’s interpretation into the Constitution, much less to ignore the Constitution’s text. Accord, e.g., A. Scalia, A Matter of Interpretation 38 (1997) (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the

¹ The United States changed its position following oral argument, but it neither withdrew its briefs nor sought to dismiss the case.

[*528] Extending the *Bostock* framework here would depart dramatically from this Court’s [Equal Protection Clause](#) jurisprudence. We have faced sexual-orientation claims in the equal protection context for decades. See, e.g., [Obergefell v. Hodges](#), 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015); [United States v. Windsor](#), 570 U. S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013); [Romer v. Evans](#), 517 U. S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). “But in those cases, the Court never suggested that sexual orientation discrimination is just a form of sex discrimination” warranting heightened constitutional scrutiny. [Bostock](#), 590 U. S., at 797, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (KAVANAUGH, J., dissenting). For example, while pregnancy is undeniably “bound up with sex,” [id.](#), at 661, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (majority opinion), the Court has rejected [***162] [**1839] the contention that the exclusion of pregnancy-related [****39] conditions from disability benefits violates the [Equal Protection Clause](#), see [Geduldig v. Aiello](#), 417 U. S. 484, 494, 94 S. Ct. 2485, 41 L. Ed. 2d 256 (1974); see also [Dobbs v. Jackson Women’s Health Org.](#), 597 U. S. 215, 236, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022) (“[T]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny”).

Applying *Bostock*’s reasoning to the [Equal Protection Clause](#) would also invite sweeping consequences. Many statutes “regulate medical procedures defined by sex.” [L. W. v. Skrmetti](#), 83 F. 4th 460, 482 (CA6 2023) (collecting examples, including laws referencing testicular and prostate cancer). If heightened scrutiny applied to such laws, then “[a]ny person with standing to challenge” such a decision could “haul the State into federal court and compel it to establish by evidence (presumably in the form of expert testimony) that there is an ‘exceedingly persuasive justification’ for the classification.” [United States v. Virginia](#), 518 U. S. 515, 597, 116 S. Ct. 2264, 135

[L. Ed. 2d 735 \(1996\) \(Scalia, J., dissenting\)](#). Given the ensuing potential for “high-cost, high-risk lawsuit[s],” [ibid.](#), States might simply decline to adopt or enforce sex-based medical laws or regulations, even where such rules would be best medical practice. The burden of skeptical judicial review is therefore far from the “modest step” of requiring a State to [*529] “show its work” that the dissent posits. *Post*, at 607 (opinion of SOTOMAYOR, J.).³

And, if *Bostock*’s reasoning applies to sex, it is difficult to see why it would not apply to other protected characteristics. Race presumably would be a but-for cause of—or, at least, “inextricably bound up with,” [590 U. S., at 660-661, 140 S. Ct. 1731, 207 L. Ed. 2d 218](#)—a university’s decision to credit “an applicant’s discussion of how race affected his or her life,” [Students for Fair Admissions, Inc.](#), 600 U. S., at 230, 143 S. Ct. 2141, 216 L. Ed. 2d 857. Under *Bostock*’s reasoning, such an essay is permissible only if it can survive our “daunting” strict-scrutiny standard. [600 U. S., at 206, 143 S. Ct. 2141, 216 L. Ed. 2d 857](#); but see, e.g., [Washington v. Davis](#), 426 U. S. 229, 239, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976) (noting that the Court has “never held that the constitutional standard for adjudicating claims [****40] of invidious racial discrimination is identical to the standards applicable under Title VII”).

The Constitution compels none of this. While the majority concludes that SB1 does not discriminate

³I assume for purposes of this opinion that government-sponsored sex discrimination triggers heightened scrutiny under the [Equal Protection Clause](#). As I have noted elsewhere, however, “[i]t is possible that the [Equal Protection Clause](#) does not prohibit discriminatory legislative classifications” at all. [United States v. Vaello Madero](#), 596 U. S. 159, 178, n. 4, 142 S. Ct. 1539, 212 L. Ed. 2d 496 (2022) (concurring opinion). And, even if it does, the Court “routinely applied rational-basis review” to sex-discrimination claims “until the 1970’s,” [Virginia](#), 518 U. S., at 575, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (Scalia, J., dissenting), which might suggest that the application of heightened scrutiny to such claims is a departure from the [Fourteenth Amendment](#)’s original understanding. But, the parties have not briefed the issue, so I do not pass upon it here.

based on sex even under *Bostock*'s incorrect reasoning, see *ante*, at 519-520, I would [***163] make clear that, in constitutional challenges, courts need not engage *Bostock* at all.

II

The Court rightly rejects efforts by the United States and the private plaintiffs to accord outsized credit to claims about medical consensus and expertise. The United States asserted that “the medical community [**1840] and the nation’s leading [*530] hospitals overwhelmingly agree” with the Government’s position that the treatments outlawed by SB1 can be medically necessary. Brief for United States 35; see also Brief for Respondents in Support of Petitioner 5 (asserting that “[e]very major medical association in the United States” supports this position). The implication of these arguments is that courts should defer to so-called expert consensus.

There are several problems with appealing and deferring to the authority of the expert class. *First*, so-called experts have no license to countermand the “wisdom, fairness, or logic of legislative choices.” *FCC v. Beach Communications, Inc.*, 508 U. S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). *Second*, contrary to the representations of the United States and the private plaintiffs, there is no medical consensus on how [****41] best to treat gender dysphoria in children. *Third*, notwithstanding the alleged experts’ view that young children can provide informed consent to irreversible sex-transition treatments, whether such consent is possible is a question of medical ethics that States must decide for themselves. *Fourth*, there are particularly good reasons to question the expert class here, as recent revelations suggest that leading voices in this area have relied on questionable evidence, and have allowed ideology to influence their medical guidance.

Taken together, this case serves as a useful reminder that the American people and their representatives are entitled to disagree with those who hold themselves out as experts, and that courts

may not “sit as a super-legislature to weigh the wisdom of legislation.” *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421, 423, 72 S. Ct. 405, 96 L. Ed. 469 (1952). By correctly concluding that SB1 warrants the “paradigm of judicial restraint,” *Beach Communications*, 508 U. S., at 314, 113 S. Ct. 2096, 124 L. Ed. 2d 211, the Court reserves to the people of Tennessee the right to decide for themselves.

A

The views of self-proclaimed experts do not “shed light on the meaning of the Constitution.” *Dobbs*, 597 U. S., at 272-273, 142 S. Ct. 2228, 213 L. Ed. 2d 545. [*531] Thus, whether “major medical organizations” agree with the result of Tennessee’s democratic process is irrelevant. *Post*, at 582, n. 5 (opinion of SOTOMAYOR, J.). To hold otherwise would permit elite sentiment to distort and stifle democratic debate under the guise of scientific judgment, and would reduce judges to mere “spectators . . . in construing our Constitution.” 83 F. 4th, at 479.

Just a few Terms ago, this Court acknowledged the importance of reserving to the democratic [****42] process the right to decide controversial medical questions. In *Dobbs*, the respondents sought to invoke the authority of “overwhelming medical consensus” and “numerous major medical organizations” [***164] to dispatch with Mississippi’s asserted interest in minimizing pain for the unborn. Brief for Respondents, O. T. 2021, No. 19-1932, pp. 31-32. The Court pointedly rejected the notion that a consensus among popular expert groups could remove “the mitigation of fetal pain” from the “legitimate interests” of the people. 597 U. S., at 301, 142 S. Ct. 2228, 213 L. Ed. 2d 545.

Rational-basis review is critical to safeguarding these legitimate interests. Under this level of review, courts ask only whether a law is “rationally related to a legitimate governmental interest.” *Department of Agriculture v. Moreno*, 413 U. S. 528, 533, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973).

That deferential standard is not only legally compelled in this case, but is practically essential for preserving “the original constitutional proposition that courts do not substitute their social and economic beliefs [****1841**] for the judgment of legislative bodies.” *Ferguson v. Skrupa*, 372 U. S. 726, 730, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963). When legislation does not cross constitutional lines, States must have leeway to effect the judgment of their citizens—no matter whether experts disagree. And, when this Court has nonetheless given exalted status to expert opinion, it has been to our detriment: Past deference to expertise provided the theory of eugenics “added legitimacy and considerable momentum,” with “[t]his Court thr[owing] its prestige behind the eugenics movement in its 1927 decision upholding the constitutionality of Virginia’s [***532**] forced-sterilization law.” *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 587 U. S. 490, 499-500, 139 S. Ct. 1780, 204 L. Ed. 2d 78 (2019) (THOMAS, J., concurring) (citing *Buck v. Bell*, 274 U. S. 200, 47 S. Ct. 584, 71 L. Ed. 1000 (1927)). Fortunately, we do not repeat that mistake today.

B

Before this Court, the United States asserted that “overwhelming evidence” supports the use of puberty blockers and cross-sex hormones for treating pediatric gender dysphoria, and that this view represents “the overwhelming consensus of the medical community.” Pet. for Cert. 2, 7. These claims are untenable. “[T]he concept of gender dysphoria as a medical condition is relatively new and the use of drug treatments that change or modify a child’s [******43**] sex characteristics is even more recent.” 83 F. 4th, at 472. The treatments at issue are subject to a rapidly evolving debate that demonstrates a lack of medical consensus over their risks and benefits. Under these conditions, it is imperative that courts treat state legislation with “a strong presumption of validity,” *Beach Communications*, 508 U. S., at 314, 113 S. Ct. 2096, 124 L. Ed. 2d 211, and in turn protect States’ ability to enact “high-stakes medical

policies, in which compassion for the child points in both directions,” 83 F. 4th, at 472.

1

SB1 prohibits puberty blockers, cross-sex hormones, and surgery for the purpose of treating gender dysphoria in children. See *Tenn. Code Ann. §§68-33-102(5)(A)-(B)*, 68-33-103(a). The United States and the dissent have described these medications and procedures as “gender-affirming care.” Brief for United States 2; *post*, at 581 (opinion of SOTOMAYOR, J.). But, that “sanitized description” obscures [*****165**] the nature of the medical interventions at issue. *Stenberg v. Carhart*, 530 U. S. 914, 983, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000) (THOMAS, J., dissenting). I therefore begin with an overview of the treatments regulated under SB1.

[***533**] *Puberty Blockers*. Puberty blockers are powerful synthetic drugs “designed to slow the development of male and female physical features.” 83 F. 4th, at 467. The Food and Drug Administration (FDA) initially approved these drugs “to treat prostate cancer; endometriosis, a painful disease that [******44**] causes uterine tissue to grow elsewhere in the body; and the unusually early onset of puberty,” also known as “precocious puberty.” M. Twohey & C. Jewett, Pressing Pause on Puberty, N. Y. Times, Nov. 14, 2022, pp. A14-A15 (Twohey 2022).

For purposes of treating gender dysphoria, however, puberty blockers generally are administered “off-label,” meaning without FDA authorization for the specific use. See 2 App. 838-839; 83 F. 4th, at 478. Although it is neither unusual nor unlawful for drugs to be used off-label, the FDA has recognized that “just because a drug has been approved for one class of patients doesn’t mean it’s safe for another.” Twohey 2022, at A15. That admonition is important here: To treat precocious puberty, puberty blockers are administered until [****1842**] the age appropriate for puberty; to treat gender dysphoria, however, puberty blockers are administered to stop puberty

throughout the years it would normally occur. See 2 App. 677. The “use of drugs to suppress normal puberty has multiple organ system effects whose long-term consequences have not been investigated.” *Ibid.*

This absence of evidence is a “major drawback” in assessing the effects of puberty blockers on children with gender dysphoria. G. Betsi, P. Goulia, S. Sandhu, & P. Xekouki, Puberty Suppression in Adolescents With Gender Dysphoria: An Emerging Issue With Multiple Implications, *Frontiers in Endocrinology* [****45] 16 (2024). “The existing studies are limited in number, of small sample size, uncontrolled, observational, usually short-term, [and] potentially subject to bias.” *Ibid.*; see also, e.g., C. Terhune, R. Respaut, & M. Conlin, As More Transgender Children Seek Medical Care, Families Confront Many Unknowns, *Reuters* (Oct. 6, 2022), <https://www.reuters.com/investigates/special-report/usa-transyouth-care> [*534] (“No clinical trials have established [puberty blockers’] safety for such off-label use”).

It is undisputed, however, that these treatments carry risks. Research suggests that, aside from interrupting a child’s normal pubertal development, puberty blockers may lead to decreased bone density and impacts on brain development. See, e.g., 2 App. 678-680; M. Cretella, Gender Dysphoria in Children, 32 *Issues in L. & Med.* 287, 297 (2017). And, “[d]espite widespread assertions that puberty blockers are ‘fully reversible,’” it is unclear whether “patients ever develop normal levels of fertility if puberty blockers are terminated after a ‘prolonged delay of puberty.’” 2 App. 678. At bottom, “[t]here remains considerable uncertainty regarding the effects of puberty blockers in individuals experiencing” gender dysphoria. A. Miroshnychenko et al., Puberty Blockers for Gender Dysphoria [****46] in *Youth: A Systematic Review and Meta-Analysis*, *Online First, Archives of Disease in Childhood* (Jan. 24, [***166] 2025) (draft, at 1),

<https://adc.bmj.com/content/110/6/429>.⁴

Cross-sex hormones. Following puberty blockers, the next stage of sex-transition treatments for children involves cross-sex hormones. This treatment is also typically “off-label,” 2 App. 780, and requires “very high doses” of hormones of the opposite sex, *id.*, at 769. For example, one of the organizations that sets standards for pediatric sextransition treatment recommends raising transitioning females’ levels of testosterone “6 to 100 times higher than native [*535] female testosterone levels.” *Id.*, at 774. For males seeking to transition into females, the organization recommends raising levels of estradiol, a type of estrogen, to “2 to 43 times above the normal range.” *Id.*, at 780.

Prescribing such high doses of testosterone to girls induces “hyperandrogenism,” which can cause increased cardiovascular risk, “irreversible changes to the vocal cords,” “clitoromegaly and atrophy of the lining of the uterus and vagina,” as well as “ovarian and breast cancer.” *Id.*, at 772-779. Giving high doses of estrogen to boys induces “hyperestrogenemia,” which can produce similarly [****47] severe side effects including, among other things, increased cardiovascular risk, breast cancer, and sexual [**1843] dysfunction. *Id.*, at 779-781. And, for girls and boys alike, “it is generally accepted, even by advocates of transgender hormone therapy, that hormonal treatment impairs fertility, which may be irreversible.” *Id.*, at 520-521; accord, W. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 *J. Clinical Endocrinology & Metabolism* 3869,

⁴ While the United States addressed the risks of puberty blockers “in and of themselves,” Tr. of Oral Arg. 46, the vast majority of gender dysphoric children treated with puberty blockers progress to cross-sexhormone treatment. See, e.g., 2 App. 554 (citing study in which “98% of those who started puberty suppression progressed to cross-sex hormone therapy”). A discussion of puberty blockers’ risks therefore should not exclude the risks presented by cross-sex hormones.

3882 (2017) (ES Guidelines).

Surgery. SB1 also bans “[s]urgically removing, modifying, altering, or entering into tissues, cavities, or organs” as a treatment for gender dysphoria. [Tenn. Code Ann. §68-33-102\(5\)\(A\)](#). The District Court concluded that the plaintiffs lacked standing to challenge SB1’s ban on sex-transition surgery for minors, see *ante*, at 508, and the parties do not address this provision’s constitutionality here. But, the United States has taken the position that “surgery is essential and medically necessary to alleviate gender dysphoria.” Amended Complaint in Intervention in *Boe v. Marshall*, No. 2:22-cv-00184 (MD Ala., May 4, 2022), ECF Doc. 92, p. 9, ¶39. The practice therefore warrants brief discussion.

Sex-transitioning surgeries for girls include “the surgical removal [****48] of the breasts” and “phalloplasty,” that is, an “attemp[t] [*536] to create a pseudo-penis” by transplanting “a roll of skin and subcutaneous tissue” from another area of the body “to the pelvis.” 2 App. 784-785; see also [Lange v. Houston Cty.](#), 101 F. 4th 793, 802 (CA11) ([Brasher, J., dissenting](#)) (“[A] natal woman’s phalloplasty ‘involves removal of the uterus, ovaries, and vagina, and creation of a neophallu[s] and scrotum with scrotal prostheses,’ which ‘is a multistage reconstructive [***167] procedure’”), vacated and reh’g en banc granted, 110 F. 4th 1254 (CA11 2024). For boys, surgical interventions include “removal of the testicles alone to permanently lower testosterone levels,” as well as an “attempt to create a pseudo-vagina” by “surgically open[ing]” the boy’s penis, removing “erectile tissue,” and then “clos[ing] and invert[ing] the penis] into a newly created cavity in order to simulate a vagina.” 2 App. 784. These surgical interventions are irreversible, entail significant complications, and, in some cases, result in permanent infertility. *Id.*, at 782-786; see also ES Guidelines 3893.

2

The ongoing debate over the efficacy of sex-

transition treatments for children confirms that medical and regulatory authorities are not of one mind about the treatments’ risks and benefits. These conditions illustrate why States may rightly be skeptical of groups or advocates claiming that expert consensus supports their position, and why courts must exercise restraint in reviewing state legislatures’ decisions in this area. Accord, *e.g.*, [Beach Communications](#), 508 U. S., at 314, 113 S. Ct. 2096, 124 L. Ed. 2d 211.

The treatments now referred to as “gender-affirming care” were “not available for minors until just before the millennium.” 83 F. 4th, at 467. These treatments originated with Dutch [****49] healthcare workers in the 1990s, who first “began using puberty blockers . . . to treat gender dysphoria in minors.” *Ibid.* The so-called “Dutch Protocol” “permitted puberty blockers for minors during the early stages of puberty, [*537] allowed hormone therapy at 16, and allowed genital surgery at 18.” *Ibid.* (internal quotation marks omitted).

In 1998, the World Professional Association for Transgender Health (WPATH)—which is regarded by some as “the leading association of medical professionals treating transgender individuals,” Brief for United States 3—revised its treatment standards to “endorse the Dutch Protocol,” 83 F. 4th, at 467. Originally, WPATH’s [**1844] guidelines permitted puberty blockers at the onset of puberty, cross-sex hormones for those 16 or older, and sex-change surgery only for adults. *Ibid.* WPATH relaxed its recommendations in 2012, and began permitting cross-sex hormones for children under the age of 16. *Ibid.* WPATH further relaxed its recommendations when it published the eighth (and current) version of its standards of care in 2022. See E. Coleman et al., Standards of Care for the Health of Transgender and Gender Diverse People, Version 8, 23 Int’l J. Transgender Health (2022) (WPATH 2022 Guidelines or Guidelines). These Guidelines endorse using puberty blockers and cross-sex hormones at the onset of puberty and allowing children [****50] to receive many surgical treatments previously reserved for adults.

See *id.*, at S64-S66. “On the whole, the standards of care for minors ‘have become less restrictive over the course of time.’” [83 F. 4th, at 468](#).

At the same time, the number of children identifying as transgender has surged, and medical professionals have increasingly expressed doubts over the quality of evidence supporting the use of puberty blockers, cross-sex hormones, and surgery to treat them. See *ante*, at 504-505. Over the past several years, [***168] public health authorities in different countries have concluded that these sex-transition treatments are experimental in practice, and that the evidence supporting their use is of “‘very low certainty,’” “‘insufficient,’” and “‘inconclusive.’” *Ante*, at 505. “In countries like Sweden, Norway, France, the Netherlands and Britain—long considered [*538] exemplars of gender progress—medical professionals have recognized that early research on medical interventions for childhood gender dysphoria was either faulty or incomplete.” P. Paul, *Gender Dysphoric Kids Deserve Better Care*, N. Y. Times, Feb. 4, 2024, p. 9 (Paul 2024); accord, [Tenn. Code Ann. §68-33-101\(e\)](#) (“The legislature finds that health authorities in Sweden, Finland, and the United Kingdom . . . have found no evidence that the benefits of these procedures [****51] outweigh the risks”); 1 App. 332-342 (describing countries’ skepticism over the use of puberty blockers and cross-sex hormones as treatments).⁵

[*539] The Cass Review, published in April 2024, offers an influential example of the [***1845] degree to which the debate over pediatric sex-transition treatments remains unsettled. See H. Cass, *Independent Review of Gender Identity Services for Children and Young People: Final Report* (Cass Review). After witnessing a 40-fold increase in the number of referrals to its centralized clinic for sex-transitioning services, the United Kingdom’s National Health Service (NHS) commissioned this report to conduct a “thorough independent review of the use of puberty blockers and cross-sex hormones” to treat children with gender dysphoria. 1 App. 333-334. The report concludes that “we have no good evidence on the long-term outcomes of interventions to manage gender-related distress,” and highlights the lack of reliable evidence to support the use of puberty blockers and cross-sex hormones in treating transgender kids. Cass Review 13, 32-33 (observing “insufficient/inconsistent evidence about the effects of puberty suppression,” and “‘a lack of high-quality [****52] research assessing the outcomes of hormone interventions in adolescents [***169] with gender dysphoria/incongruence’”); see also *ante*, at 524-525. Among other things, the Cass Review determined that the “evidence [the researchers] found did not support th[e] conclusion” that “hormone treatment reduces the elevated risk of death by suicide” among children suffering from gender dysphoria. Cass Review 33; see also *id.*, at 187 (“[T]he evidence does not adequately support

⁵JUSTICE SOTOMAYOR suggests that the restrictions on genderdysphoria treatments imposed in Norway, Sweden, and England are inapposite because those countries still permit some treatments where “medically necessary,” whereas Tennessee’s SB1 does not. *Post*, at 582, n. 4 (dissenting opinion). But, States might reasonably question whether any of the banned treatments are “medically necessary,” as the supposed experts in the field have adopted an exceptionally broad understanding of that concept. Consider the Guidelines’ chapter on “those who identify as eunuchs,” a group that includes “individuals . . . assigned male at birth” who “wish to eliminate masculine physical features, masculine genitals, or genital functioning.” WPATH 2022 Guidelines S88. During a deposition, an author of the Guidelines confirmed that “WPATH’s official position” is that castration may be “medically necessary” even where a male who identifies as a eunuch and seeks castration has “no recognized mental health conditions” and where

“no finding is made that he’s actually at high risk of self-castration.” *Boe v. Marshall*, No. 2:22-cv-00184 (MD Ala., Oct. 9, 2024), ECF Doc. 700-3, p. 52. This expansive understanding of medical necessity would seem to justify any medical intervention so long as it might help individuals “better align their bodies with their gender identity,” WPATH 2022 Guidelines S88, and presumably animates WPATH’s conclusion that surgical interventions can constitute “medically necessary gender-affirming medical treatment[s] in adolescents,” *id.*, at S66. Given that the limits of “medical necessity” in this context are debatable, States might reasonably decline to provide exceptions for it—particularly where, as here, they have reached the conclusion that specific procedures for children are “experimental in nature” and may carry unknown “harmful effects.” [Tenn. Code Ann. §68-33-101\(b\)](#).

the claim that gender-affirming treatment reduces suicide risk”).

This shifting scientific landscape has forced governments to act quickly under conditions of uncertainty. In the months following the Cass Review’s publication, for example, NHS imposed new restrictions on the use of puberty blockers and cross-sex hormones for sex-transition treatments. See *ante*, at 525. And, just a week after oral argument in this case, the United Kingdom indefinitely banned new prescriptions of puberty blockers to treat children with gender [*540] dysphoria, except in clinical trials. See S. Castle, *Ban on Puberty Blockers for U. K. Teens Is Settled*, N. Y. Times Int’l, Dec. 13, 2024, p. A11. In areas with this much “medical and scientific uncertainty,” courts must afford States “wide discretion.” [*Gonzales v. Carhart*, 550 U. S. 124, 163, 127 S. Ct. 1610, 167 L. Ed. 2d 480 \(2007\)](#).

C

Setting aside whether sex-transition treatments for children are *effective*, States may legitimately question whether they are *ethical*. States have a legitimate interest “in protecting the integrity and ethics of the medical profession.” [*Washington v. Glucksberg*, 521 U. S. 702, 731, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 \(1997\)](#). And, as the United States has acknowledged, “the ‘general ethical principles’ governing [****53] pediatric care” require the patient’s informed consent. Brief for United States 5. Mounting evidence gives States reason to question whether children are capable of providing informed consent to irreversible sex-transition treatments, and thus whether these treatments can be ethically administered.

1

States could reasonably conclude that the level of young children’s cognitive and emotional development inhibits their ability to consent to sex-transition treatments. Consistent with WPATH’s recommendation that puberty blockers be available from the onset of puberty, see WPATH 2022

Guidelines S111, S256, “[m]any physicians in the United States and elsewhere” now “prescrib[e] blockers to patients at the first stage of puberty—as early as age 8.” Twohey 2022, at A14.

[**1846] There is no dispute, however, that the “decision-making capacity” of adolescents “is developing, but not yet complete.” 2 App. 895. This Court has recognized as much in other contexts, explaining that children’s “lack of maturity” and “underdeveloped sense of responsibility” often lead to “impetuous and ill-considered actions and decisions.” [*541] [*Roper v. Simmons*, 543 U. S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 \(2005\)](#) (internal quotation marks omitted). It is therefore unsurprising that “[t]he risks associated [****54] with puberty blockers and cross-sex hormones are difficult for adolescents to comprehend and appreciate,” as the “near certainty of infertility . . . is [***170] likely to not be appreciated until the age during which most individuals consider having children.” 2 App. 894.

But, these are precisely the risks to which children who receive these treatments are required to consent. Consider the contents of a consent form obtained from a gender clinic in Alabama. After providing a long list of potential risks and side effects, many of which are discussed above, see *supra*, at 533-535, the form requires both the child and parent to initial their consent to various statements. Among these are acknowledgments that “the side effects and safety of these medicines are not completely known,” that the proposed treatment “may affect my sex life in different ways and future ability to cause a pregnancy,” and that the treatments may lead to permanent infertility. See *Boe*, ECF Doc. 78-41, pp. 3-4, 10. The capacity to knowingly consent to these medical interventions requires a level of comprehension about science, sex, and fertility that state legislatures could determine a child is unlikely to possess. See 2 App. 893-895; [*Tenn. Code Ann. §68-33-101\(h\)*](#) (finding that “minors lack the maturity to fully understand and appreciate the life-altering consequences” of

the treatments at issue).⁶

[*542] 2

The voices of “detransitioners”—individuals who have undergone sex-transition treatments but no longer view themselves as transgender—provide States with an additional reason to question [****55] whether children are providing informed consent to the medical interventions described above. See, e.g., Brief for Larger Detransitioners Community as *Amici Curiae* 24-28; Brief for Partners for Ethical Care et al. as *Amici Curiae* 17-38.

A recurring theme in discussions of detransitioners is that doctors have responded to the “skyrocketing” “number of adolescents requesting [sex-transitioning] medical care” by “hastily dispensing medicine or recommending medical doctors prescribe it.” L. Edwards-Leeper & E. Anderson, *The Mental Health Establishment Is Failing Trans Kids*, Washington Post, Nov. 24, 2021, pp. B1-B2. In many cases, evidence suggests that children “are being rushed toward” medical treatment “[w]ithout proper assessment,” and “the rising number of detransitioners that clinicians [**1847] report seeing . . . indicates that this approach can backfire.” *Id.*, at B2; accord, e.g., [Eknes-Tucker v. Governor of Ala., 114 F. 4th 1241, 1267 \(CA11 2024\)](#) (opinion of Lagoa, J.) (“Alabama presented evidence from many

detransitioners who uniformly testified that they were not aware of the long-term impacts of the treatments they underwent”); Brief for Respondents [***171] 12-13 (explaining that, before enacting SB1, the Tennessee Legislature heard testimony “from a detransitioner who explained that she was not ‘capable of making informed lifelong decisions’ as a teenager” but nevertheless received transition treatments).⁷

[*543] States have an interest in ensuring that minor patients have the time and capacity to fully understand the irreversible treatments they may undergo. Cf. [Gonzales, 550 U. S., at 159, 127 S. Ct. 1610, 167 L. Ed. 2d 480](#) (identifying State’s “legitimate concern” regarding “lack of information” provided by abortionists). And, despite the supposed expert consensus that young children can consent to irreversible sex-transition treatments, States have good reasons to disagree; as “any parent knows,” children’s comprehension is limited, [Roper, 543 U. S., at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#), and the growing number of detransitioners illustrates the risks of assuming otherwise.

D

Recent revelations suggest that WPATH, long considered a standard bearer in treating pediatric

⁶Parents also may have difficulty providing informed consent to their children’s sex-transition treatments. Reports suggest that, in medical consultations, “[p]arents are routinely warned that to pursue any path outside of agreeing with a child’s self-declared gender identity is to put a gender dysphoric youth at risk for suicide, which feels to many people like emotional blackmail.” Paul 2024, at 8; see also [Eknes-Tucker v. Governor of Ala., 114 F. 4th 1241, 1268 \(CA11 2024\)](#) (Lagoa, J., concurring in denial of rehearing en banc) (acknowledging “testimony from nine parents who said that doctors, therapists, and other practitioners pressured them to start their children on cross-sex hormones and puberty blockers or otherwise circumvented their wishes”). States might reasonably question whether, under such conditions, parents’ consent is valid and consistent with ethical principles.

⁷The United States has asserted that “all of the available evidence shows that” detransitioners constitute “a very small number” of individuals receiving sex-transition treatments. Tr. of Oral Arg. 49. But, “those who abandon a transition are likely to stop talking to their doctors, and so disappear from the figures.” Trans Substantiation, *The Economist*, Apr. 8, 2023, p. 18; see also 2 App. 653 (“A significant majority (76%) [of detransitioners in one study] did not inform their clinicians of their detransition”). Thus, “[t]he number of people who detransition or discontinue gender treatments is not precisely known.” A. Ghorayshi, *Youth Gender Clinic Lands in a Political Storm*, N. Y. Times, Aug. 26, 2023, p. A12. And, because “[i]t is quite possible that low reported rates of detransition and regret” among earlier groups of patients “will no longer apply” to the increasingly large number of children seeking these treatments, “there is reason to believe that that the numbers of detransitioners may increase.” M. Irwig, *Detransition Among Transgender and Gender-Diverse People—An Increasing and Increasingly Complex Phenomenon*, 107 J. Clinical Endocrinology & Metabolism e4261, e4262 (2022).

gender dysphoria, see Brief for United States 3, bases its guidance on insufficient evidence and allows [****56] politics to influence its medical conclusions. Beyond the lack of consensus over the efficacy and ethics of pediatric sex-transition treatments, these developments provide States even stronger bases for treating supposed authorities in this area with skepticism.

WPATH itself recognizes that evidence supporting the efficacy of puberty blockers, cross-sex hormones, and surgical intervention for treating gender dysphoria in children is [*544] lacking. In its most recent Guidelines, for example, the group notes that “[a] key challenge in adolescent transgender care is *the quality of evidence* evaluating the effectiveness of medically necessary gender-affirming medical and surgical treatments . . . over time.” WPATH 2022 Guidelines S45-S46 (emphasis added). A contributor to the Guidelines underscored this challenge, explaining that, “[o]ur concerns, echoed by the social justice lawyers we spoke with, is that evidence-based review reveals little or no evidence and puts us in an untenable position in terms of affecting policy or winning lawsuits.” [*Eknes-Tucker, 114 F. 4th, at 1261*](#) (opinion of Lagoa, J.).

Nevertheless, WPATH publicly represents that “[g]ender-affirming interventions [**1848] are based on decades of clinical experience and [****57] research,” and are [***172] “safe and effective” treatments. Guidelines S18. WPATH appears to rest this conclusion on self-referencing consensus rather than evidence-based research, which may help explain the group’s confidence in the face of concededly inadequate evidence. See Cass Review 130. In its analysis of several “guidelines” for transgender medicine—including not only the WPATH 2022 Guidelines, but also those from groups like the Endocrine Society—the Cass Review notes that “most of the guidelines described insufficient evidence about the risks and benefits of medical treatment in adolescents,” but nevertheless “went on to cite this same evidence to recommend medical treatments,” or to base their

recommendations on “*other* guidelines” prescribing the same course of action. *Ibid.* (emphasis added). This approach was particularly pronounced in the WPATH 2022 Guidelines, which “cited many of the other national and regional guidelines to support some of its recommendations, despite these guidelines having been considerably influenced by WPATH 7,” the prior version of WPATH’s Standards of Care. Cass Review 130.

States would also have good reason to question whether WPATH has a basis for believing that children can provide [*545] informed consent to sex-transition treatments. “[I]n a leaked recording of a WPATH Panel,” for example, an endocrinologist acknowledged the difficulty of explaining cross-sex hormones and puberty blockers to children, noting that “‘the thing you have to remember about kids is that we’re often explaining these sorts of things to people who haven’t even had biology in high school yet.’” [*Eknes-Tucker, 114 F. 4th, at 1268-1269*](#) (opinion of Lagoa, J.). “[I]t’s always a good theory that you talk about fertility preservation with a [****58] 14 year old,” the endocrinologist continued, “‘but I know I’m talking to a blank wall.’” *Id., at 1269*. Analogizing a teenage patient’s comprehension to that of a blank wall should raise serious concerns regarding the patient’s ability to provide informed consent. Given WPATH’s recognition that “[c]onsent requires the cognitive capacity to understand the risks and benefits of a treatment,” Guidelines S38, States thus might reasonably question whether WPATH could be “genuine in its claim that these treatments are safe, effective, and well understood, particularly for minors,” [*Eknes-Tucker, 114 F. 4th, at 1268*](#) (opinion of Lagoa, J.).

Other “recent revelations” might reinforce the conclusion that “WPATH’s lodestar is ideology, not science.” *Id., at 1261*. For example, newly released documents suggest that WPATH tailored its Standards of Care in part to achieve legal and political objectives. In one instance, the chair of WPATH’s guidelines committee testified that it was “ethically justifiable” for the authors of the

WPATH 2022 Guidelines to “advocate for language changes [in these Guidelines] to strengthen [their] position in court.” *Boe*, ECF Doc. 700-3, p. 42. One of the Guidelines’ contributors was more direct: “My hope with these [Guidelines] is that they land in such a way as to have serious effect in . . . law and policy settings.” ECF Doc. 700-13, p. 25; see also Brief for State of Alabama as *Amicus Curiae* 11-15 (Alabama Brief) (describing similar statements [****59] from other WPATH contributors).

[*546] Worse, recent reporting has exposed [***173] that WPATH changed its medical guidance to accommodate external political pressure. See Brief for Respondents 9-11; Alabama Brief 15-23. Unsealed documents reveal that a senior official in the Biden administration “pressed [WPATH] to remove age limits for adolescent surgeries from guidelines for care of transgender [**1849] minors” on the theory that ““specific listings of ages, under 18, will result in devastating legislation for trans care.” A. Ghorayshi, *Biden Officials Pushed To Remove Age Limits for Trans Surgery*, N. Y. Times, June 27, 2024, p. A17. Despite some internal disagreement, WPATH acceded and “removed the age minimums in its eighth edition of the standards of care.” *Ibid.*; see Alabama Brief 17-20.⁸

Over a decade ago, one of WPATH’s contributors explained that ““WPATH aspires to be both a scientific organization and an advocacy group for the transgendered,”” and admitted that WPATH’s Standards of Care ““is not a politically neutral document.”” *Kosilek v. Spencer*, 774 F. 3d 63, 78 (CA1 2014). WPATH’s apparent willingness to let political interests influence its medical conclusions highlights this reality. States are never required to substitute expert opinion for their legislative judgment, and, when the experts appear to have

compromised [****60] their credibility, it makes good sense to chart a different course.⁹

[*547] ***

This case carries a simple lesson: In politically contentious debates over matters shrouded in scientific uncertainty, courts should not assume that self-described experts are correct.

Deference to legislatures, not experts, is particularly critical here. Many prominent medical professionals have declared a consensus around the efficacy of treating children’s gender dysphoria with puberty blockers, cross-sex hormones, and surgical interventions, despite mounting evidence to the contrary. They have dismissed grave problems undercutting the assumption that young children can consent to irreversible treatments that may deprive them of their ability to eventually produce children of their own. They have built their medical determinations on concededly weak evidence. And, they have surreptitiously compromised their medical recommendations to achieve political ends.

The Court today reserves “to the people, their elected representatives, and the democratic process” the power to decide how best to address an area of medical uncertainty and extraordinary importance. *Ante*, at 525. That sovereign prerogative does not bow to “major medical organizations.” *Post*, at 582, n. 5 [***174] (opinion of SOTOMAYOR, J.). “[E]xperts and elites have been wrong before—and they may prove to be

⁸ After its influence became public, the Government backtracked and announced that it “opposed gender-affirming surgery for minors.” R. Rabin, T. Rosenbluth, & N. Weiland, *Biden Opposes Surgery for Transgender Minors*, N. Y. Times, June 30, 2024, p. 22.

⁹ WPATH’s deference to political pressure is not the only high-profile example of ideology influencing medical conclusions in this area. Recently, “[a]n influential doctor and advocate of adolescent gender treatments” declined to publish “a long-awaited study of puberty-blocking drugs” that suggested her initial hypothesis about the drugs’ efficacy had not “borne out.” A. Ghorayshi, *Doctor, Fearing Outrage, Slows a Gender Study*, N. Y. Times, Oct. 24, 2024, pp. A1, A23. The doctor explained that she feared “the findings might fuel the kind of political attacks that have led to bans of the youth gender treatments in more than 20 states, one of which will soon be considered by the Supreme Court.” *Id.*, at A23.

wrong again.” [*Students for Fair Admissions, Inc.*, 600 U. S., at 268, 143 S. Ct. 2141, 216 L. Ed. 2d 857](#) (THOMAS, J., concurring).

JUSTICE BARRETT, with whom JUSTICE THOMAS joins, concurring.

Because the Court concludes that Tennessee’s Senate Bill 1 does not classify on the basis of transgender status, it does not resolve whether transgender status constitutes a suspect [*548] class. *Ante*, at 517-519; [**1850] see [*Geduldig v. Aiello*, 417 U. S. 484, 496, 94 S. Ct. 2485, 41 L. Ed. 2d 256 \(1974\)](#) [****61]. I write separately to explain why, in my view, it does not.

I

As a “practical necessity,” “most legislation classifies for one purpose or another.” [*Romer v. Evans*, 517 U. S. 620, 631, 116 S. Ct. 1620, 134 L. Ed. 2d 855 \(1996\)](#). Laws distribute benefits that advantage particular groups (like in-state tuition for residents), draw lines that might seem arbitrary (like income thresholds for means-tested benefits), and set rules for specific categories of people (like a particular profession or age group). Such classifications do not usually render a law unconstitutional. Instead, as a general matter, laws are presumed to be constitutionally valid, and a legislative classification will be upheld “so long as it bears a rational relation to some legitimate end.” *Ibid*.

There are only a few exceptions to this rule: classifications based on race, sex, and alienage. Racial and ethnic classifications receive strict scrutiny; to survive a constitutional challenge, they must be “‘narrowly tailored’” to serve “‘compelling governmental interests.’” [*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U. S. 181, 206-207, 143 S. Ct. 2141, 216 L. Ed. 2d 857 \(2023\)](#); see also [*Regents of Univ. of Cal. v. Bakke*, 438 U. S. 265, 292, 98 S. Ct. 2733, 57 L. Ed. 2d 750 \(1978\)](#) (opinion of Powell, J.) (observing that the [*Equal Protection Clause*](#) applies “to all ethnic groups

seeking protection from official discrimination”). Classifications based on alienage are subject to similarly close scrutiny.¹ [*Nyquist v. Mauclet*, 432 U. S. 1, 7, 97 S. Ct. 2120, 53 L. Ed. 2d 63 \[*549\] \(1977\)](#). And laws distinguishing between men and women receive intermediate scrutiny; to survive a constitutional challenge, they must be “‘substantially related’” to achieving an “‘important governmental objectiv[e].’” [*United States v. Virginia*, \[***175\] 518 U. S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 \(1996\)](#).

Beyond these categories, the set has remained virtually closed. Indeed, this Court “has not recognized any new constitutionally protected classes in over four decades, and instead has repeatedly declined to do so.” [*Ondo v. Cleveland*, 795 F. 3d 597, 609 \(CA6 2015\)](#). So in urging us to recognize transgender status as a suspect classification, the plaintiffs face a high bar.²

¹ Alienage is a unique category. Because of Congress’s broad authority over immigration, we have treated it as a suspect class only vis-à-vis the States. See, e.g., [*Takahashi v. Fish and Game Comm’n*, 334 U. S. 410, 418-419, 68 S. Ct. 1138, 92 L. Ed. 1478 \(1948\)](#). For the same reason, we have grounded our scrutiny of state laws as much in the [*Supremacy Clause*](#) as in the [*Equal Protection Clause*](#). See, e.g., [*Toll v. Moreno*, 458 U. S. 1, 9-10, 102 S. Ct. 2977, 73 L. Ed. 2d 563 \(1982\)](#) (holding that a state policy precluding certain aliens from acquiring in-state status for the purpose of university tuition violated the [*Supremacy Clause*](#) and declining to consider equal protection arguments); [*Takahashi*, 334 U. S., at 419, 68 S. Ct. 1138, 92 L. Ed. 1478](#) (“State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with [the] constitutionally derived federal power to regulate immigration, and have accordingly been held invalid”). See also [*Graham v. Richardson*, 403 U. S. 365, 376-380, 91 S. Ct. 1848, 29 L. Ed. 2d 534 \(1971\)](#).

² Because the plaintiffs contend that intermediate scrutiny rather than strict scrutiny is the correct standard, they refer to transgender status as a “quasi-suspect” class. E.g., Brief for Respondents in Support of Petitioner 37; see [*Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 437-438, 105 S. Ct. 3249, 87 L. Ed. 2d 313 \(1985\)](#) (using the phrase “quasi-suspect classification” to refer to classifications that trigger “intermediate-level scrutiny”). As any form of heightened review departs from the presumption that legislative classifications are constitutional, I follow the Sixth Circuit in using the phrase “suspect class” or “suspect classification” to refer generically to all classifications that trigger more than rational-basis review. See [*L. W. v. Skrametti*, 83 F. 4th 460, 486 \(2023\)](#).

[**1851] To determine whether a group constitutes a “suspect class” [****62] akin to the canonical examples of race and sex, we apply a test derived from the famous footnote 4 in *United States v. Carolene Products Co.* See 304 U. S. 144, 152-153, n. 4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938) (suggesting that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”). We consider whether members of the group in question “exhibit obvious, immutable or distinguishing characteristics [*550] that define them as a discrete group,” whether the group has, “[a]s a historical matter, . . . been subjected to discrimination,” and whether the group is “a minority or politically powerless.” *Lyng v. Castillo*, 477 U. S. 635, 638, 106 S. Ct. 2727, 91 L. Ed. 2d 527 (1986). The test is strict, as evidenced by the failure of even vulnerable groups to satisfy it: We have held that the mentally disabled, the elderly, and the poor are not suspect classes. See *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 442, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (mental disability); *Massachusetts Bd. of Retirement v. Murgia*, 427 U. S. 307, 313-314, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976) (*per curiam*) (age); *San Antonio Independent School Dist. v. Rodriguez*, 411 U. S. 1, 28, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) (poverty). In fact, as far as I can tell, we have *never* embraced a new suspect class under this test. Our restraint reflects the principle that “[w]hen social or economic legislation is at issue, the *Equal Protection Clause* allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.” *Cleburne*, 473 U. S., at 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (citation omitted).

II

The Sixth Circuit held that transgender individuals do not constitute a suspect class, and it was right to

do so.³ [***176] To begin, [****63] transgender status is not marked by the same sort of “‘obvious, immutable, or distinguishing characteristics’” as race or sex. *L. W. v. Skrametti*, 83 F. 4th 460, 487 (2023) (quoting *Bowen v. Gilliard*, 483 U. S. 587, 602, 107 S. Ct. 3008, 97 L. Ed. 2d 485 (1987)); see *Lyng*, 477 U. S., at 638, 106 S. Ct. 2727, 91 L. Ed. 2d 527. In particular, it is not defined by a trait that is “‘definitively ascertainable at the moment of birth.’” 83 F. 4th, at 487 (quoting *Ondo*, 795 F. 3d, at 609). The plaintiffs here, for instance, began to experience gender dysphoria at varying ages—some from a young age, others not until the onset of puberty. See Brief for Respondents [*551] in Support of Petitioner 8-12. Meanwhile, the plaintiffs acknowledge that some transgender individuals “detransition” later in life—in other words, they begin to identify again with the gender that corresponds to their biological sex. See Tr. of Oral Arg. 49, 108. Accordingly, transgender status does not turn on an “immutable . . . characteristi[c].” *Lyng*, 477 U. S., at 638, 106 S. Ct. 2727, 91 L. Ed. 2d 527.

[**1852] Nor is the transgender population a “discrete group,” as our cases require. *Ibid.* Instead, like classes we have declined to recognize as suspect, the category of transgender individuals is “large, diverse, and amorphous.” *Rodriguez*, 411 U. S., at 28, 93 S. Ct. 1278, 36 L. Ed. 2d 16. The World Professional Association for Transgender Health states that the term “‘transgender’ can describe ‘a huge variety of gender identities and expressions.’” 83 F. 4th, at 487 (quoting Standards of Care for the Health of Transgender and Gender Diverse People S15 (8th ed. 2022)). The American Psychological Association similarly uses the phrase “‘transgender youth’” as an “umbrella term” “to describe . . . varied groups” with “many diverse gender experiences.” Brief for American Psychological

³ JUSTICE ALITO would likewise hold that transgender persons do not qualify as a suspect or quasi-suspect class. See *post*, at 566 (opinion concurring in part and concurring in judgment). Though his analysis differs in emphasis, see *ibid.*, n. 6, I understand it to be consistent with mine.

Association et al. as *Amici Curiae* 6, n. 7. Underscoring the point, plaintiffs’ counsel acknowledged at oral argument that “there are people who fall within a transgender identity who may not fit into a binary identity.” Tr. of Oral Arg. 100. The boundaries of the group, in other words, are not defined by an easily ascertainable characteristic that is fixed and consistent across the group.

Finally, holding that transgender people constitute [****64] a suspect class would require courts to oversee all manner of policy choices normally committed to legislative discretion. The parties agree that the States have a legitimate interest in regulating health care. They also agree that transgender status implicates physical and mental health—indeed, this case is about the medical treatment of children with gender dysphoria, which is “clinically significant distress resulting from the incongruence between . . . gender identity and . . . [*552] sex assigned at birth,” and which “can result in severe anxiety, depression, self-harm, and even suicide.” Brief for Respondents in Support of Petitioner 4-5. The question of how to regulate a medical condition such as gender dysphoria involves a host of policy judgments that legislatures, not courts, are best equipped to make. See *Cleburne*, [***177] 473 U. S., at 441-442, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (declining to recognize a suspect class when the “distinguishing characteristics” of the proposed class are “relevant to interests the State has the authority to implement”).

Consider just a few: What are the relevant risks and benefits to children of puberty blockers and hormone treatments? What is the age at which these treatments become appropriate? 15? 16? 18? What about surgeries? Expert disagreements highlight the difficulty of such choices. As the Court recounts, England, Finland, Norway, and Sweden have raised concerns about using puberty blockers or hormone treatments on juveniles with gender dysphoria and have limited such treatments, in some cases by allowing them to go forward only in a research

setting. See 1 App. 332-342, 409-411; 2 *id.*, at 726-727; *ante*, at 505. By contrast, the guidelines promulgated by the Endocrine Society, upon which the plaintiffs rely, broadly recommend treatment for adolescents with sustained gender dysphoria and the capacity to give informed consent. App. to Pet. for Cert. 256a-259a. As we have emphasized before, “state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty.” *Gonzales v. Carhart*, 550 U. S. 124, 163, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007). The prospect of courts second-guessing legislative choices in this area should set off alarm bells. Cf. *Lochner v. New York*, 198 U. S. 45, 72, 25 S. Ct. 539, 49 L. Ed. 937 (1905) (Harlan, J., dissenting) (“What the precise facts are it may be difficult to say. It is enough for . . . this court to know . . . that the question is one about which there is room for debate and for an honest difference of opinion”).

[*553] Beyond the treatment of gender dysphoria, [****65] transgender status implicates several other areas of legitimate regulatory policy—ranging [**1853] from access to restrooms to eligibility for boys’ and girls’ sports teams. If laws that classify based on transgender status necessarily trigger heightened scrutiny, then the courts will inevitably be in the business of “closely scrutiniz[ing] legislative choices” in all these domains. *Cleburne*, 473 U. S., at 441-442, 105 S. Ct. 3249, 87 L. Ed. 2d 313. To be sure, an individual law “‘inexplicable by anything but animus’” is unconstitutional. *Trump v. Hawaii*, 585 U. S. 667, 706, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018). But legislatures have many valid reasons to make policy in these areas, and so long as a statute is a rational means of pursuing a legitimate end, the *Equal Protection Clause* is satisfied.

III

The conclusion that transgender individuals do not share the “obvious, immutable, or distinguishing characteristics” of “a discrete group” is enough to demonstrate that transgender status does not define

a suspect class. [Lyng, 477 U. S., at 638, 106 S. Ct. 2727, 91 L. Ed. 2d 527](#). But the second factor—whether the group has, “[a]s a historical matter, . . . been subjected to discrimination,” *ibid.*—also poses a problem for the plaintiffs’ argument.

In addressing this factor, the plaintiffs assume that a history of private discrimination may satisfy this condition. For instance, the plaintiffs argue that “it is undeniable that [****66] transgender [***178] individuals, as a class, have ‘historically been subject to discrimination including in education, employment, housing, and access to healthcare.’” Brief for United States 29; Brief for Respondents in Support of Petitioner 37 (adopting the arguments made by the United States).⁴ The Solicitor General confirmed at oral argument that this argument [*554] did not turn on “discrimination . . . reflected in the laws.” Tr. of Oral Arg. 60. The District Court also assumed that a history of private discrimination could suffice to establish that a group comprises a suspect class. See [L. W. v. Skrmetti, 679 F. Supp. 3d 668, 690 \(MD Tenn. 2023\)](#).

This assumption is mistaken. For purposes of the [Fourteenth Amendment](#), the relevant question is whether the group has been subject to a longstanding pattern of discrimination *in the law*. In other words, we ask whether the group has suffered a history of *de jure* discrimination.

Existing suspect classes had such a history. Most obviously, “[t]he clear and central purpose of the [Fourteenth Amendment](#) was to eliminate all official state sources of invidious racial discrimination in the States.” [Loving v. Virginia, 388 U. S. 1, 10, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 \(1967\)](#). We have made that point “repeatedly.” [Students for Fair Admissions, Inc., 600 U. S., at 206, 143 S. Ct. 2141, 216 L. Ed. 2d 857](#) (gathering cases). In recognizing

sex as a suspect class, we similarly emphasized that women faced more than a century’s [****67] worth of discrimination in the law: “[N]ot until 1920 did women gain a constitutional right to the franchise. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any ‘basis in reason’ could be conceived for the discrimination.” [Virginia, 518 U. S., at 531, 116 S. Ct. 2264, 135 L. Ed. 2d 735](#) (citation omitted); see also [Frontiero v. Richardson, 411 U. S. 677, 684-685, 93 S. Ct. 1764, 36 L. Ed. 2d 583 \(1973\)](#) (plurality opinion) (“As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes”). [**1854] And in protecting alienage, we underscored the many state laws that discriminated on that ground, typically by targeting individuals of a particular national origin. See, e.g., [Takahashi v. Fish and Game Comm’n, 334 U. S. 410, 427, 68 S. Ct. 1138, 92 L. Ed. 1478 \(1948\)](#) (Murphy, J., concurring) (discussing a state law “directed in spirit and in effect solely against aliens of Japanese birth”); [Yick Wo v. Hopkins, 118 U. S. 356, 373-374, 6 S. Ct. 1064, 30 L. Ed. 220 \(1886\)](#) (identifying ordinances that discriminated [*555] against Chinese nationals). Indeed, Congress criminalized discrimination on the basis of alienage by state actors in 1870, “in response to California legislation restricting the rights of Chinese immigrants.” [Rajaram v. Meta Platforms, Inc., 105 F. 4th 1179, 1183-1184 \(CA9 2024\)](#); see 16 Stat. 144 (codified, as amended, [18 U. S. C. §242](#)).

The distinction between *de jure* discrimination and private animus is [****68] consistent with the [Fourteenth Amendment’s](#) text and purpose. Most [***179] fundamentally, the [Fourteenth Amendment](#) constrains state action, not private conduct. See [Nat’l Collegiate Ath. Ass’n v. Tarkanian, 488 U. S. 179, 191, 109 S. Ct. 454, 102 L. Ed. 2d 469 \(1988\)](#). And state actors are entitled to a presumption that their actions turn on constitutionally legitimate motivations rather than impermissible animus. [Schilb v. Kuebel, 404 U. S.](#)

⁴ As the Court explains, the Department of Justice has reconsidered the Government’s position in this case following the change in administration. *Ante*, at 509, n. 1. The private plaintiffs, however, have maintained the same position throughout.

[357, 364, 92 S. Ct. 479, 30 L. Ed. 2d 502 \(1971\)](#). Of course, this presumption can be defeated, and a widespread history of state action that reflects animus or stereotyping gives courts good reason to be suspicious of the government’s motives. But because we presume that state actors abide by the Constitution, the fact of private discrimination—which is not itself unconstitutional, even if morally blameworthy—does not provide a basis for inferring that state actors are also likely to discriminate and thereby violate the Constitution.

This focus on *de jure* discrimination is not only theoretically sound—it is also judicially manageable. Courts are ill suited to conduct an open-ended inquiry into whether the volume of private discrimination exceeds some indeterminate threshold. By contrast, they are well equipped to analyze whether there is a history of legislation that has discriminated against the group in question.

Focusing the inquiry on *de jure* state action would also clarify the test for political powerlessness, which is another factor we have used to determine whether a classification is suspect. *Carolene Products*, the source of the “discrete and insular minority” test, equates political powerlessness with laws burdening those who lacked a vote. See [304 U. S., at \[*556\] 152-153, n. 4, 58 S. Ct. 778, 82 L. Ed. 1234](#) (citing [McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 428, 4 L. Ed. 579 \(1819\)](#) (a State regulating the Federal Government); [South Carolina Highway Dept. v. Barnwell Brothers, Inc., 303 U. S. 177, 184, n. 2, 58 S. Ct. 510, 82 L. Ed. 734 \(1938\)](#) (a State regulating out-of-state corporations)). This kind of “political powerlessness,” which leaves the affected persons altogether unable to protect themselves in the political process, tracks the experience of the existing suspect classes.

We have said little, however, about what “political powerlessness” [****69] means for our recognition of *new* suspect classes. See [Lyng, 477 U. S., at 638, 106 S. Ct. 2727, 91 L. Ed. 2d 527](#) (stating without elaboration that close relatives are

not “politically powerless”); [Murgia, 427 U. S., at 313](#) (same for the elderly). And in the absence of clear guidance from us, lower courts have resorted to considering evidence like whether the group has drawn the support of powerful interest groups, achieved equal representation in government, or obtained [**1855] affirmative statutory protection from discrimination in the private sector. See, e.g., [83 F. 4th, at 487](#) (evaluating whether transgender litigants are supported by “major medical organizations” and “large law firms”); [679 F. Supp. 3d, at 691](#) (suggesting that the analysis turns on whether the group has “achiev[ed] relatively equal representation in political bodies”); *Grimm v. Gloucester Cty. School Bd.*, 972 F. 3d 586, 613 (CA4 2020) (concluding that transgender people are politically powerless because of a “dearth of openly transgender persons serving in the executive and legislative branches” or in the judiciary). These markers reflect sociological intuitions [***180] about a group’s relative political power; they do not constitute an objective, legally grounded standard that courts can apply consistently. A legacy of *de jure* discrimination, by contrast, more precisely (and objectively) captures the interests [****70] that lie at the heart of the [Equal Protection Clause](#).

Because the litigants assumed that evidence of private discrimination could suffice for the suspect-class inquiry, they did not thoroughly discuss whether transgender individuals [*557] have suffered a history of *de jure* discrimination as a class. And because the group of transgender individuals is an insufficiently discrete and insular minority, the question is largely academic.⁵ In

⁵The evidence that is before this Court is sparse but suggestive of relatively little *de jure* discrimination. When asked at oral argument, the Solicitor General acknowledged that “historical discrimination against transgender people may not have been reflected in the laws.” Tr. of Oral Arg. 60. Counsel for the private plaintiffs, however, suggested that bans on military service for transgender individuals and on cross-dressing might qualify as *de jure* discrimination. See *id.*, at 110; see also *post*, at 601-602 (SOTOMAYOR, J., dissenting). Because the issue was unbriefed, I take no position on whether there is a longstanding history of *de jure* discrimination with respect to the relevant characteristic of transgender status.

future cases, however, I would not recognize a new suspect class absent a demonstrated history of *de jure* discrimination.

The [Equal Protection Clause](#) does not demand heightened judicial scrutiny of laws that classify based on transgender status. Rational-basis review applies, which means that courts must give legislatures flexibility to make policy in this area.

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

I concur in the judgment and join Parts I and II-B of the opinion of the Court. I agree with much of the discussion in Part II-A-1, which holds that Tennessee’s Senate Bill 1 (SB1) does not classify on the basis of “sex,” but I set out my own analysis of this issue in Part I of this opinion. I do not join Part II-A-2 of the opinion of the Court, [****71] which concludes that SB1 does not classify on the basis of “transgender status.” There is a strong argument that SB1 does classify on that ground, but I find it unnecessary to decide that question. I would assume for the sake of argument that the law [*558] classifies based on transgender status, but I would nevertheless sustain the law because such a classification does not warrant heightened scrutiny. I also do not join Part II-A-3 of the Court’s opinion because I do not believe that the reasoning employed in [Bostock v. Clayton County](#), 590 U. S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020), is applicable when determining whether a law classifies based on sex for [Equal Protection Clause](#) purposes.

I

A

To begin, I agree with the Court that SB1 does not classify on the basis of “sex” [**1856] within the meaning of our equal protection precedents. What those cases have always meant by “sex” is the status of having the genes of a male or female. That was the common understanding of the term in 1971

when the Court, in [Reed v. Reed](#), 404 U. S. 71, 74, 92 S. Ct. 251, 30 L. Ed. 2d 225, first held that a law that [***181] discriminated against women violated the [Equal Protection Clause](#). See, e.g., Random House Dictionary of the English Language 1307 (1966) (defining “sex” as “the fact or character of being either male or female”); Webster’s Third New International Dictionary 2081 (1966) (defining “sex” as [****72] “one of the two divisions of . . . human beings respectively designated male or female”). And all the Court’s subsequent cases in this line have shared that understanding.

In [Frontiero v. Richardson](#), 411 U. S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973), which was handed down in the next Term after *Reed*, a plurality referred to “sex” as “an immutable characteristic determined solely by the accident of birth.” 411 U. S., at 686, 93 S. Ct. 1764, 36 L. Ed. 2d 583. Twenty-five years later, Justice Ginsburg’s landmark opinion for the Court in [United States v. Virginia](#), 518 U. S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (VMI), exhibited the same understanding. The opinion observed that the “[p]hysical differences between men and women . . . are enduring” and that the “[i]nherent differences’ between men and women” are “cause for celebration.” *Id.*, at 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735.

[*559] While the earliest cases in this line referred solely to discrimination on the basis of “sex,” see, e.g., *Reed*, 404 U. S., at 75-77, 92 S. Ct. 251, 30 L. Ed. 2d 225; *Frontiero*, 411 U. S., at 682-688, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (plurality opinion), later equal protection cases referred to classifications based on “gender,” see [Craig v. Boren](#), 429 U. S. 190, 192, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976). But it is clear that these cases used “gender” as a synonym for “sex.” See, e.g., *id.*, at 199, 97 S. Ct. 451, 50 L. Ed. 2d 397 (using “sex” and “gender” interchangeably). In employing the term “gender” in this way, our opinions tracked a change in usage in ordinary speech. As the Oxford English Dictionary explains, “as sex came increasingly to

mean sexual intercourse . . . , *gender* began to replace it . . . as the usual word for the biological grouping of males and females.” Oxford English Dictionary (3d ed., June 2011), <https://doi.org/10.1093/OED/8610510183>. Thus, our use of the term “gender” had no substantive significance. None of our equal protection decisions has used “gender” in the sense in which it is now sometimes used, *i.e.*, to denote “a group of people in a society who share particular qualities or ways of behaving which that society associates with being male, female, or another identity.”¹

For these reasons a party claiming that a law violates the [Equal Protection Clause](#) because it classifies on the basis of sex cannot prevail simply by showing that the law draws a distinction on the basis [****73] of “gender identity.” See, *e.g.*, Merriam-Webster’s Collegiate Dictionary 520 (11th ed. 2020) (defining “gender identity”). Rather, such a plaintiff must show that the challenged law differentiates between the two biological sexes: male and female.

B

1

What, then, does it mean for a law to “classify” based on sex? The succinct answer is that a law classifies [***182] based on [*560] sex for equal protection purposes when it “[p]rescrib[es] one rule for [women], [and] [**1857] another for [men].” [Sessions v. Morales-Santana](#), 582 U. S. 47, 58, 137 S. Ct. 1678, 198 L. Ed. 2d 150 (2017). And as we have explained, the general rule is that a law meets this test if it employs an “overt gender criterion.” [Craig](#), 429 U. S., at 198, 97 S. Ct. 451, 50 L. Ed. 2d 397.

A few examples illustrate the point. A law setting one drinking age for women and another for men is a sex classification. *Id.*, at 191-192, 197-199, 97 S. Ct. 451, 50 L. Ed. 2d 397. A college policy granting

admission to women but not to men (or vice versa) is a sex classification. [Mississippi Univ. for Women v. Hogan](#), 458 U. S. 718, 720-723, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982); [VMI](#), 518 U. S., at 530-531, 116 S. Ct. 2264, 135 L. Ed. 2d 735. A law imposing different citizenship requirements for children with citizen fathers compared to children with citizen mothers is a sex classification. [Tuan Anh Nguyen v. INS](#), 533 U. S. 53, 59-62, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001).

What is apparent in each of these cases is that sex serves as an explicit “criterion,” dictating that a particular legal standard applies to one sex but not the other. See also [Weinberger v. Wiesenfeld](#), 420 U. S. 636, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975) (different rules for husbands and wives); [Stanton v. Stanton](#), 421 U. S. 7, 95 S. Ct. 1373, 43 L. Ed. 2d 688 (1975) (different rule for men and women); [Califano v. Goldfarb](#), 430 U. S. 199, 97 S. Ct. 1021, 51 L. Ed. 2d 270 (1977) (different rules for widows and widowers); [Califano v. Webster](#), 430 U. S. 313, 97 S. Ct. 1192, 51 L. Ed. 2d 360 (1977) (*per curiam*) (different rule for men and women); [Orr v. Orr](#), 440 U. S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979) (different rule for husbands and wives); [Caban v. Mohammed](#), 441 U. S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979) (different rule for unwed mothers and unwed fathers); [Wengler v. Druggists Mut. Ins. Co.](#), 446 U. S. 142, 100 S. Ct. 1540, 64 L. Ed. 2d 107 (1980) (different rules for widows and widowers); [Kirchberg v. Feenstra](#), 450 U. S. 455, 101 S. Ct. 1195, 67 L. Ed. 2d 428 (1981) (different rule for husbands and wives); [Morales-Santana](#), 582 U. S. 47, 137 S. Ct. 1678, 198 L. Ed. 2d 150 (different rules for [****74] unwed mothers and unwed fathers).

In contrast to what our cases have demanded, we have “never suggested that mere reference to sex is sufficient to [*561] trigger heightened scrutiny.” *Ante*, at 512 (citing [Nguyen](#), 533 U. S., at 64, 121 S. Ct. 2053, 150 L. Ed. 2d 115); see also [Dobbs v. Jackson Women’s Health Organization](#), 597 U. S. 215, 236-237, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022) (holding that rational basis review applied to

¹ See Cambridge English Dictionary (2025), <https://dictionary.cambridge.org/us/dictionary/english/gender>.

a prohibition on abortion, despite the fact that the law in question mentioned “the physical health of the mother”).

We have also explicitly rejected the proposition that a law classifies based on sex when it employs a non-sex classification that correlates with differential treatment of men and women. In Geduldig v. Aiello, 417 U. S. 484, 94 S. Ct. 2485, 41 L. Ed. 2d 256 (1974), for example, we considered a California insurance program that “exclude[d] from coverage certain disabilities resulting from pregnancy.” *Id.*, at 486, 94 S. Ct. 2485, 41 L. Ed. 2d 256. Although we recognized that “only women can become pregnant,” we explained that “it does not follow that every legislative classification [***183] concerning pregnancy is a sex-based classification.” *Id.*, at 496, n. 20. In the absence of a showing that the pregnancy classification at issue was being used as a “mere pretext[t] designed to effect an invidious discrimination against the members of one sex or the other,” we were unwilling to conclude that it was a proxy for a sex classification. *Id.*, at 496-497, n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256.

We applied a similar principle in Personnel Administrator of Mass. v. Feeney, 442 U. S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 [**1858] (1979). There, we considered a Massachusetts policy that conferred an “absolute advantage” on veterans who applied for state civil service positions. *Id.*, at 264, 99 S. Ct. 2282, 60 L. Ed. 2d 870. At the time of the lawsuit, “over 98% of the veterans in Massachusetts were male,” and we acknowledged that “[t]he impact of the veterans’ preference law upon the public employment opportunities of women has thus been severe.” *Id.*, at 270-271, 99 S. Ct. 2282, 60 L. Ed. 2d 870. Even so, such “severe” disparate impact did not make the law a sex classification. The distinction made by the law was “quite simply between veterans and nonveterans, not between men and women.” *Id.*, at 275, 99 S. Ct. 2282, 60 L. Ed. 2d 870. And such a classification was not a sex classification [*562] unless it could be “shown that a gender-based discriminatory

purpose has, at least in some measure, shaped [****75] the Massachusetts veterans’ preference legislation.” *Id.*, at 276, 99 S. Ct. 2282, 60 L. Ed. 2d 870.

The upshot of all these prior equal protection cases is that we will *generally* not find that a law classifies on the basis of sex unless it does so overtly, but that a challenger may escape this general rule by showing that a purportedly sex-neutral classification has been used as a “mere pretext[t] designed to effect an invidious discrimination against the members of one sex or the other.” Geduldig, 417 U. S., at 496-497, n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256.²

2

When these principles are applied to Tennessee’s SB1, it is clear that the law is not a sex classification. As the Court notes, SB1 classifies based on the purpose for which a minor seeks the covered medical treatments. Specifically, it restricts those treatments if they are sought either for the purpose of “[e]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor’s sex” or for the purpose of “[t]reating purported discomfort or distress from a [***184] discordance between the minor’s sex and asserted

² Contrary to the suggestion of JUSTICE SOTOMAYOR, this approach is fully consistent with our decision in Loving v. Virginia, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). See *post*, at 592, n. 10 (dissenting opinion). In Loving, the Court confronted a Virginia law that was plainly a “measur[e] designed to maintain White Supremacy” and that could be justified by “no legitimate overriding purpose independent of invidious racial discrimination.” 388 U. S., at 11, 87 S. Ct. 1817, 18 L. Ed. 2d 1010. The Court correctly concluded that such a law was a race classification, and that it “rest[ed] solely upon distinctions drawn according to race.” *Ibid*. It made no difference whether the law had “equal application” between the races because the Equal Protection Clause “requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination.” *Id.*, at 10, 87 S. Ct. 1817, 18 L. Ed. 2d 1010.

As I have explained, the same is true regarding sex classifications. When a law employs any classification for the purpose of invidious sex discrimination, that classification is rightly treated as a sex classification.

identity.” [Tenn. Code Ann. §§68-33-103\(a\)\(1\)\(A\), \(a\)\(1\)\(B\)](#) (2023). This scheme certainly refers to sex and may be seen [*563] as indirectly related to sex, but it is clearly not the sort of discrimination between males and females that our cases have treated as sex discrimination. It does not lay down one rule for males and another for females. Instead, it classifies based on something quite [****76] different: a minor’s reason for seeking particular treatment.

This classification scheme is also not a “mere pretext[t] designed to effect an invidious discrimination against the members of one sex or the other.” [Geduldig, 417 U. S., at 496-497, n. 20](#) [94 S. Ct. 2485, 41 L. Ed. 2d 256](#). The law begins with a panoply of legislative findings that make clear that the legislature’s purpose was to “protect the health and welfare of minors.” [§68-33-101\(a\)](#). The [**1859] legislature concluded that the prohibited medical procedures were “experimental in nature and not supported by high-quality, long-term medical studies,” and that often “a minor’s discordance can be resolved by less invasive approaches that are likely to result in better outcomes.” [§§68-33-101\(b\), \(c\)](#).

These findings are consistent with those made by other respected bodies that cannot be charged with hostility to minors experiencing gender dysphoria or to transgender people in general. See *ante*, at 505. And the limited scope of SB1 strongly supports the conclusion that the legislature’s true purpose was exactly the one set out in the statutory findings. SB1 targets only the experimental medical procedures that the legislature found to be unsupported and dangerous. It does not regulate any other behavior in which minors might engage for the purpose of expressing their gender [****77] identity. It says nothing at all about names, pronouns, hair styles, attire, recreational activities or hobbies, or career interests. And the law’s restrictions apply only to the treatment available to *minors*. Once individuals reach the age at which they are able to make informed decisions about medical care, the law

imposes no restrictions.

3

In an effort to show that SB1 classifies based on sex, the plaintiffs, the dissent, and some of the plaintiffs’ *amici* rely [*564] on what they understand to be the Court’s reasoning in [Bostock, 590 U. S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218](#). See Brief for Respondents in Support of Petitioner 24-32; *post*, at 590-591 (SOTOMAYOR, J., dissenting); Brief for State of California et al. as *Amici Curiae* 14-16; Brief for Kentucky Plaintiffs et al. as *Amici Curiae* 10-16. This argument is misguided. The decision in *Bostock* was based on the conclusion that the specific language employed in [Title VII of the Civil Rights Act of 1964](#) prohibits an adverse employment action if sex is a “but-for cause” of that action. [590 U. S., at 656-660, 140 S. Ct. 1731, 207 L. Ed. 2d 218](#). And in fleshing out what this means, the Court engaged in a controversial form of counterfactual reasoning.³ I dissented in *Bostock*, [***185] but I accept the decision as a precedent that is entitled to the staunch protection we give statutory interpretation decisions. See [Kimble v. Marvel Entertainment, LLC, 576 U. S. 446, 456, 135 S. Ct. 2401, 192 L. Ed. 2d 463 \(2015\)](#) (citing [Patterson v. McLean Credit Union, 491 U. S. 164, 172-173, 109 S. Ct. 2363, 105 L. Ed. 2d 132 \(1989\)](#)). But there is no reason to apply *Bostock*’s methodology here.

The [Equal Protection Clause](#) does not contain the same wording as Title VII, and our cases have never held that *Bostock*’s methodology applies in cases in which a law is challenged as an unconstitutional sex classification. On the contrary, as I have explained, our cases have adopted an entirely different methodology. I would follow those precedents.

³Compare M. Berman & G. Krishnamurthi, *Bostock* was Bogus: Textualism, Pluralism, and Title VII, [97 Notre Dame L. Rev. 67, 98-116 \(2021\)](#), with A. Koppelman, *Bostock* and Textualism: A Response to Berman and Krishnamurthi, [98 Notre Dame L. Rev. 89, 105-110 \(2023\)](#).

II

My main point of disagreement with the Court concerns its analysis of the plaintiffs’ argument that SB1 unconstitutionally discriminates on the basis of transgender status. See Brief for Respondents in Support of Petitioner 37-38. The Court [****78] holds that the law does not classify on this ground, and the Court therefore applies rational basis review. *Ante*, [*565] at 517-519. [**1860] I am uneasy with that analysis and would reject the plaintiffs’ argument for a different reason: because neither transgender status nor gender identity should be treated as a suspect or “quasi-suspect” class.

A

I will not dwell on the question whether SB1 classifies on the basis of transgender status or gender identity because, in the end, I do not think that the answer to that question has any effect on the outcome of this case. But the argument that SB1 classifies on those grounds cannot easily be dismissed. As noted, the law prohibits medical procedures that are intended either to “[e]nable [a] minor to identify with, or live as, a purported identity inconsistent with the minor’s sex,” or to “[t]reat [a] purported discomfort or distress from a discordance between the minor’s sex and asserted identity.” [Tenn. Code Ann. §§68-33-103\(a\)\(1\)\(A\), \(a\)\(1\)\(B\)](#). Therefore, the underlying basis for the classification is a minor’s intent to express a gender identity different from the minor’s biological sex. If being “transgender” is defined as “hav[ing] a gender identity that differs from . . . sex,” see Brief for Respondents in Support of Petitioner 4, then the intent to “identify with, or live as, a purported identity inconsistent with” one’s sex would appear to be the natural result or [****79] consequence of being transgender.

The Court nonetheless concludes that SB1 does not classify based on transgender status, and in doing so, it relies chiefly on our decision in [Geduldig](#), 417 U.S. 484, 94 S. Ct. 2485, 41 L. Ed. 2d 256. *Ante*, at 518. The dissent responds by denigrating *Geduldig*

and contending that the decision should be discarded. ⁴ *Post*, at 599-600 (opinion of SOTOMAYOR, J.).

I would not enter into this debate about SB1’s classification scheme. I would assume for the sake of argument [***186] that [*566] SB1 classifies on the basis of transgender status and move on to the question whether such a classification is either suspect or “quasi-suspect” and thus warrants some form of heightened scrutiny. That important question has divided the Courts of Appeals, ⁵ and if we do not confront it now, we will almost certainly be required to do so very soon.

B

In my view, transgender status does not qualify under our precedents as a suspect or “quasi-suspect” class. ⁶ We have never set out a hard-and-fast test that can be used to identify such classes, but, as I explain in more detail below, our decisions have identified certain key factors that transgender individuals do not share with [**1861] members of suspect and “quasi-suspect” classes. Transgender status is not “immutable,” and as a result, persons can and do move into and out of the class. Members of the class differ widely among

⁴ But see [Dobbs v. Jackson Women’s Health Org.](#), 597 U. S. 215, 236, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022) (reaffirming *Geduldig*); [Bray v. Alexandria Women’s Health Clinic](#), 506 U. S. 263, 271, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993) (same).

⁵ Compare [Grimm v. Gloucester Cty. School Bd.](#), 972 F. 3d 586, 610 (CA4 2020) (“[T]ransgender people constitute at least a quasi-suspect class”); [Hecox v. Little](#), 104 F. 4th 1061, 1079 (CA9 2024) (“[G]ender identity is at least a ‘quasi-suspect class’” (quoting *Karnoski v. Trump*, 926 F. 3d 1180, 1200-1201 (CA9 2019))), with [L. W. v. Skrametti](#), 83 F. 4th 460, 486 (CA6 2023) (“[N]either the Supreme Court nor this Court has recognized transgender status as a suspect class”); [Adams v. School Bd. of St. Johns Cty.](#), 57 F. 4th 791, 803, n. 5 (CA11 2022) (en banc) (“[W]e have grave ‘doubt’ that transgender persons constitute a quasi-suspect class”).

⁶ JUSTICE BARRETT sets forth a different analysis of the question whether transgender persons qualify as a suspect or “quasi-suspect” class. See *ante*, at 547 (concurring opinion). Although our approaches to that question emphasize different points, I do not see them as incompatible.

themselves, and it is often difficult for others to determine whether a person is a member of the class. And transgender individuals have not been subjected to a history [****80] of discrimination that is comparable to past discrimination against the groups we have classified as suspect or “quasi-suspect.”

[*567] 1

In order to understand why transgender status should not be treated as either a suspect or “quasi-suspect” class, it is helpful to recall the path that led the Court to identify those groups and afford their members heightened protection. As the Court notes, *ante*, at 509-510, laws routinely confer benefits or impose burdens on particular classes of individuals, and we have long held that equal protection principles permit such classifications so long as they “bea[r] some fair relationship to a legitimate public purpose,” *Plyler v. Doe*, 457 U. S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982).

We first developed that standard during the New Deal era, when the Court was frequently called upon to decide whether economic legislation was consistent with the Constitution. In response to those challenges, the Court adopted the principle that “regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.” *United States v. Carolene Products Co.*, 304 U. S. 144, 152, 58 S. Ct. 778, 82 L. Ed. 1234 (1938).

At the same [****81] time that the Court developed this “rational basis” standard, however, it suggested that some laws should be afforded a “narrower” [***187] presumption of constitutionality and should therefore receive “more exacting judicial scrutiny.” *Ibid.*, n. 4, 58 S. Ct. 778, 82 L. Ed. 1234. The Court opined that a different standard of review might apply to

legislation “directed at particular religious, or national, or racial minorities.” *Id.*, at 153, n. 4, 58 S. Ct. 778, 82 L. Ed. 1234 (citations omitted). It reasoned that a “more searching judicial inquiry” might be required for such legislation because “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” *Ibid.*

Consistent with that discussion, the Court soon held that “[c]lassifications based solely upon race must be scrutinized [*568] with particular care, since they are contrary to our traditions and hence constitutionally suspect.” *Bolling v. Sharpe*, 347 U. S. 497, 499, 74 S. Ct. 693, 98 L. Ed. 884 (1954). Such classifications, the Court later noted, “must be viewed in light of the historical fact that the central purpose of the *Fourteenth Amendment* was to eliminate racial discrimination emanating from official sources in the States.” *McLaughlin v. Florida*, 379 U. S. 184, 192, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964).

The discrimination that the Court had chiefly in mind was discrimination against blacks, who undoubtedly constituted a “discrete and insular minorit[y]” that was denied equal participation in the political process. *Carolene Products*, 304 U. S., at 153, n. 4, 58 S. Ct. 778, 82 L. Ed. 1234. As our cases from the period plainly illustrate, blacks faced widespread discrimination not only in fact but also in law. State and local authorities enforced a regime of official segregation in transportation, [****82] see *Plessy v. Ferguson*, 163 U. S. 537, 540, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), schools, see *Brown v. Board of [***1862] Education*, 347 U. S. 483, 487-488, 74 S. Ct. 686, 98 L. Ed. 873 (1954), and all manner of public accommodations, see *Watson v. Memphis*, 373 U. S. 526, 528, 83 S. Ct. 1314, 10 L. Ed. 2d 529 (1963) (concerning the segregation of “municipal parks and other city owned or operated recreational facilities”).

Blacks were also widely impeded from

participation in the political process. For example, several States enacted “literacy tests for voter registration” that were “designed to prevent African-Americans from voting.” *Shelby County v. Holder*, 570 U. S. 529, 536, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013) (citing *South Carolina v. Katzenbach*, 383 U. S. 301, 310, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966)). States also devised methods for excluding or impeding black citizens from serving in public office. See, e.g., *Nixon v. Herndon*, 273 U. S. 536, 541, 47 S. Ct. 446, 71 L. Ed. 759 (1927) (holding unconstitutional a law that excluded black citizens from “tak[ing] part in a primary election”); *Anderson v. Martin*, 375 U. S. 399, 400, 84 S. Ct. 454, 11 L. Ed. 2d 430 (1964) (holding unconstitutional a law that required ballots to “designate the race of candidates for elective office”).

[*569] Given this history of pervasive discrimination and the fact that “the central purpose of the *Fourteenth Amendment* was to eliminate racial discrimination,” the Court concluded that racial classifications are “constitutionally suspect, and subject to the most rigid scrutiny.” *McLaughlin*, 379 U. S., at 192, 85 S. Ct. 283, 13 L. Ed. 2d 222 (citation and internal quotation [***188] marks omitted). And at around the same time, the Court also treated national origin and ancestry as suspect classes, largely because of their proximal relationship to race. See, [****83] e.g., *Oyama v. California*, 332 U. S. 633, 646, 68 S. Ct. 269, 92 L. Ed. 249 (1948); *Korematsu v. United States*, 323 U. S. 214, 216, 65 S. Ct. 193, 89 L. Ed. 194 (1944), overruled by *Trump v. Hawaii*, 585 U. S. 677, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018).⁷

⁷The Court has also sometimes referred to “alienage” as a suspect class. See *Nyquist v. Mauclet*, 432 U. S. 1, 7, 97 S. Ct. 2120, 53 L. Ed. 2d 63 (1977). Alienage, however, is quite unlike the other suspect classes the Court has identified. Our cases make clear that constitutional scrutiny only applies to state (not federal) laws that classify based on alienage. See *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U. S. 572, 602, 96 S. Ct. 2264, 49 L. Ed. 2d 65 (1976). And it applies to only those state laws that discriminate against aliens who are “lawfully admitted.” *Ibid.*; see also *Plyler v. Doe*, 457 U. S. 202, 219, n. 19, 102 S. Ct.

The Court has also suggested that religion is a suspect class. See *Carolene Products*, 304 U. S., at 152, n. 4, 58 S. Ct. 778, 82 L. Ed. 1234. That determination follows from the *First Amendment*, which prohibits any impairment of the “free exercise” of “religion.” But because this right is expressly protected by that provision, questions of religious discrimination have generally been decided on *First Amendment* grounds. See, e.g., *Fulton v. Philadelphia*, 593 U. S. 522, 532, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021); *Espinoza v. [*570] Montana Dept. of Revenue*, 591 U. S. 464, 473-474, 140 S. Ct. 2246, 207 L. Ed. 2d 679 (2020); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 584 U. S. 617, 638, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018).

[**1863] With this history in mind, it is apparent that the circumstances that led to the identification of race and national origin as suspect classes were truly extraordinary. As the Court subsequently explained, the designation of a suspect class is reserved for those classes “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *San Antonio Independent School Dist. v. Rodriguez*, 411 U. S. 1, 28, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973). And entitlement to “suspect class” status is largely reserved for those groups whose members tend to “carry an obvious badge” of their membership in the suspect class, which in part explains “the severity or pervasiveness of the historic legal and political discrimination against”

2382, 72 L. Ed. 2d 786 (1982) (“We reject the claim that ‘illegal aliens’ are a ‘suspect class’”). The Court applies such scrutiny not because state laws classifying based on alienage are inherently problematic, but rather because the Federal Government has “primary responsibility in the field of immigration and naturalization.” *Flores de Otero*, 426 U. S., at 602, 96 S. Ct. 2264, 49 L. Ed. 2d 65. The identification of alienage as a suspect class is therefore less a result of historical discrimination based on immutable characteristics and more a result of the *Supremacy Clause*. See *Takahashi v. Fish and Game Comm’n*, 334 U. S. 410, 415-417, 68 S. Ct. 1138, 92 L. Ed. 1478 (1948); *Truax v. Raich*, 239 U. S. 33, 41-42, 36 S. Ct. 7, 60 L. Ed. 131 (1915).

the group. [*Mathews v. Lucas*, 427 U. S. 495, 506, 96 S. Ct. 2755, 49 L. Ed. 2d 651 \(1976\)](#). Suspect class status is therefore [****84] generally inappropriate for “large, diverse, and amorphous” groups, [*Rodriguez*, 411 U. S., at 28, 93 S. Ct. 1278, 36 L. Ed. 2d 16](#), that do not share “obvious, immutable, or distinguishing characteristics that define them as a discrete group,” [*Lyng v. \[***189\] Castillo*, 477 U. S. 635, 638, 106 S. Ct. 2727, 91 L. Ed. 2d 527 \(1986\)](#). See also [*Mathews*, 427 U. S., at 506, 96 S. Ct. 2755, 49 L. Ed. 2d 651](#); [*Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 442-443, 105 S. Ct. 3249, 87 L. Ed. 2d 313 \(1985\)](#).

No one can doubt that race satisfies all these criteria. Racial minorities experienced a long history of invidious discrimination and lack of political power. Race, as that concept was long understood in this society, is an immutable characteristic that often coincides with a visible and distinguishable “badge” of membership in the group. [*Mathews*, 427 U. S., at 506, 96 S. Ct. 2755, 49 L. Ed. 2d 651](#). And both our Constitution and our “traditions” provide that discrimination based on race is proscribed in all but the narrowest circumstances. [*Bolling*, 347 U. S., at 499, 74 S. Ct. 693, 98 L. Ed. 884](#). We have therefore viewed, and continue to [*571] view, racial classifications as “inherently suspect.” [*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U. S. 181, 209, 143 S. Ct. 2141, 216 L. Ed. 2d 857 \(2023\)](#) (internal quotation marks omitted). And since [*Brown v. Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873](#), we have struck down nearly every race- or national-origin-based classification that has come before us; our now-overruled affirmative action decisions were the exception to the rule. [*Students for Fair Admissions*, 600 U. S., at 211-214, 224-225, 143 S. Ct. 2141, 216 L. Ed. 2d 857](#) (overruling [*Regents of Univ. of Cal. v. Bakke*, 438 U. S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 \(1978\)](#)), and [*Grutter v. Bollinger*, 539 U. S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 \(2003\)](#)); see also [*600 U. S., at 287, 143 S. Ct. 2141, 216 L. Ed. 2d 857*](#) (THOMAS, J., concurring) (“The Court’s opinion rightly makes clear that [*Grutter*](#) is, for all

intent and purposes, overruled”).

2

This Court has never “equat[ed]” classifications based on sex with classifications based on race or national origin for [*Equal Protection Clause*](#) purposes, [*VMI*, 518 U. S., at 532, 116 S. Ct. 2264, 135 L. Ed. 2d 735](#), and thus has never held that sex-based classifications are “suspect.” But since the 1970s, the Court has recognized that such classifications warrant more careful inspection than is provided by ordinary “rational basis” review. See *ibid.*; [*Craig*, 429 U. S., at 198, 97 S. Ct. 451, 50 L. Ed. 2d 397](#). We often refer to this as “heightened scrutiny” (or “intermediate scrutiny”), and we have used [****85] the term “quasi-suspect” to describe groups that qualify for this form of heightened review. See, e.g., [*Cleburne*, 473 U. S., at 442, 105 S. Ct. 3249, 87 L. Ed. 2d 313](#). Under heightened or intermediate [**1864] scrutiny, it must be shown that a sex-based classification “serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” [*Morales-Santana*, 582 U. S., at 59, 137 S. Ct. 1678, 198 L. Ed. 2d 150](#) (internal quotation marks omitted).

This “heightened scrutiny” standard was developed in recognition of the fact that classifications based on sex share many features with classifications based on race. Early on, the plurality opinion in [*Frontiero v. Richardson*](#) observed that [*572] “our Nation has had a long and unfortunate history of sex discrimination” that resulted in “statute books . . . laden with gross, stereotyped [***190] distinctions between the sexes.” [*411 U. S., at 684-685, 93 S. Ct. 1764, 36 L. Ed. 2d 583*](#). Although the opinion acknowledged “that the position of women in America ha[d] improved markedly,” it noted that “women still face[d] pervasive, although at times more subtle, discrimination.” *Id.*, at 685-686, 93 S. Ct. 1764, 36 L. Ed. 2d 583. That pervasive discrimination against women could be explained “in part because of the high visibility of the sex characteristic.” *Id.*, at 686, 93 S. Ct. 1764, 36 L. Ed.

[2d 583](#). And such sex-discrimination was particularly unfair, the opinion reasoned, because “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.” *Ibid*.

On these bases, the *Frontiero* plurality opined that classifications based on sex should be treated as “inherently suspect,” just like classifications based on race. [Id., at 688, 93 S. Ct. 1764, 36 L. Ed. 2d 583](#). Although the full Court never adopted that position, it has justified the imposition of “heightened scrutiny” on largely the same grounds. As the Court later noted in *Craig*, a whole range of laws still on the books reflected “archaic and overbroad generalizations” and “increasingly outdated misconceptions concerning the role of females.” [429 U. S., at 198-199, 97 S. Ct. 451, 50 L. Ed. 2d 397](#) (internal quotation marks omitted). The Court has further observed that women, like blacks and other racial minorities, [****86] tend to “carry an obvious badge” of their membership in the disadvantaged class, and the Court saw this as a partial explanation for “the severity or pervasiveness” of the discrimination experienced by both groups. [Mathews, 427 U. S., at 506, 96 S. Ct. 2755, 49 L. Ed. 2d 651](#). And women, like blacks, had long been excluded, either by law or prejudice, from equal participation in the political process. See [VMI, 518 U. S., at 531, 116 S. Ct. 2264, 135 L. Ed. 2d 735](#).

Thus, the application of “heightened scrutiny” to sex classifications can be explained in large part by the fact that sex discrimination shares many characteristics with racial discrimination: it was historically entrenched and pervasive; it was based on identifiable and immutable characteristics; [**573] and it included barriers to full participation in the political process.

Despite all this, however, the Court has not perfectly equated these two forms of discrimination. See [id., at 532, 116 S. Ct. 2264, 135 L. Ed. 2d 735](#). We have acknowledged that the “[p]hysical differences between men and women . .

. are enduring” and “remain cause for celebration.” [Id., at 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735](#). For this reason, sex is not a categorically “proscribed classification.” *Ibid*. “Principles of equal protection do not require” legislators to “ignore th[e] reality” that there are real differences between men and women that may sometimes justify legislation that classifies based on sex. [Nguyen, 533 U. S., at 66, 121 S. Ct. 2053, 150 L. Ed. 2d 115](#). And classifications based on sex have occasionally been upheld. See, e.g., [Michael M. v. Superior Court, Sonoma Cty., 450 U. S. 464, 475-476, 101 S. Ct. 1200, 67 L. Ed. 2d 437 \(1981\)](#) (plurality opinion); [Nguyen, 533 U. S., at 73, 121 S. Ct. 2053, 150 L. Ed. 2d 115](#).

[**1865] 3

Although the Court has held that classifications based on race, national [***191] origin, and sex call for a higher [****87] level of scrutiny, it has frequently refused to apply such scrutiny to other classifications. And it has done so even when those classifications share some characteristics with race, national origin, and sex. A few examples are sufficient to illustrate the Court’s general approach. Despite the fact that poor people have often been subjected to harsh and disrespectful treatment, a class defined by poverty is too “large, diverse, and amorphous” to qualify as suspect or “quasi-suspect.” [Rodriguez, 411 U. S., at 28, 93 S. Ct. 1278, 36 L. Ed. 2d 16](#). Although age is an immutable characteristic, “the aged . . . have not experienced” the “‘history of purposeful unequal treatment’” that is needed to justify a higher level of scrutiny. [Massachusetts Bd. of Retirement v. Murgia, 427 U. S. 307, 313, 96 S. Ct. 2562, 49 L. Ed. 2d 520 \(1976\)](#) (*per curiam*) (quoting [Rodriguez, 411 U. S., at 28, 93 S. Ct. 1278, 36 L. Ed. 2d 16](#)). Presence in this country in violation of the immigration laws, although sometimes associated with social stigma, cannot define membership in a protected class because that status is not “an absolutely [**574] immutable characteristic” and may be relevant to “proper

legislative goal[s].” *Plyler*, 457 U. S., at 220, 102 S. Ct. 2382, 72 L. Ed. 2d 786. Family relational status is likewise not entitled to elevated scrutiny because “[c]lose relatives . . . have not been subjected to discrimination” and “do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group.” *Lyng*, 477 U. S., at 638, 106 S. Ct. 2727, 91 L. Ed. 2d 527.

Even in close cases, the Court has been notably reluctant to apply an elevated level of scrutiny. This is particularly striking in the case of persons with disabilities. In *Cleburne*, the Court considered whether it should apply “[h]eightedened scrutiny” to laws that classify based on intellectual disability. 473 U. S., at 442-443, 105 S. Ct. 3249, 87 L. Ed. 2d 313. The Court acknowledged that the intellectually disabled are “immutable” different and that “there have been and there will continue to be instances of discrimination against [them] that are in fact invidious.” [****88] *Id.*, at 442, 446, 105 S. Ct. 3249, 87 L. Ed. 2d 313. Nonetheless, the Court found that “the States’ interest in dealing with and providing for [these individuals] is plainly a legitimate one,” *id.*, at 442, 105 S. Ct. 3249, 87 L. Ed. 2d 313, and that “lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice,” *id.*, at 443, 105 S. Ct. 3249, 87 L. Ed. 2d 313. The Court further recognized that the intellectually disabled are a “large and diversified group” and are not “all cut from the same pattern.” *Id.*, at 442, 105 S. Ct. 3249, 87 L. Ed. 2d 313. In light of all these facts, the Court was reluctant to identify a new suspect or “quasi-suspect” class based on the existence of “immutable disabilities” and “some degree of prejudice from at least part of the public at large.” *Id.*, at 445, 105 S. Ct. 3249, 87 L. Ed. 2d 313.

Overall, our decisions refusing to identify new suspect and “quasi-suspect” classes exhibit two salient features. First, the identification of a suspect or “quasi-suspect” class has been exceedingly rare. Such status has been denied to groups, like persons with disabilities and the aged, who were found by Congress to need special legislation to protect them

from widespread discrimination. See, [***192] *e.g.*, *Rehabilitation Act of 1973*, 29 U. S. C. §701 *et seq.*; *Americans with Disabilities Act of 1990*, 42 U. S. C. §12101 *et seq.*; [*575] *Individuals with Disabilities Education Act*, 20 U. S. C. §1400 *et seq.*; *Age Discrimination in Employment Act of 1967*, 29 U. S. C. §621 *et seq.* Accordingly, the Court’s reluctance to apply a special level of scrutiny to a proposed class should not be taken as a denial of the fact that the class has suffered from [**1866] harmful discrimination or a lack of political power.

Second, no single characteristic is independently sufficient to qualify a proposed class as suspect or “quasi-suspect”; instead, in the rare instances in which the Court has identified a suspect or “quasi-suspect” class, it has done so based on a strong showing of multiple relevant criteria: a history of widespread and conspicuous discrimination, *de facto* or *de jure* [****89] exclusion from equal participation in the political process, and an immutable characteristic that tends to serve as an obvious badge of membership in a clearly defined and readily identifiable group.

4

With this background in mind, I do not think that transgender status is sufficiently similar to race, national origin, or sex to warrant a higher level of scrutiny.

Although transgender persons have undoubtedly experienced discrimination, the plaintiffs and their many *amici* have not been able to show a history of widespread and conspicuous discrimination that is similar to that experienced by racial minorities or women. Instead, they provide little more than conclusory statements. See, *e.g.*, Brief for United States 29; Brief for Respondents in Support of Petitioner 37. But as we explained in *Cleburne*, heightened scrutiny cannot be justified on the ground that a proposed class has suffered from “some degree of prejudice from at least part of the public at large.” 473 U. S., at 445, 105 S. Ct. 3249, 87 L. Ed. 2d 313. Rather, a higher level of scrutiny

is reserved for those groups, like racial minorities and women, who have suffered from a long history of discrimination that is both severe and pervasive. See [*Frontiero*, 411 U. S., at 684, 93 S. Ct. 1764, 36 L. Ed. 2d 583](#) (plurality opinion) (“[O]ur [*576] Nation has had a long and unfortunate history of sex discrimination”); [*Mathews*, 427 U. S., at 506, 96 S. Ct. 2755, 49 L. Ed. 2d 651](#) (characterizing the historic discrimination faced by women and blacks as “sever[e] and pervasiv[e]”).

Furthermore, there is no evidence that transgender individuals, like racial minorities and women, have been excluded from participation in the political process. It is certainly true that the very small size of the transgender population means that the members of this group cannot wield much political clout simply by casting their votes. But that is true of “a variety of other groups . . . who cannot themselves mandate [****90] the desired legislative responses.” [*Cleburne*, 473 U. S., at 445, 105 S. Ct. 3249, 87 L. Ed. 2d 313](#). And despite the small size of the transgender population, the members of this group have had notable success in convincing many lawmakers to address their problems. See Brief for Respondents 47 (citing [*Cal. Educ. Code Ann. §221.5\(f\)*](#) (West 2021); [*Va. Code Ann. §38.2-3449.1*](#) (2020); [*Wash. Rev. Code Ann. §28A.642.080*](#) (2024)); see also [*Cleburne*, 473 U. S., at 443, \[***193\] 105 S. Ct. 3249, 87 L. Ed. 2d 313](#) (arguing that the “distinctive legislative response” to the problems of the intellectually disabled “belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary”).

The parties in this case also admit that transgender status is not an immutable characteristic. See Tr. of Oral Arg. 97-98. Instead, a person’s gender identity may “shif[t],” and a person who is transgender now may not be transgender later. *Id.*, at 98; see also Brief for Society for Evidence-Based Gender Medicine as *Amicus Curiae* 19-25 (discussing the rates of desistance among transgender youth). Moreover, transgender status, unlike race and sex, is often not accompanied by visibly identifiable

characteristics. A person’s “gender identity” is an “internal sense,” Merriam-Webster’s Collegiate Dictionary, at 520, and transgender persons as a class do not [**1867] uniformly “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group,” [*577] [*Lyng*, 477 U. S., at 638, 106 S. Ct. 2727, 91 L. Ed. 2d 527](#). Nor do they necessarily tend to “carry an obvious badge” of their membership in the class that might serve to exacerbate discrimination. [*Mathews*, 427 U. S., at 506, 96 S. Ct. 2755, 49 L. Ed. 2d 651](#).

Finally, the definition of transgender status that we have been given reveals that transgender people make up a “diverse” and “amorphous class.” [*Rodriguez*, 411 U. S., at 28, 93 S. Ct. 1278, 36 L. Ed. 2d 16](#). Individuals are regarded as transgender whenever “they have a gender identity that differs from the sex they were assigned at birth.” Brief for Respondents in Support of Petitioner 4. That definition encompasses not just biological men who permanently identify as women [****91] and biological women who permanently identify as men, but also individuals who might identify with a particular gender at a particular point in time and individuals who identify permanently or temporarily with both sexes, neither sex, or some other identity. See Brief for American Psychological Association et al. as *Amici Curiae* 6, and n. 7 (describing “transgender youth” as an “umbrella term” that can refer to minors who are “gender diverse” or “nonbinary”). We have previously refused to apply a higher level of scrutiny to such “amorphous” classes for good practical reasons. See, e.g., [*Rodriguez*, 411 U. S., at 28, 93 S. Ct. 1278, 36 L. Ed. 2d 16](#); [*Cleburne*, 473 U. S., at 442-443, 105 S. Ct. 3249, 87 L. Ed. 2d 313](#). Since such classes are not rigidly defined, it is hard to pin down whether they share the relevant characteristics that make closer scrutiny warranted. And it is difficult for both courts and legislatures to identify the outer bounds of such groups.

In light of all the above, I am unwilling to conclude that transgender status, like race, national origin, and sex, is entitled to a higher level of scrutiny than

ordinary rational basis review. That conclusion, however, should not be taken as a denial of the discrimination that transgender people have faced. Nor should it be taken as an evaluation of [****92] any specific legislative action concerning transgender persons. It simply means that transgender persons, like members of other disadvantaged groups—the poor, the aged, the disabled, [*578] etc.—have not made the extraordinary showing that they are entitled to a higher level of constitutional scrutiny.

[***194] III

Because transgender status is not a suspect or “quasi-suspect” class, even if Tennessee’s SB1 classifies on that ground, it must be sustained so long as it “bears some fair relationship to a legitimate public purpose.” *Plyler*, 457 U. S., at 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786. As the Court notes, SB1 easily satisfies that standard. *Ante*, at 522-525.

I therefore agree with the Court that the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Dissent by: SOTOMAYOR; KAGAN

Dissent

JUSTICE SOTOMAYOR, with whom JUSTICE JACKSON joins, and with whom JUSTICE KAGAN joins as to all but Part V, dissenting.

To give meaning to our Constitution’s bedrock equal protection guarantee, this Court has long subjected to heightened judicial scrutiny any law that treats people differently based on sex. See *United States v. Virginia*, 518 U. S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). If a State seeks to differentiate on that basis, it must show that the sex classification “serves important governmental objectives and that the discriminatory means employed [**1868] are substantially

related to the achievement of those objectives.” *Ibid.* (internal quotation marks omitted). [****93] Such review (known as intermediate scrutiny) allows courts to ascertain whether the State has a sound, evidence-based reason to distinguish on the basis of sex or whether it does so in reliance on impermissible stereotypes about the sexes.

Today, the Court considers a Tennessee law that categorically prohibits doctors from prescribing certain medications to adolescents if (and only if) they will help a patient “identify with, or live as, a purported identity inconsistent with the minor’s sex.” *Tenn. Code Ann. §68-33-103(a)(1)(A)* (2023). In addition to discriminating against transgender [*579] adolescents, who by definition “identify with” an identity “inconsistent” with their sex, that law conditions the availability of medications on a patient’s sex. Male (but not female) adolescents can receive medicines that help them look like boys, and female (but not male) adolescents can receive medicines that help them look like girls.

Tennessee’s law expressly classifies on the basis of sex and transgender status, so the Constitution and settled precedent require the Court to subject it to intermediate scrutiny. The majority contorts logic and precedent to say otherwise, inexplicably declaring it must uphold Tennessee’s categorical ban on lifesaving medical treatment so long as “any reasonably conceivable state of facts” might justify it. *Ante*, at 522. Thus, the majority subjects a law that plainly discriminates on the basis of sex to mere rational-basis review. By retreating from meaningful judicial review exactly where [****94] it matters most, the Court abandons transgender children and their families to political whims. In sadness, I dissent.

I

A

Begin with the medical context in which Tennessee’s law operates. See *Tenn. Code Ann. §68-33-101 et seq.*; see also S. B. 1, 113th Gen. Assem., 1st Extra. Sess. (2023) (SB1). Doctors [***195] in the United States prescribe hormones

and puberty inhibitors to treat a range of medical conditions. Often, they are administered to help minors conform to the typical appearance associated with their sex identified at birth. Children who start experiencing puberty at a premature age (precocious puberty), for example, have long received puberty-delaying medications to stave off puberty until adolescence. See App. 22. Adolescent boys might also receive the hormone testosterone to initiate puberty delayed beyond its typical start. App. to Pet. for Cert. 266a. Without testosterone, puberty would “eventually initiate naturally” in most patients, but medication “is often prescribed [*580] to avoid some of the social stigma that comes from undergoing puberty later than one’s peers.” *Ibid.* Adolescent females with delayed puberty may receive the hormone estrogen for the same reason. *Ibid.*

After puberty begins, doctors may prescribe these same medicines to adolescents whose physical appearance does not align with what one might expect from their sex identified at birth. An adolescent female, for example, might receive testosterone suppressors and hormonal birth control to reduce the growth of unwanted hair on her face or body [****95] (sometimes called male-pattern hair growth or hirsutism). See *ibid.*; see also App. 100 (“[M]edications that are used to suppress testosterone can be used to address symptoms of polycystic ovarian syndrome, which can include unwanted facial hair and body hair, excessive sweating, and body odor”); Brief for Experts on Gender Affirming Care as *Amici Curiae* 12 (describing the prevalence of hirsutism [**1869] in people identified as female at birth).¹ An adolescent male may also receive hormones to address a benign but atypical increase in breast gland tissue (known as gynecomastia), sometimes resulting from below-average testosterone levels. See, e.g., G. Kanakis et al., EAA Clinical Practice Guidelines—Gynecomastia Evaluation and Management, 7 *Andrology* 778, 779-780 (2019).

Like any medical treatment, hormones and puberty blockers come with the potential for side effects. See, e.g., App. to Pet. for Cert. 266a-267a; App. 970-974; Brief for United States 45-46. Yet patients and their parents may decide to proceed with treatment on the advice of a physician, despite the accompanying medical risks.

Physicians prescribe these same medications to transgender adolescents, whose gender identity is [****96] inconsistent with their sex identified at birth. Hormones and puberty blockers help align transgender adolescents’ physical appearance with their gender identity, as they do when prescribed to [*581] adolescents who want to align their appearances with their sex identified at birth. The same puberty suppressants prescribed to pause the onset of precocious puberty can pause puberty for transgender adolescents, giving them “time to further understand their gender identity.” App. to Pet. for Cert. 256a.

Hormone therapy later allows transgender teens to initiate puberty consistent with their gender identity. That typically involves testosterone for adolescent transgender boys (who [***196] were identified as female at birth) and testosterone suppression and estrogen for adolescent transgender girls (who were identified as male at birth). Such treatments help adolescents identified as female at birth look more masculine and those identified as male at birth look more feminine. As is true for most medical treatment for minors, puberty blockers and hormones should be administered only after a comprehensive and individualized risk-benefit assessment, and with parental consent. See American Medical Association, Code of Medical Ethics, 2.2.1 Pediatric Decision Making (2022); E. Coleman et al., Standards of Care for the Health of Transgender and Gender Diverse People, Version 8, 23 *Int’l J. Transgender Health* S1, S58 (2022).²

¹ See also W. Hafsi & J. Kaur, Hirsutism, *StatPearls* (May 3, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK470417/>.

² The use of surgery to treat gender dysphoria, which JUSTICE THOMAS addresses in some detail, see *ante*, at 535-536 (concurring opinion), is not at issue in this case.

Transgender adolescents’ access to hormones and puberty blockers (known as gender-affirming care) is not a matter of mere cosmetic preference. To the contrary, access to care can be a question of life or death. Some transgender adolescents suffer from gender [****97] dysphoria, a medical condition characterized by clinically significant and persistent distress resulting from incongruence between a person’s gender identity and sex identified at birth. App. to Pet. for Cert. 251a-252a. If left untreated, gender dysphoria can lead to severe anxiety, depression, eating disorders, substance abuse, self-harm, and suicidality. See, e.g., Coleman, 23 Int’l J. Transgender [*582] Health, at S62. Suicide, in particular, is a major concern for parents of transgender teenagers, as the lifetime prevalence of suicide attempts among transgender individuals may be as high as 40%. App. to Pet. for Cert. 264a. Tragically, studies suggest that as many as one-third of transgender high school students attempt suicide in any given year.³

[**1870] When provided in appropriate cases, gender-affirming medical care can meaningfully improve the health and wellbeing of transgender adolescents, reducing anxiety, depression, suicidal ideation, and (for some patients) the need for more invasive surgical treatments later in life.⁴ That is why the American Academy of Pediatrics, American Medical Association, American Psychiatric Association, American Psychological Association, and American Academy of Child Adolescent Psychiatry all agree that hormones and

puberty blockers are “appropriate and medically necessary” to treat gender dysphoria when clinically indicated. *Id.*, at 285a.⁵

[***197] [*583] B

Tennessee has taken a different tack. The State enacted SB1 to categorically [****98] prohibit physicians from prescribing puberty blockers and hormone therapy for the purpose of treating gender dysphoria in minors. Tennessee’s blanket ban applies only when hormones and puberty blockers are prescribed to “[e]nabl[e] a minor to identify with, or live as, a purported identity inconsistent with the minor’s sex” or to alleviate “discomfort or distress from a discordance between the minor’s sex and asserted identity.” [Tenn. Code Ann. §68-33-103\(a\)\(1\)](#). SB1 leaves untouched the use of the same drugs to treat any other medical condition, including delayed (or early) puberty and any other “physical or chemical abnormality present in a minor that is inconsistent with the normal development of a human being of the minor’s sex.” [§68-33-102\(1\)](#). In other words, SB1 allows physicians to help align adolescents’ physical appearance with their gender identity (despite associated risks) if it is consistent with their sex identified at birth, but not if inconsistent. Indeed, Tennessee’s stated interests in SB1 include “encouraging minors to appreciate their sex.” [§68-33-101\(m\)](#).

C

³See M. Johns et al., Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students, 68 *Morbidity and Mortality Weekly Rep.* 67, 70 (2019).

⁴The majority and JUSTICE THOMAS make much of recent changes to the routine provision of gender-affirming care to minors in Norway, Sweden, and England. *Ante*, at 505, 524-525; *ante*, at \537-539 (concurring opinion). While all three countries have committed to researching further the risks and benefits of prescribing puberty blockers and hormones to adolescents, none has categorically banned doctors from providing patients with all gender-affirming care where medically necessary. See Brief for Foreign Non-Profit Organizations as *Amici Curiae* 4-13.

⁵Far from signaling that “self-proclaimed experts” can determine “the meaning of the Constitution,” *ante*, at 530 (opinion of THOMAS, J.), this reference to the positions of major medical organizations is simply one piece of factual context relevant to the Court’s assessment of whether SB1 is substantially related to the achievement of an important government interest. See *infra*, at 586-587 (describing the intermediate scrutiny standard). Indeed, even JUSTICE THOMAS seems to recognize that some scientific and medical evidence (at least that which is consistent with his view of the merits) is relevant to the questions this case presents. See *ante*, at 534, 535, 539, 544 (referencing the Cass Review and various peer-reviewed medical journals).

Tennessee’s ban applies no matter what the minor’s parents and doctors think, with no regard for the severity of the minor’s mental health conditions or the extent to **[****99]** which treatment is medically necessary for an individual child. The stories of the plaintiffs in this case reflect the stakes of that harsh reality.

Ryan Roe, now 16, felt as early as elementary school that he “was a boy.” App. to Pet. for Cert. 234a. Before puberty, **[**1871]** Ryan thought “there wasn’t that much of a difference between boys and girls” and that he “could manage existing in the middle.” *Ibid.* As puberty approached, however, **[*584]** Ryan grew increasingly anxious about the impending changes to his body. He started throwing up every morning before school. As his voice changed, Ryan contemplated going mute. *Id.*, at 235a. Eventually, after two years of psychotherapy and extensive consultations with his parents and doctors, Ryan’s physicians prescribed him testosterone. Ryan began to find his voice again. He started raising his hand in class, participating in school, and looking at himself in the mirror. Ryan attests that “[g]ender-affirming health care saved [his] life.” *Id.*, at 234a. For Ryan’s parents, “[i]t is simply not an option to cut [him] off from this care.” *Id.*, at 246a. “I worry about his ability to survive,” Ryan’s mother attests. “[L]osing him would break me.” *Ibid.*

L. W., too, began to question **[****100]** her gender as early as fourth grade. At the time, she felt like she was “drowning” and “trapped in the wrong body,” often sick at school because she “did not feel comfortable using the boy’s bathroom.” *Id.*, at 223a. At age 13, L. **[***198]** W. and her parents sought out medical treatment. Puberty blockers and estrogen, prescribed to L. W. after consultation with her parents and doctors, changed her life. “We have a confident, happy daughter now, who is free to be herself,” her mom explains. App. 85. “As a mother, I could not bear watching my child go through physical changes that would destroy her well-being and cause her life-long pain.” *Id.*, at 86.

Echoing a similar refrain, John Doe and his family attest that John felt from an early age he was a boy. He chose a male name for himself around the age of three. As puberty approached, John grew terrified of undergoing what he saw as “the wrong puberty,” recognizing that “some of those changes could be permanent.” App. to Pet. for Cert. 232a. After years of psychotherapy, he began taking puberty-delaying medication. His mother, who “shed many tears during the first year” of this process, acknowledges that “John’s gender transition has not been easy.” App. 95. Yet she attests that John’s access to medical treatment is “the one thing” that gives her hope that he can “have a fulfilling life.” *Id.*, at 94.

[*585] D

Faced with the choice between leaving Tennessee in search of treatment and risking their children’s lives, Ryan, John, L. W., and their parents sued to enjoin SB1. The United States intervened in support.⁶ Together, they argued that SB1 unconstitutionally discriminates **[****101]** on the basis of sex and transgender status. After review of the factual record, the District Court agreed, holding that the law would likely fail intermediate scrutiny because its targeted ban on promoting inconsistency with sex was not substantially related to Tennessee’s asserted interest in protecting minors from dangerous medical procedures. [*L. W. v. Skrmetti*, 679 F. Supp. 3d 668, 710 \(MD Tenn. 2023\)](#).

A divided panel of the Sixth Circuit reversed. All three judges appeared to “accept the premise” that “the statut[e] treat[s] minors differently based on sex.” [*L. W. v. Skrmetti*, 83 F. 4th 460, 481 \(2023\)](#); see also [*id.*, at 484](#) (“[T]he necessity of heightened

⁶ Although the United States submitted a letter to this Court changing its position on the equal protection question after the completion of oral argument, see *ante*, at 509, n. 1 (majority opinion), the United States has neither withdrawn its briefs nor sought to dismiss this case. The United States therefore remains the petitioner in this case.

review . . . will not be present **[**1872]** every time that sex factors into a government decision”). Yet the majority refused to apply intermediate scrutiny because it believed that the law did not necessarily “disadvantage ‘persons’ based on their sex.” *Id.*, at 483. Because the Sixth Circuit never applied intermediate scrutiny to SB1, the only question this Court must decide is whether the Constitution required it to do so.

II

A

The level of constitutional scrutiny courts apply in reviewing state action is enormously consequential. Where a state law neither “proceeds along suspect lines nor infringes fundamental constitutional rights,” reviewing courts generally **[*586]** uphold a challenged law under the *Equal Protection Clause* so long as “any reasonably conceivable state of facts . . . could **[***199]** provide a rational basis for the classification.” **[****102]** *FCC v. Beach Communications, Inc.*, 508 U. S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). That lenient standard, which the majority erroneously applies today, demands hardly more than a cursory glance at the State’s reasons for legislating.

This Court has long recognized, however, that a more “searching” judicial review is warranted when the rights of “discrete and insular minorities” are at stake. *United States v. Carolene Products Co.*, 304 U. S. 144, 153, n. 4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938). Because such minorities often face systemic barriers to vindicating their interests through the political process, courts have a comparative advantage over the elected branches in safeguarding their rights. *Ibid.* Such judicial scrutiny is at its apex in reviewing laws that classify on the basis of race and national origin. States may not enact laws that classify on those bases unless they can pass through the “daunting two-step examination known in our cases as ‘strict scrutiny.’” *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U. S. 181, 206, 143 S. Ct. 2141, 216 L. Ed. 2d 857

(2023); see *id.*, at 206-207, 143 S. Ct. 2141, 216 L. Ed. 2d 857 (“Under that standard we ask . . . whether the racial classification is used to ‘further compelling governmental interests’” and then “whether the government’s use of race is ‘narrowly tailored—meaning ‘necessary’—to achieve that interest”).

For nearly half a century, the Court has applied a different standard, known as intermediate scrutiny, to all “statutory classifications that distinguish **[****103]** between males and females.” *Nev. Dept. of Human Res. v. Hibbs*, 538 U. S. 721, 728, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003); see *Craig v. Boren*, 429 U. S. 190, 197-199, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976). States can differentiate on the basis of sex only to “‘serv[e] important governmental objectives’” and only if the sex classification is “‘substantially related to the achievement of those objectives.’” *Hibbs*, 538 U. S., at 728, 123 S. Ct. 1972, 155 L. Ed. 2d 953. The standard is an intermediate one because it strikes an important balance. **[*587]** On the one hand, there are some genuine “[p]hysical differences between men and women,” so not all sex-based legislation is discriminatory or constitutionally proscribed. *Virginia*, 518 U. S., at 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735. On the other hand, sex-based legislation always presents a serious risk of invidious discrimination that relies on “overbroad generalizations about the different talents, capacities, or preferences of males or females.” *Ibid.* Intermediate scrutiny is the core judicial tool to differentiate innocuous sex-based laws from discriminatory ones.

B

SB1 plainly classifies on the basis of sex, so the Constitution demands intermediate scrutiny. Recall that SB1 prohibits the **[**1873]** prescription of hormone therapy and puberty blockers only if done to “enable a minor to identify with, or live as, a purported identity inconsistent with the minor’s sex” or to alleviate “discomfort or distress from a discordance between the **[****104]** minor’s sex

and asserted identity.” [Tenn. Code Ann. §68-33-103\(a\)\(1\)](#). Use of the same drugs to treat any other “disease” is unaffected. [§68-33-103\(b\)\(1\)\(A\)](#). Physicians may continue, [***200] for example, to prescribe hormones and puberty blockers to treat any “physical or chemical abnormality present in a minor that is inconsistent with the normal development of a human being of the minor’s sex.” [§68-33-102\(1\)](#).

What does that mean in practice? Simply that sex determines access to the covered medication. Physicians in Tennessee can prescribe hormones and puberty blockers to help a male child, but not a female child, look more like a boy; and to help a female child, but not a male child, look more like a girl. Put in the statute’s own terms, doctors can facilitate consistency between an adolescent’s physical appearance and the “normal development” of her sex identified at birth, but they may not use the same medications to facilitate “inconsisten[cy]” with sex. All this, the State openly admits, [*588] in service of “encouraging minors to appreciate their sex.” [§68-33-101\(m\)](#).

Like any other statute that turns on inconsistency with a protected characteristic, SB1 plainly classifies on the basis of sex. A simple analogy illustrates the point. Suppose Tennessee prohibited minors [****105] from attending “any services, rituals, or assemblies if done for the purpose of allowing the minor to identify with a purported identity *inconsistent* with the minor’s religion.” Brief for Yale Philosophers as *Amici Curiae* 10. No one would seriously dispute that such a rule classifies on the basis of religion. Whether the law prohibits a minor from attending any particular religious service turns on the minor’s religion: A Jewish child can visit a synagogue but not a church, while a Christian child can attend church but not the synagogue.

SB1 operates in the same way. Consider the mother who contacts a Tennessee doctor, concerned that her adolescent child has begun growing unwanted facial hair. This hair growth, the mother reports,

has spurred significant distress because it makes her child look unduly masculine. The doctor’s next step depends on the adolescent’s sex. If the patient was identified as female at birth, SB1 allows the physician to alleviate her distress with testosterone suppressants. See App. to Pet. for Cert. 266a (describing such treatments); App. 100 (same). What if the adolescent was identified male at birth, however? SB1 precludes the patient from receiving the same medicine.

Now consider the parents who [****106] tell a Tennessee pediatrician that their teenage child has been experiencing an unwanted (but medically benign) buildup of breast gland tissue. See *supra*, at 580. Again, the pediatrician’s next move depends on the patient’s sex. Identified male at birth? SB1 allows the physician to prescribe hormones to reduce the buildup of such tissue. Yet a child identified as female at birth experiencing the same (or more) distress must be denied the same prescription. In both scenarios, SB1 “provides [*589] that different treatment be accorded to [persons] on the basis of their sex,” and therefore necessarily “establishes a classification subject to scrutiny under the [Equal Protection Clause](#).” [Reed v. Reed](#), 404 U. S. 71, 75, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971).⁷ [***201] [**1874] The Sixth Circuit apparently agreed. [83 F. 4th, at 481](#) (accepting the premise that “the statut[e] treat[s] minors differently based on sex”).

Tennessee, too, essentially concedes the point. It admits that a prohibition on wearing clothing “‘inconsistent with’” the wearer’s sex would trigger intermediate scrutiny, as would a law prohibiting professionals from working in jobs “‘inconsistent

⁷ JUSTICE ALITO insists that the words “sex” and “gender” in our equal protection precedents refer to an “‘immutable characteristic determined solely by the accident of birth.’” *Ante*, at 558 (opinion concurring in part and concurring in judgment) (quoting [Frontiero v. Richardson](#), 411 U. S. 677, 686, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973)). SB1 discriminates along those very lines: Adolescents displaying male “characteristic[s]” at birth are precluded from accessing the same medications those with female characteristics can freely receive. *Id.*, at 686, 93 S. Ct. 1764, 36 L. Ed. 2d 583.

with” their sex. Brief for Respondents 25. That is because for some jobs and some outfits, “a male can have the job” or wear the outfit, “and a female [****107] cannot.” *Ibid.* SB1 draws exactly the same kind of sex-based line: For some treatments that help adolescents look and feel more masculine, a male minor can have the treatment, and a female minor cannot.⁸

[*590] That SB1 conditions a patient’s access to treatment even in part on her sex is enough to trigger intermediate scrutiny. This Court’s equal protection precedents ask only whether a law “differentiates on the basis of gender.” *Sessions v. Morales-Santana*, 582 U. S. 47, 58, 137 S. Ct. 1678, 198 L. Ed. 2d 150 (2017). If so, the law “attract[s] heightened review under the Constitution’s equal protection guarantee.” *Ibid.* A long line of this Court’s equal protection precedents confirms that much. See *Hibbs*, 538 U. S., at 728, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (“[S]tatutory classifications that distinguish between males and females are subject to heightened scrutiny”); *Virginia*, 518 U. S., at 531, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action”); *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 136, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (“[A]ll gender-based classifications today” “warrant . . . heightened scrutiny”). That is why

an Alabama statute that “authoriz[es] the imposition of alimony obligations on husbands, but not on wives,” “‘establishes a classification subject to scrutiny under the *Equal Protection Clause*’”: The plaintiff, “Mr. Orr[,] bears a burden he would [****108] not bear were he female.” *Orr v. Orr*, 440 U. S. 268, 273, 278, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979).

This Court’s decision in *Bostock v. Clayton County*, 590 U. S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020), confirms the classification on SB1’s [***202] face. As *Bostock* explained in the context of Title VII’s prohibition on employment discrimination, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual [**1875] based on sex.” *Id.*, at 660, 140 S. Ct. 1731, 207 L. Ed. 2d 218. In deciding that discrimination based on incongruence between sex and gender identity was discrimination “because of sex,” *Bostock* asked the very same question our equal protection precedents do: whether “changing the employee’s sex would have yielded a different choice by the employer.” *Id.*, at 659-660, 140 S. Ct. 1731, 207 L. Ed. 2d 218; cf. *Students for Fair Admissions, Inc.*, 600 U. S., at 231 (applying strict scrutiny to government [*591] actions that treat people differently “on the basis of race”).⁹ The

⁸ The majority dismisses out of hand the United States’ assertion that SB1 is designed to “force boys and girls to look and live like boys and girls,” Brief for United States 23, urging that any suggestion of sex stereotyping is relevant only to whether a law that classifies on the basis of sex fails intermediate scrutiny. *Ante*, at 516. That argument ignores that a law policing a sex stereotype, like the hypothetical requirement that all children wear “sex-consistent clothing,” can itself qualify as sex-based government action that triggers intermediate scrutiny. See *United States v. Virginia*, 518 U. S. 515, 531, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996); *Bostock v. Clayton County*, 590 U. S. 644, 660, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020). The clothing law would tolerate from a female minor at least some behavior (wearing a skirt, for example) that it proscribes for male minors and thereby treat minors differently on the basis of sex. In any event, the United States need not rest on a theory of sex stereotyping here because SB1 classifies by sex on its face.

⁹ JUSTICE THOMAS and JUSTICE ALITO observe, correctly, that the *Equal Protection Clause* and Title VII use different words. *Ante*, at 564 (opinion of ALITO, J.); *ante*, at 527 (opinion of THOMAS, J.). Yet that difference in wording does not change that this Court’s equal protection precedents have always required courts to ask the same question this Court considered in *Bostock*: that is, whether a law “differentiate[s] on the basis of gender.” *Sessions v. Morales-Santana*, 582 U. S. 47, 58, 137 S. Ct. 1678, 198 L. Ed. 2d 150 (2017).

To be sure, the constitutional analysis diverges from Title VII once a court identifies a law or policy that differentiates on the basis of sex. That is because the Constitution tolerates governmental differentiation on that basis if it survives intermediate scrutiny. *Virginia*, 518 U. S., at 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735. Title VII offers employers no similar opportunity to justify sex discrimination, so the inquiry largely concludes once an employee establishes that she was treated worse because of sex or another protected trait. See *Muldrow v. St. Louis*, 601 U. S. 346, 354, 144 S. Ct. 967, 218 L. Ed. 2d 322 (2024). There is no reason to think,

answer was clearly yes, for the simple reason that discrimination against transgender employees necessarily “penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.” [Bostock, 590 U. S., at 660, 140 S. Ct. 1731, 207 L. Ed. 2d 218](#). Nor was it a defense to liability that the discrimination might apply equally to both sexes: “[A]n employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine” in both cases “fires an individual in part because of sex.” [Id., at 659, 140 S. Ct. 1731, 207 L. Ed. 2d 218](#). The same is true of SB1. By depriving adolescents of hormones and puberty blockers only when such treatment is “inconsistent with” a minor’s sex, the law necessarily deprives minors identified as male at birth of the same treatment it tolerates for an adolescent identified as female at birth (and vice versa).

[*592] III

Notwithstanding that SB1 distinguishes between males and females in the medical treatments it authorizes, the Sixth Circuit declined to apply intermediate scrutiny. It believed SB1’s treatment of both sexes to be “evenhanded,” [83 F. 4th, at 479](#), meaning (in the panel’s judgment) the classifications were not “invidious” or “unfair.” [Id., at 483-484](#). Intermediate scrutiny, of course, is how this Court determines whether a particular [***203] sex-based classification is invidious or unfair. See, e.g., [Virginia, 518 U. S., at 531, 116 S. Ct. 2264, 135 L. Ed. 2d 735](#). The Sixth Circuit thus effectively held that intermediate scrutiny did not apply to SB1 because it thought SB1 might well

pass such scrutiny. Even the majority today does not endorse this circular approach.¹⁰

[**1876] Though it skirts the Sixth Circuit’s error, the majority rests its conclusion on an equally implausible ground: that SB1’s prohibition on treatments “inconsistent with [a] minor’s sex” contains no sex classification at all. [Tenn. Code Ann. §68-33-103\(a\)\(1\)](#). As the statute’s text itself makes clear, that conclusion is indefensible.

[*593] A

How does the majority [****109] wriggle itself (and the Sixth Circuit) free of any obligation to take a closer look? It abstracts away the sex classification on SB1’s face, asserting that the law classifies based only on “age” and “medical purpose.” The theory, apparently, is that SB1 is sex neutral because it simply allows doctors to “administer puberty blockers or hormones to minors to treat certain conditions but not to treat gender dysphoria.” *Ante*, at 511. Unlike a law that prohibits attendance at a religious service “inconsistent with” the attendee’s religion, the majority says, “[a] law prohibiting the administration of specific drugs for particular

however, that a facial classification like SB1 could simultaneously be sex based under Title VII and sex neutral under the [Equal Protection Clause](#). See [General Elec. Co. v. Gilbert, 429 U. S. 125, 133, 97 S. Ct. 401, 50 L. Ed. 2d 343 \(1976\)](#) (“Particularly in the case of defining the term ‘discrimination,’ which Congress has nowhere in Title VII defined, [equal protection] cases afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII”).

¹⁰ JUSTICE ALITO, for his part, suggests that a law does not “classify” on the basis of sex unless it explicitly creates one rule for the class of all women and another for the class of all men. *Ante*, at 559-562. The [Fourteenth Amendment](#), however, “protect[s] persons, not groups.” [Adarand Constructors, Inc. v. Peña, 515 U. S. 200, 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158 \(1995\)](#). “[A]t the heart of the Constitution’s guarantee of equal protection,” this Court has said, “lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.” [Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U. S. 181, 223, 143 S. Ct. 2141, 216 L. Ed. 2d 857 \(2023\)](#) (quoting [Miller v. Johnson, 515 U. S. 900, 911, 115 S. Ct. 2475, 132 L. Ed. 2d 762 \(1995\)](#)). That SB1 imposes sex-based classifications on Tennessee boys as well as girls does not resolve the equal protection problem: If anything, it exacerbates it. See [Loving v. Virginia, 388 U. S. 1, 8, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 \(1967\)](#) (“[W]e reject the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the [Fourteenth Amendment’s](#) proscription of all invidious racial discriminatio[n] . . .”).

medical uses” simply does not trigger heightened scrutiny. *Ante*, at 516.

The problem with the majority’s argument is that the very “medical purpose” SB1 prohibits is defined by reference to the patient’s sex. Key to whether a minor may receive puberty blockers or hormones is whether the treatment facilitates the “medical purpose” of helping the minor live or appear “inconsistent with” the minor’s sex. That is why changing a patient’s sex yields different outcomes under SB1. Again, take the adolescent distressed by newly developing facial hair. Was the patient identified [****110] female at birth? SB1 authorizes the prescription of medication. Male at birth? SB1 prohibits it.

For truly sex-neutral laws, it is impossible to imagine a single scenario where changing a patient’s sex yields a different result. To borrow from the majority’s catalog of apparently benign medical-use distinctions, imagine Tennessee allowed consumption of DayQuil to ease coughs, but not minor aches and pains. See *ante*, at 513. [***204] The regulated medical purposes (treatment of coughs, aches, and pains) are unrelated to sex, so a patient’s sex will never determine whether she can consume DayQuil. All that matters is whether the patient has a cough.

[*594] So too for New York’s ban on assisted suicide, which the majority equates to SB1. *Ante*, at 511. In *Vacco v. Quill*, 521 U. S. 793, 117 S. Ct. 2293, 138 L. Ed. 2d 834 (1997), this Court subjected the assisted-suicide ban to rational-basis review because it neither “treat[ed] anyone differently from anyone else” nor “dr[ew] any distinctions between persons.” *Id.*, at 800, 117 S. Ct. 2293, 138 L. Ed. 2d 834. In New York, the Court explained, “[e]veryone” can “refuse unwanted lifesaving medical treatment” and “no one is permitted to assist a suicide.” [**1877] *Ibid*. Yet unlike for SB1, neither sex nor any other protected characteristic distinguished the terminally ill patient who could permissibly “hasten death” from another prohibited from doing so. *Id.*, at 800-

801, 117 S. Ct. 2293, 138 L. Ed. 2d 834. All that mattered [****111] was the patient’s existing connection to life-support systems: Those connected could lawfully hasten death by discontinuing treatment, while others (who required a prescription for lethal medication to do so) could not. The patient’s sex (or race, or national origin) would never decide the outcome. SB1, by contrast, renders every treatment decision it regulates dependent on two things: a minor’s sex identified at birth, and the consistency of the requested treatment with that sex.

That the majority finds a way to recast SB1 in sexneutral terms is no evidence that SB1 is sex neutral in the way hypothetical prohibitions on DayQuil or assisted suicide would be. *Contra, ante*, at 513-514. The majority emphasizes that, in Tennessee, “no minor may be administered puberty blockers or hormones to treat gender dysphoria,” while “minors of *any* sex may be administered puberty blockers or hormones for other purposes.” *Ante*, at 515. But nearly every discriminatory law is susceptible to a similarly race- or sex-neutral characterization. A prohibition on interracial marriage, for example, allows *no* person to marry someone outside of her race, while allowing persons of *any* race to marry within their races. See *Loving v. Virginia*, 388 U. S. 1, 9, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).¹¹ [*595] The same is true of a hypothetical law prohibiting attendance at services “inconsistent with” a child’s religion, while allowing all children to attend religion-

¹¹ JUSTICE ALITO takes the position that this Court scrutinized and invalidated Virginia’s antimiscegenation law because of its impermissible purpose “to maintain White Supremacy” and not simply because it classified on the basis of race. *Ante*, at 562, n. 2. Of course, that is not what *Loving* said. See 388 U. S., at 11, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (“[T]he *Equal Protection Clause* demands that racial classifications . . . be subjected to the ‘most rigid scrutiny’”); see also *ante*, at 514 (majority opinion). In any event, the notion that some category of laws employing sex classifications should be scrutinized only if the purpose is “invidious sex discrimination,” *ante*, at 562, n. 2 (opinion of ALITO, J.), flips the equal protection inquiry on its head. The whole purpose, after all, of intermediate scrutiny is to separate invidious sex classifications from permissible ones.

consistent services. See *supra*, at 588. Indeed, the majority itself seems to recognize that laws prohibiting professions “inconsistent” with a person’s [***205] sex, marriages “inconsistent” with a person’s race, or religious services “inconsistent” with a person’s faith must be subject to heightened review, even if rewritten as ostensibly neutral prohibitions on sex-, race-, and faith-inconsistent behavior. See *ante*, at 514-515. And although the majority insists that its logic would not apply to the hypothetical religion-consistent services law, *ante*, at 515, it offers no principled reason to differentiate that law from SB1’s prohibition on promoting “inconsisten[cy] with” the patient’s sex.

B

Recognizing, perhaps, that this Court already decided in *Bostock* that discrimination based on incongruence between sex and gender identity was itself discrimination “because of sex,” the majority seeks to distinguish *Bostock* away. Unlike in *Bostock*, the majority urges, “changing a minor’s sex or transgender status does not alter the application of SB1.” *Ante*, at 520. Again, it emphasizes that no “medical treatment” under SB1 is actually doled out on the basis of sex, because (it says) medical “treatment” necessarily encompasses [****112] “both a given drug and the specific indication for which it is being administered.” [**1878] *Ante*, at 513, 519-520. The majority’s logic is as follows: “If a transgender boy [who was identified as female at birth] seeks testosterone to treat [*596] his gender dysphoria, SB1 prevents a healthcare provider from administering it to him.” *Ante*, at 520. “If you change his biological sex from female to male,” the majority says, “SB1 would still not permit him the hormones he seeks because he would lack a qualifying diagnosis for the testosterone—such as a congenital defect, precocious puberty, disease, or physical injury.” *Ibid*.

As should be abundantly clear by this point, the majority’s recharacterization of SB1 is impossible to reconcile with the statute’s plain terms. SB1

allows physicians to prescribe hormones and puberty blockers to treat not just some defined category of cancers and rashes, but any “physical or chemical abnormality present in a minor that is inconsistent with the normal development of a human being of the minor’s sex.” §68-33-102(1). If a minor has some physical “abnormality” (say, medically benign facial hair) typically perceived as “inconsistent” with her sex identified at birth (female), SB1 [****113] deems it a “congenital defect” that physicians can treat. Change the patient’s sex from female to male, and the law now forbids providing the same drugs to rid the minor of the same facial hair. In other words, SB1 makes explicit that the very reason why a doctor can treat an adolescent female for “hirsutism (male-pattern hair growth),” but not gender dysphoria is that the former will promote consistency with sex, while the latter does the opposite. Cf. *ante*, at 521 (majority opinion). As was true in *Bostock*, then, the law deprives minors of medical treatment based, in part, on sex.

To be sure, when the hypothetical minor is male, not female, the patient’s diagnosis may well change too: The female adolescent distressed by facial hair might receive a diagnosis of hirsutism while the male adolescent may be diagnosed with gender dysphoria. See *supra*, at 580, 588; see also [***206] *ante*, at 521 (majority opinion). The same, however, was true in *Bostock*. When an employer fires an employee because she is transgender, the Court explained, “two causal factors may be in play”: the individual’s sex and the sex “with which the [*597] individual identifies.” 590 U. S., at 661, 140 S. Ct. 1367, 206 L. Ed. 2d 554. Yet so long as the plaintiff’s sex is “one but-for cause of that decision,” the employer discriminates on the basis of sex. *Id.*, at 656, 140 S. Ct. 1367, 206 L. Ed. 2d 554. So too with SB1. Sex and diagnosis may both “be in play.” *Id.*, at 661, 140 S. Ct. 1367, 206 L. Ed. 2d 554. As long as sex is one of the law’s distinguishing features, however, the law classifies on the basis of sex, and the *Equal Protection Clause* requires application of intermediate scrutiny.

C

In a final [****114] bid to avoid applying our equal protection precedents, the majority asserts that “mere reference to sex” is insufficient to trigger intermediate scrutiny, especially in the “medical context.” *Ante*, at 512. Of course, not every legislative mention of sex triggers intermediate scrutiny. A law mandating that no person, “regardless of sex,” can consume a dangerous drug, for example, would be subject to rational-basis review. Yet SB1 does not just mention sex. It defines an entire category of prohibited conduct based on inconsistency with sex. And it is hard to imagine a law that prohibits conduct “inconsistent with” sex that could avoid intermediate scrutiny.

Nor does the fact that SB1 concerns the “medical context” change the relevant analysis. *Ibid*. No one disputes that “[s]ome medical treatments and procedures are uniquely bound up in sex” or [**1879] that there are “biological differences between men and women.” *Ibid*. That there are such physical differences is, after all, one of the reasons why sex is not altogether a proscribed classification. See *Virginia*, 518 U. S., at 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735. A law that allowed only women to receive certain breast cancer treatments, for example, might well be consistent with the Constitution’s equal protection mandate if the State establishes that the relevant treatments are suited to women’s (and not men’s) bodies. Cf. *ante*, at 512 (noting [****115] “‘many’ breast cancer treatments [are] approved for women only”). Laws that differentiate based on biological distinctions between men and women are precisely the sort [*598] that States might successfully defend under intermediate scrutiny. Biological differences between the sexes, however, are no reason to skirt such scrutiny altogether.

Fashioning a medical-context-only exception also runs counter to decades of equal protection precedents. This Court has clarified that, although not every sex-based distinction is “marked by

misconception and prejudice,” *Tuan Anh Nguyen v. INS*, 533 U. S. 53, 73, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001), every sex-based distinction does warrant intermediate scrutiny. See *J. E. B.*, 511 U. S., at 136 (“[A]ll gender-based classifications today” “warrant . . . heightened scrutiny” (emphasis added)).

Take, for example, *Tuan Anh Nguyen*, where this Court assessed the constitutionality of a law imposing one set of citizenship-acquisition requirements on children born abroad [***207] out of wedlock to U. S. citizen mothers and another on those born of U. S. citizen fathers. 533 U. S., at 6, 121 S. Ct. 2053, 150 L. Ed. 2d 1150. The Court ultimately decided that the “different set of rules” for fathers and mothers was “neither surprising nor troublesome from a constitutional perspective” because “[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood.” *Id.*, at 63, 121 S. Ct. 2053, 150 L. Ed. 2d 115. We reached that conclusion, however, only after demanding of the Government an explanation for why that sex classification “serve[d] ‘important governmental objectives’ ” and how “‘the discriminatory means employed’ [were] ‘substantially related to the achievement of those objectives.’ ” *Id.*, at 60, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (quoting *Virginia*, 518 U. S., at 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735). In no sense did the biological differences between the sexes relieve courts of the obligation to examine the sex classification with a careful constitutional eye. Nor is any medical-context exception necessary because intermediate scrutiny itself allows the State to maintain classifications where justified by biology.

IV

Having blithely dispensed with the notion that SB1 classifies on the basis of sex, the majority next asserts that “SB1 does not classify [****116] on the basis of transgender status.” *Ante*, [*599] at 517. That too is contrary to the statute’s text and plainly wrong.

SB1 prohibits Tennessee physicians from offering

hormones and puberty blockers to allow a minor to “identify with” a gender identity inconsistent with her sex. [Tenn. Code Ann. §68-33-103\(a\)\(1\)\(A\)](#). Desiring to “identify with” a gender identity inconsistent with sex is, of course, exactly what it means to be transgender. The two are wholly coextensive. See Oxford English Dictionary (3d ed., Dec. 2023), https://www.oed.com/dictionary/transgender_adj (Trans-gender, when used as an adjective, means “a person whose sense of personal identity and gender does not correspond to that person’s sex at birth . . .”). That is why it would defy common sense to suggest an employer’s policy of firing all persons identifying with or living as an identity inconsistent with their sex does not **[**1880]** discriminate on the basis of transgender status.

Left with nowhere else to turn, the Court hinges its conclusion to the contrary on the by-now infamous footnote 20 of [Geduldig v. Aiello](#), 417 U. S. 484, 94 S. Ct. 2485, 41 L. Ed. 2d 256 (1974), which declared that discrimination on the basis of pregnancy is not discrimination on the basis of sex. See [id.](#), at 496-497, n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256. The footnote reasoned that, although “only women can become pregnant,” “[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics” and “lawmakers are constitutionally **[****117]** free to include or exclude pregnancy from the coverage of legislation . . . on any reasonable basis, just as with respect to any other physical condition.” *Ibid.* The takeaway, according to the majority, is that “not . . . every legislative classification concerning pregnancy is a sex-based classification,” and so (apparently) not every legislative classification concerning “gender incongruence” (at least in the context of medical treatments) classifies on the **[***208]** basis of transgender status. [Id.](#), at 496, n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256.

Geduldig was “egregiously wrong” when it was decided, both “[b]ecause pregnancy discrimination is inevitably sex discrimination” and because discrimination against women is **[*600]** so “tightly

interwoven with society’s beliefs about pregnancy and motherhood.” [Coleman v. Court of Appeals of Md.](#), 566 U. S. 30, 56-57, 132 S. Ct. 1327, 182 L. Ed. 2d 296 (2012) (Ginsburg, J., dissenting). That the majority must resuscitate so unpersuasive a source, widely rejected as indefensible even 40 years ago, is itself a telling sign of the weakness of its position. See S. Law, Rethinking Sex and the Constitution, [132 U. Pa. L. Rev.](#) 955, 983 (1984) (“Criticizing *Geduldig* has . . . become a cottage industry”). That the Court today extends *Geduldig*’s logic for the first time beyond pregnancy and abortion is more troubling still. Divorced from its fact-specific **[****118]** context, *Geduldig*’s reasoning may well suggest that a law depriving all individuals who “have ever, or may someday, menstruate” of access to health insurance would be sex neutral merely because not all women menstruate.

In any event, even *Geduldig*’s faulty reasoning cannot save the majority’s conclusion that SB1 is innocent of transgender discrimination. Unlike pregnancy, a desire to “identify with, or live as, a purported identity inconsistent with [one’s] sex,” [Tenn. Code Ann. §68-33-103\(a\)\(1\)\(A\)](#), is not some “objectively identifiable physical condition” that legislatures can target without reference to sex or transgender status, [Geduldig](#), 417 U. S., at 496, n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256. And while not all women are pregnant, *ibid.*, all transgender people, by definition, “identify with, or live as, a purported identity inconsistent with [their] sex,” [Tenn. Code Ann. §68-33-103\(a\)\(1\)\(A\)](#). So, unlike the classes of pregnant persons and women, the class of minors potentially affected by SB1 and transgender minors are one and the same.

That SB1 discriminates on the basis of transgender status is yet another reason it must be subject to heightened scrutiny. For one, this Court already decided in *Bostock* that “it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex,” [590 U. S.](#), at 660, 140 S. Ct. 1731, 207 L. Ed. 2d 218, and sex discrimination

is of course subject to heightened scrutiny. Nor should there be [*601] serious dispute that transgender persons bear the [****119] hallmarks of a quasi-suspect class.¹² See [*Cleburne v. Cleburne \[**1881\] Living Center, Inc.*, 473 U. S. 432, 441, 105 S. Ct. 3249, 87 L. Ed. 2d 313 \(1985\)](#) (describing the standard).

Transgender people have long been subject to discrimination in healthcare, employment, and housing, and to rampant harassment and physical violence. See *Grimm v. Gloucester Cty. School Bd.*, 972 F. 3d 586, 611 (CA4 2020) (detailing that history); see also K. Barry, B. Farrell, J. Levi, & N. Vanguri, A Bare Desire To Harm: Transgender People and the [*Equal Protection Clause*](#), 57 B. C. L. Rev. 507, 556-557 (2016) (describing Congress’s exclusion of transgender people from the Fair Housing Act, Americans with Disabilities Act, and Rehabilitation Act). Individuals whose gender identity diverges from their sex identified at birth (whether labeled as “transgender” at the time or not), moreover, have been subject to a lengthy history of *de jure* discrimination in the form of cross-dressing bans, police brutality, and anti-sodomy laws. See, e.g., K. Redburn, Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963-86, 40 L. and Hist. Rev. 679, 685, 687 (2022); A. Lvovsky, Vice Patrol 29, 108 (2021); W. Eskridge, GayLaw: Challenging the Apartheid of the Closet 328-337 (1999) (cataloging state consensual sodomy laws, 1610-1988). Beginning in 1843, cities ranging from “major metropolitan centers such as Chicago and Los

Angeles to small cities and towns including Cheyenne, Wyoming and Vermillion, South [*602] Dakota” enacted ordinances that (most commonly) criminalized any person “‘appear[ing] [****120] upon any public street or other public place . . . in a dress not belonging to his or her sex.’” Redburn, 40 L. and Hist. Rev., at 687. In any event, those searching for more evidence of *de jure* discrimination against transgender individuals, see *ante*, at 554-557 (BARRETT, J., concurring), need look no further than the present. The Federal Government, for example, has started expelling transgender servicemembers from the military and threatening to withdraw funding from schools and nonprofits that espouse support for transgender individuals.¹³

Transgender persons, moreover, have a defining characteristic (incongruence between sex and gender identity) that plainly “‘bears no relation to [the individual’s] ability to perform or contribute to society.’” [*Cleburne*, 473 U. S., at 441, 105 S. Ct. 3249, 87 L. Ed. 2d 313](#). As a group, the class is no more “‘large, diverse, and amorphous,’” *ante*, at 551 (opinion of BARRETT, J.); *ante*, at 570 (ALITO, J., concurring in part and concurring in judgment), than most races or ethnic groups, many of which similarly include individuals with “‘a huge variety’” of identities and experiences, *ante*, at 551 (opinion of BARRETT, J.). (Not all racial, ethnic, or religious minorities, for example, “‘carry an obvious badge’ of their membership in the disadvantaged class.” Cf. *ante*, at 572 (opinion of ALITO [****121], J.).)¹⁴ As evidenced by the recent [**1882] rise in discriminatory state and

¹² Myriad courts across the country have reached the same conclusion. See, e.g., *Grimm v. Gloucester Cty. School Bd.*, 972 F. 3d 586, 610-613 (CA4 2020); *Karnoski v. Trump*, 926 F. 3d 1180, 1200-1201 (CA9 2019) (*per curiam*); [*Evancho v. Pine-Richland School Dist.*](#), 237 F. Supp. 3d 267, 288-289 (WD Pa. 2017); [*Adkins v. New York*](#), 143 F. Supp. 3d 134, 139 (SDNY 2015); [*Flack v. Wisconsin Dept. of Health Servs.*](#), 328 F. Supp. 3d 931, 951-953 (WD Wis. 2018); [*F. V. v. Barron*](#), 286 F. Supp. 3d 1131, 1145 (Idaho 2018); [*M. A. B. v. Board of Educ. of Talbot Cty.*](#), 286 F. Supp. 3d 704, 719-722 (Md. 2018); [*Norsworthy v. Beard*](#), 87 F. Supp. 3d 1104, 1119 (ND Cal. 2015).

¹³ See Order, *United States v. Shilling*, No. 24A1030 (2025); see also Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, Exec. Order No. 14168, 90 Fed. Reg. 8615 (2025).

¹⁴ See, e.g., L. Noe-Bustamante, A. Gonzalez-Barrera, K. Edwards, L. Mora, & M. Hugo Lopez, Measuring the Racial Identity of Latinos, Pew Research Center, <https://www.pewresearch.org/race-and-ethnicity/2021/11/04/measuring-the-racial-identity-of-latinos/> (highlighting the range of self-reported skin color among people who identify as Latino).

federal policies and the fact that transgender people “are underrepresented in every [***210] branch of government,” *Grimm*, 972 F. 3d, at 611-613, moreover, the class lacks the political power to [*603] vindicate its interests before the very legislatures and executive agents actively singling them out for discriminatory treatment. See *Lyng v. Castillo*, 477 U. S. 635, 638, 106 S. Ct. 2727, 91 L. Ed. 2d 527 (1986). In refusing to say as much, the Court today renders transgender Americans doubly vulnerable to state-sanctioned discrimination.¹⁵

V

SB1’s classifications by sex and transgender status clearly require the application of intermediate scrutiny. The majority’s choice instead to subject SB1 to rational-basis review, the most cursory form of constitutional review, is not only indefensible as a matter of precedent but also extraordinarily consequential. Instead of scrutinizing the legislature’s classifications with an eye towards ferreting out unconstitutional discrimination, the majority declares it will uphold Tennessee’s ban as long as there is “‘any reasonably conceivable state of facts that could provide a rational basis for the classification.’” *Ante*, at 522 (quoting *Beach Communications, Inc.*, 508 U. S., at 313; emphasis added). That marks the first time in [****122] 50 years that this Court has applied such deferential review, normally employed to assess run-of-the-mill economic regulations, to legislation that explicitly differentiates on the basis of sex. As a result, the Court never even asks whether Tennessee’s sex-based classification imposes the sort of invidious discrimination that the *Equal Protection Clause* prohibits.

The majority says that it does not want to “second-guess the lines that SB1 draws,” *ante*, at 524, or to “resolve” disagreements about the safety and efficacy of “medical treatments [*604] in an evolving field,” *ante*, at 525. The concurrences, too, warn that applying intermediate scrutiny in this case may “require courts to oversee all manner of policy choices normally committed to legislative discretion,” including in “areas of legitimate regulatory policy . . . ranging from access to restrooms to eligibility for boys’ and girls’ sports teams.” *Ante*, at 551, 553 (opinion of BARRETT, J.); see also *ante*, at 528 (THOMAS, J., concurring) (highlighting the potential for “‘high-cost, high-risk lawsuit[s]’”). Looking carefully at a legislature’s proffered reasons for acting, as our equal protection precedents demand, is neither needless “second-guess[ing],” *ante*, at 524 (majority opinion), nor judicial encroachment on “areas of legitimate regulatory policy,” *ante*, at 553 (opinion of BARRETT, J.). After all, “‘closely scrutiniz[ing] legislative choices’” is exactly how courts distinguish “legitimate regulatory polic[ies]” from discriminatory ones. *Ibid*.

Indeed, judicial scrutiny has long [***211] played an essential role in guarding against legislative efforts to impose upon individuals the State’s views about how people of a particular [****123] sex (or race) should live or look [**1883] or act. Women, it was once thought, were not suited to attend military schools with men. *Virginia*, 518 U. S., at 520-523, 540-541, 116 S. Ct. 2264, 135 L. Ed. 2d 735. Men and women, others said, should not marry those of a different race. *Loving*, 388 U. S., at 4, 87 S. Ct. 1817, 18 L. Ed. 2d 1010. Those laws, too, posed politically fraught and contested questions about race, sex, and biology. In a passage that sounds hauntingly familiar to readers of Tennessee’s brief, Virginia argued in *Loving* that, should this Court intervene, it would find itself in a “bog of conflicting scientific opinion upon the effects of interracial marriage, and the desirability of preventing such alliances, from the physical, biological, genetic, anthropological, cultural, psychological, and sociological point of view.”

¹⁵ Of course, regardless of whether transgender persons constitute a suspect class, courts must strike down any law that reflects the kind of “irrational prejudice” that this Court has recognized as an illegitimate basis for government action. *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 450, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985); see also *ante*, at 553 (opinion of BARRETT, J.) (recognizing that “an individual law ‘inexplicable by anything but animus’ is unconstitutional”).

Brief for Appellee in *Loving v. Virginia*, O. T. 1966, No. 395, p. 7. “In such a situation,” Virginia continued, “it is the exclusive province of the Legislature of each State to make the determination for its citizens as to the desirability of a policy of permitting [*605] or preventing such [interracial] alliances—a province which the judiciary may not constitutionally invade.” *Id.*, at 7-8.

This Court, famously, rejected the States’ invitation in *Loving* to “defer to the wisdom of the state legislature” [****124] based on assertions that “the scientific evidence is substantially in doubt.” [388 U. S., at 8, 87 S. Ct. 1817, 18 L. Ed. 2d 1010](#). In considering the constitutionality of Virginia’s male-only military academy, too, the Court itself assessed the “opinions of Virginia’s expert witnesses” that “[m]ales tend to need an atmosphere of adversativeness,” while “[f]emales tend to thrive in a cooperative atmosphere.” [518 U. S., at 541, 116 S. Ct. 2264, 135 L. Ed. 2d 735](#). What the Court once recognized as an imperative check against discrimination, it today abandons.

Yet the task of ascertaining SB1’s constitutionality is a familiar one. Tennessee has proffered an undoubtedly important interest in “protect[ing] the health and welfare of minors” by prohibiting medical procedures that carry “risks and harms.” [Tenn. Code Ann. §§68-33-101\(a\), \(b\)-\(e\)](#); see [New York v. Ferber, 458 U. S. 747, 756-757, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 \(1982\)](#) (States’ “interest in ‘safeguarding the physical and psychological well-being of a minor’” is “‘compelling’”). All, including the Solicitor General, agree that the State may strictly regulate access to cross-sex hormones and puberty blockers to achieve that purpose. See Tr. of Oral Arg. 39-40, 152-153 (agreeing that West Virginia’s more tailored limitations on gender-affirming care would likely survive intermediate scrutiny). It may well be, too, that “[d]eference to legislatures” is “particularly [****125] critical” in this context, where the provision of medical care to minors is at issue. *Ante*, at 547 (opinion of THOMAS, J.). But that does not change the Court’s obligation, as

mandated by our precedents, to determine whether the challenged sex classification in SB1’s categorical ban is tailored to protecting minors’ health and welfare, or instead rests on unlawful stereotypes about how boys and girls should look and act. See [Virginia, 518 U. S., at 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735](#). [***212] Infusing that antecedent legal question with a host of [*606] evidence relevant only to the subsequent application of judicial scrutiny, as JUSTICE THOMAS would have us do, see *ante*, at 530-546, simply puts the cart before the horse.

The present record offers reason to question (as the District Court did) whether Tennessee’s categorical ban on treating gender dysphoria bears the “requisite direct, substantial relationship” to its interest in protecting minors’ health. [Mississippi Univ. for Women v. Hogan, 458 U. S. 718, 725, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 \(1982\)](#). Tennessee has offered little evidence, for example, that it is more dangerous to receive puberty blockers to “identify [**1884] with, or live as, a purported identity inconsistent with the minor’s sex” than to treat other conditions like precocious puberty.¹⁶ Why, then, does SB1 proscribe the regulated medications to treat gender dysphoria, while leaving them available for myriad other purposes? So too is it difficult to ignore that Tennessee professes concern with protecting the health of minors while categorically banning gender-affirming care for even those minors exhibiting the most severe mental-health conditions, including suicidality.

The majority’s choice to avoid applying

¹⁶ JUSTICE THOMAS urges that “[a] discussion of puberty blockers’ risks . . . should not exclude the risks presented by cross-sex hormones” because, at present, many “gender dysphoric children treated with puberty blockers progress to cross-sex hormone treatment.” *Ante*, at 534, n. 4. But the fact that many transgender adolescents currently receive both puberty blockers and cross-sex hormones does not preclude States from regulating access to cross-sex hormones more stringently than access to puberty blockers. Nor does it excuse the State from its obligation to establish that its categorical ban on each type of medication is, in fact, tailored to protecting minors’ health and welfare.

intermediate scrutiny is all the more puzzling, however, because this Court need not itself resolve these questions or wade into what it dubs the “fierce scientific and policy debates about the safety, efficacy, and propriety of medical treatments in an evolving field.” *Ante*, at 525. The Sixth Circuit never even asked whether the challenged sex classification in SB1 “serves [****126] ‘important governmental objectives’” or is “‘substantially related [*607] to the achievement of those objectives.’” *Virginia, 518 U. S., at 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735*. All the United States requested of this Court was confirmation that intermediate scrutiny applied. Brief for United States 32. On remand, the courts could have taken due account of the “[r]ecent developments” that (according to the majority) “underscore the need for legislative flexibility in this area,” including a recent report from England’s National Health Service on the use of puberty blockers and hormones to treat transgender minors. *Ante*, at 524. Yet the majority inexplicably refuses to take even the modest step of requiring Tennessee to show its work before the lower courts.

This case presents an easy question: whether SB1’s ban on certain medications, applicable only if used in a manner “inconsistent with . . . sex,” contains a sex classification. Because sex determines access to the covered medications, it clearly does. Yet the majority refuses to call a spade a spade. Instead, it obfuscates a sex [***213] classification that is plain on the face of this statute, all to avoid the mere possibility that a different court could strike down SB1, or categorical healthcare bans like it. The Court’s willingness to do so here does irrevocable damage to the *Equal Protection Clause* and invites legislatures to engage in discrimination by hiding blatant sex classifications in plain sight. It also authorizes, without second thought, untold harm to transgender children and the parents and families who love them. Because there is no constitutional justification for that result, I dissent.

JUSTICE KAGAN, dissenting.

For all the reasons [****127] JUSTICE SOTOMAYOR gives, Tennessee’s SB1 warrants heightened judicial scrutiny. See *ante*, at 585-603 (dissenting opinion). That means the law survives if, but only if, its sex-based classifications are “substantially related to the achievement” of “important governmental objectives.” [*608] *United States v. Virginia, 518 U. S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996)*. As JUSTICE SOTOMAYOR notes, the point of applying that test is to smoke out “invidious” or otherwise [**1885] unfounded discrimination. *Ante*, at 587; *Michael M. v. Superior Court, Sonoma Cty., 450 U. S. 464, 469, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981)* (plurality opinion). More concretely put, heightened scrutiny reveals whether a law is based on “overbroad generalizations,” stereotypes, or prejudices, or is instead based on legitimate state interests, such as the one here asserted in protecting minors’ health. *Virginia, 518 U. S., at 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735*. Because the Court is wrong in not subjecting SB1 to that kind of examination, I join Parts I through IV of JUSTICE SOTOMAYOR’s dissent.

I take no view on how SB1 would fare under heightened scrutiny, and therefore do not join Part V. The record evidence here is extensive, complex, and disputed, and the Court of Appeals (because it applied only rational-basis review) never addressed the relevant issues. Still more, both the plaintiffs and the Government asked this Court not to itself apply heightened scrutiny, but only to remand [****128] that inquiry to the lower courts. So I would both start and stop at the question of what test SB1 must satisfy. As JUSTICE SOTOMAYOR shows, it is heightened scrutiny. I respectfully dissent.



Caution

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

United States v. Virginia

Supreme Court of the United States

January 17, 1996, Argued ; June 26, 1996, Decided *

No. 94-1941

* Together with No. 94-2107, Virginia et al. v. United States, also on certiorari to the same court.

Reporter

518 U.S. 515 *; 116 S. Ct. 2264 **; 135 L. Ed. 2d 735 ***; 1996 U.S. LEXIS 4259 ****; 64 U.S.L.W. 4638; 96 Cal. Daily Op. Service 4694; 96 Daily Journal DAR 7573; 10 Fla. L. Weekly Fed. S 93

UNITED STATES, PETITIONER 94-1941 v.
VIRGINIA ET AL. VIRGINIA, ET AL.,
PETITIONERS 94-2107 v. UNITED STATES

Subsequent History: [****1] As Amended July 3, 1996.

Prior History: ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Disposition: [No. 94-2107, 976 F.2d 890](#), affirmed; [No. 94-1941, 44 F.3d 1229](#), reversed and remanded.

Core Terms

single-sex, classification, diversity, military, train, sex, court of appeals, female, mission, higher education, all-male, persuasive, faculty, male, educational opportunity, coeducational, cadets, methodology, quotation, attend, gender, governmental objective, man and woman, graduate, citizen-soldiers, concurrence, leadership, strict scrutiny, intermediate, single-gender

Case Summary

Procedural Posture

Appeal by United States from judgment of the United States Court of Appeals for the Fourth Circuit holding for Virginia in suit challenging policy denying women admission to publicly funded university.

Overview

The United States sued Virginia for violating the [Equal Protection Clause](#) of [U.S. Const. amend. XIV](#) owing to Virginia's policy of denying women admission to a publicly funded university. The Supreme Court, reviewing the decision of the

federal appeals court, held for the United States. The court opined that in cases of official classification based on gender, the proffered justification must be exceedingly persuasive; that the burden of justification was demanding and rested entirely on the state; that the state must show at least that the challenged classification served important governmental objectives and that the discriminatory means employed were substantially related to the achievement of those objectives; that the justification was genuine, not hypothesized or invented post hoc in response to litigation; and that it did not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. Since Virginia failed to satisfy the burden placed upon, the judgment below was reversed.

Outcome

Judgment reversed; Virginia failed to satisfy its burden of providing an exceedingly persuasive justification for its sex-based admissions policy or that the policy was substantially related to the achievement of those objectives.

LexisNexis® Headnotes

Constitutional Law > Equal
Protection > Gender & Sex

Education Law > Students > Right to Education

Constitutional Law > Equal Protection > Nature
& Scope of Protection

[HN1](#) Equal Protection, Gender & Sex

[U.S. Const. amend. XIV](#)'s equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational

opportunities its publicly funded military university, the Virginia Military Institute, affords.

Civil Rights Law > General Overview

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Equal Protection > General Overview

HN2 Civil Rights Law

See [*U.S. Const. amend. XIV*](#).

Constitutional Law > Equal Protection > Gender & Sex

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

HN3 Equal Protection, Gender & Sex

A party seeking to uphold government action based on sex must establish an exceedingly persuasive justification for the classification. To succeed, the defender of the challenged action must show at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.

Constitutional Law > Equal Protection > Gender & Sex

Governments > Legislation > Overbreadth

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

HN4 Equal Protection, Gender & Sex

In cases of official classification based on gender, the reviewing court, focusing on the differential treatment or denial of opportunity for which relief is sought, must determine whether the proffered justification is exceedingly persuasive. The burden of justification is demanding and it rests entirely on the state. The state must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Constitutional Law > Equal Protection > National Origin & Race

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

HN5 Equal Protection, National Origin & Race

Although the most stringent judicial scrutiny is reserved for classifications based on race or national origin, strict scrutiny of such classifications is not inevitably fatal in fact.

Civil Rights Law > General Overview

Constitutional Law > Equal Protection > Gender & Sex

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

HN6 Civil Rights Law

Although supposed inherent differences are no longer accepted as a ground for race or national origin classifications, physical differences between

men and women are enduring. The two sexes are not fungible; a community made up exclusively of one sex is different from a community composed of both.

Civil Rights Law > General Overview

Constitutional Law > Equal
Protection > Gender & Sex

HN7 Civil Rights Law

Sex classifications may be used to compensate women for particular economic disabilities they have suffered, to promote equal employment opportunity, and to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.

Civil Rights Law > General Overview

Constitutional Law > Equal
Protection > Gender & Sex

Governments > Legislation > Overbreadth

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

HN8 Civil Rights Law

Courts must take a hard look at generalizations on tendencies advanced in support of disparate treatment of the sexes. State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females. Equal protection principles, as applied to gender classifications, mean state actors may not rely on overbroad generalizations to make judgments about people that are likely to perpetuate historical patterns of discrimination.

Civil

Procedure > Remedies > Injunctions > Permanent Injunctions

Constitutional Law > Equal
Protection > Gender & Sex

HN9 Injunctions, Permanent Injunctions

A remedial decree must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination. The categorical exclusion of women from an extraordinary educational opportunity afforded men is a constitutional violation. A proper remedy for an unconstitutional exclusion aims to eliminate, so far as possible, the discriminatory effects of the past and to bar like discrimination in the future.

Constitutional Law > Equal
Protection > Gender & Sex

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

HN10 Equal Protection, Gender & Sex

All gender-based classifications today warrant heightened scrutiny.

Lawyers' Edition Display

Decision

Virginia held to violate equal protection with respect to male-only admission policy of Virginia Military Institute; proposed remedy of separate women's institute at private women's college held not to cure constitutional violation.

Summary

Virginia Military Institute (VMI), a state-supported college subject to the state legislature's control, was founded as an all-male institution in 1839. By the mid-1970's, VMI was the sole single-sex public college in Virginia. VMI had a distinctive mission--in which the college was considered to have succeeded--of producing citizen-soldiers who were prepared for leadership in civilian life and military service. Also, VMI used an "adversative," or doubting, educational method, which featured physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values. In 1990, the United States (1) sued Virginia and VMI in the United States District Court for the Western District of Virginia, and (2) alleged that VMI's exclusively male admission policy violated the [equal protection clause](#) of the [Federal Constitution's Fourteenth Amendment](#). In 1991, the District Court rejected the equal protection challenge, on the basis that--while some women would want to attend VMI and some women were capable of all of the individual activities required of VMI cadets--(1) VMI's school for men brought diversity to Virginia's otherwise coeducational system; (2) the only means of achieving this objective was to exclude women from VMI; and (3) if women were admitted, then some aspects of the school's distinctive method would have to be changed, with respect to (a) allowing for personal privacy, (b) altering physical education requirements, at least for women, and (c) modifying the adversative environment ([766 F Supp 1407](#)). In 1992, the United States Court of Appeals for the Fourth Circuit vacated and remanded, as the court expressed the view that (1) even if, as was doubtful, there was a state policy of educational diversity that included single-sex institutions, an explanation was lacking as to how this policy was furthered by affording a unique educational benefit only to males; (2) while VMI's absence of privacy, physical training, and adversative approach would be affected by admitting women, neither the goal of producing citizen-soldiers nor VMI's implementing

methodology was inherently unsuitable for women; and (3) on remand, Virginia, in the first instance, would have the responsibility for selecting a remedial course, from options including--so long as the [Fourteenth Amendment](#) was satisfied--(a) admitting women to VMI and adjusting its program, or (b) establishing a parallel program ([976 F2d 890](#)). In 1993, the United States Supreme Court denied certiorari ([508 US 946](#), [124 L Ed 2d 651](#), [113 S Ct 2431](#)). Virginia then proposed a separate program for women, the Virginia Women's Institute for Leadership (VWIL), which would (1) be located at a private women's college, and (2) have different academic offerings, a cooperative rather than an adversative method of education, and lesser financial resources. In 1994, the District Court ruled that this proposal met the requirements of the [equal protection clause](#), as--even though the VMI methodology could be used to educate women and some women might prefer this methodology--VMI and VWIL would achieve substantially similar outcomes ([852 F Supp 471](#)). In 1995, the Court of Appeals affirmed in pertinent part, as the court expressed the view that (1) under a deferential standard of review, Virginia's goal of single-gender college education was legitimate; and (2) men at VMI and women at VWIL would obtain substantially comparable benefits ([44 F3d 1229](#)). The Court of Appeals then denied rehearing en banc ([52 F3d 90](#)).

On certiorari, the Supreme Court affirmed the Court of Appeals' 1992 judgment, reversed the Court of Appeals' 1995 judgment, and remanded the case for further proceedings. In an opinion by Ginsburg, J., joined by Stevens, O'Connor, Kennedy, Souter, and Breyer, JJ., it was held that (1) under the applicable standard of heightened review, Virginia's exclusion of women from VMI's extraordinary educational opportunities for military training and civilian leadership development denied, to women who were capable of all of the individual activities required of VMI cadets, the equal protection of the laws that was guaranteed by the [Fourteenth Amendment](#), as (a) there was no persuasive evidence that VMI's male-only

admission policy was in furtherance of a policy of diversity, and (b) the exceedingly persuasive justification required for equal protection purposes was not established by Virginia's argument that VMI's adversative method provided benefits that could not be made available, unmodified, to women; and (2) Virginia's proffered VWIL remedy did not cure the constitutional violation, because (a) Virginia had shown no exceedingly persuasive justification for withholding from qualified women premier training of the kind which VMI afforded, and (b) Virginia had not shown substantial equality in the separate educational opportunities which Virginia would support at VMI and VWIL.

Rehnquist, Ch. J., concurring in the judgment, expressed the view that (1) Virginia had violated the [equal protection clause](#) by maintaining VMI's all-male admission policy without providing any--much less a comparable--institution for women; and (2) VWIL failed as a remedy, because this proposed women's institution (a) was distinctly inferior to VMI, the existing male institution, and (b) would continue to be distinctly inferior for the foreseeable future.

Scalia, J., dissenting, expressed the view that (1) the Supreme Court, in order to shut down an institution that had served the people of Virginia with pride and distinction for more than a century and a half, improperly rejected the factual findings of two courts below, swept aside precedent concerning the review of sex-based classifications, and ignored the nation's long tradition of government-supported men's military colleges; and (2) Virginia's election to fund one public all-male institution and one on the adversative model--and to concentrate its resources in a single entity which served both these interests in diversity--was substantially related to Virginia's important educational interests.

Thomas, J., did not participate.

Headnotes

CONSTITUTIONAL LAW §345 > equal protection -- state-supported military college -- male-only admission policy -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E] [LEdHN\[1F\]](#) [1F] [LEdHN\[1G\]](#) [1G] [LEdHN\[1H\]](#) [1H] [LEdHN\[1I\]](#) [1I]

Under the standard of heightened review applicable with respect to the male-only admission policy of a state-supported military college subject to the state legislature's control, the state's exclusion of women from the military college's extraordinary educational opportunities for military training and civilian leadership development denies, to women who are capable of all of the individual activities required of the military college's cadets, the equal protection of the laws that is guaranteed by the [Federal Constitution's Fourteenth Amendment](#), as (1) there is no persuasive evidence that the male-only admission policy is in furtherance of a state policy of diversity, where (a) the state has not shown that the military college was established, or has been maintained, with a view to diversifying, by the categorical exclusion of women, educational opportunities within the state, and (b) an equal protection purpose of genuinely advancing an array of educational options is not served by the military college's historic and constant plan to afford a unique educational benefit only to males, because however "liberally" this plan serves the state's sons, this plan makes no provision for the state's daughters; (2) the exceedingly persuasive justification required for equal protection purposes is not established by the state's argument that the military college's "adversative," or doubting, educational method provides benefits that cannot be made available, unmodified, to women; (3) the military college offers an educational opportunity no other state institution provides; (4) the military college's prestige--associated with its success in developing citizen-soldiers--is unequalled; (5) women seeking and fit for an education of the military college's quality cannot be offered

anything less, under the state's obligation to afford such women genuinely equal protection; and (6) there is no reason to believe that the admission of capable women would destroy the military college, rather than enhance its capacity to serve the nation. (Scalia, J., dissented from this holding; Rehnquist, Ch. J., dissented in part from this holding.)

CONSTITUTIONAL LAW §345 > male-only military college -- equal protection violation -- remedy of separate women's institute -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B] [LEdHN\[2C\]](#) [2C] [LEdHN\[2D\]](#) [2D] [LEdHN\[2E\]](#) [2E] [LEdHN\[2F\]](#) [2F] [LEdHN\[2G\]](#) [2G] [LEdHN\[2H\]](#) [2H]

Given that, with respect to the male-only admission policy of a state-supported military college, the state has been found to violate the [equal protection clause](#) of the [Federal Constitution's Fourteenth Amendment](#) by excluding women who are capable of all of the individual activities required of the military college's cadets, the state's proffered remedy of maintaining the military college as male-only and creating a separate women's institute for leadership, to be located at a private women's college, does not cure the constitutional violation and provide equal opportunity, because the state has shown no exceedingly persuasive justification for withholding from qualified women premier training of the kind which the military college affords, as (1) the women's institute would (a) afford women no opportunity to experience the rigorous military training for which the military college is famed, and (b) use a cooperative educational method which reinforces self-esteem, rather than the military college's "adversative," or doubting, educational method, which features physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values; (2) these methodological differences are not justified by the state's generalizations about what is

appropriate for "most women," where (a) the state has never asserted that the military college's method of education suits "most men," (b) only about 15 percent of the military college's cadets enter career military service, (c) the military college's implementing methodology is not inherently unsuitable for women, and (d) even though admitting women to the military college would require alterations necessary to afford members of each sex privacy from the other sex in living arrangements--and to adjust aspects of the physical training programs--experience shows that such adjustments are manageable; (4) in myriad respects other than military training, the proposed women's institute would not qualify as the military college's equal, where (a) the student body, faculty, course offerings, facilities, and financial reserves of the women's institute would not match those of the military college, and (b) a graduate of the women's institute could not anticipate the benefits associated with the military college's long history, prestige, and influential alumni network; (5) thus, the state has not shown substantial equality in the separate educational opportunities which the state would support at the military college and the women's institute; and (6) it is error to expose the state's plan of a women's institute to a deferential analysis, for all gender-based classifications warrant heightened scrutiny. (Scalia, J., dissented from this holding.)

CONSTITUTIONAL LAW §325 > equal protection -- gender-based government action -- > Headnote: [LEdHN\[3\]](#) [3]

Under the Federal Constitution's equal protection principle, parties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action; for cases of official classification based on gender, a reviewing court, in focusing on the differential treatment or denial of opportunity for which relief is sought, must determine whether the proffered justification is exceedingly persuasive; the burden

of justification is demanding and rests entirely on the government, which must show at least that (1) the challenged classification serves important governmental objectives, and (2) the discriminatory means employed are substantially related to the achievement of those objectives; the justification must be genuine, not hypothesized or invented post hoc in response to litigation; moreover, the justification must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

CONSTITUTIONAL LAW §325 > equal protection -- sex classifications -- > Headnote:

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

The heightened review standard established, under the Federal Constitution's equal protection principle, for gender-based government action does not make sex a proscribed classification, given that the physical differences between men and women are enduring; sex classifications may be used (1) to compensate women for particular economic disabilities which women have suffered, and (2) to advance full development of the talent and capacities of the nation's people; however, such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.

CIVIL RIGHTS §1 > race or national origin classifications -- > Headnote:

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

Under the Federal Constitution's equal protection principle, supposed "inherent differences" are not accepted as a ground for race or national origin classifications.

CIVIL RIGHTS §7.7 > employment -- sex classifications -- > Headnote:

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

Under the Federal Constitution's equal protection principle, sex classifications may be used to promote equal employment opportunity.

CONSTITUTIONAL LAW §325 > equal protection -- gender-based exclusions -- > Headnote:

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

Allegedly benign justifications proffered in defense of categorical exclusions on the basis of gender will not be accepted automatically under the Federal Constitution's equal protection principle; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.

CONSTITUTIONAL LAW §325 > equal protection -- denying women opportunity -- > Headnote:

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

Under the Federal Constitution's equal protection principle, generalizations about "the way women are" or estimates of what is appropriate for "most women" do not justify denying opportunity to women whose talent and capacity place them outside the average description.

CONSTITUTIONAL LAW §345 > male-only college - equal protection violation -- remedy -- > Headnote:

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

Given that, with respect to the male-only admission policy of a state-supported military college, the state has been found to violate the [equal protection](#)

clause of the Federal Constitution's Fourteenth Amendment by excluding women who are capable of all of the individual activities required of the college's cadets, the state must craft a remedy for the women on whose behalf the United States instituted a suit against the state and the military college, that is, women who (1) are so capable, (2) would do well under the military college's "adversative" method of education, (3) would want to attend the military college if they had the opportunity, and (4) can meet the physical standards which the military college currently imposes on men; the remedy must (1) end such women's exclusion from a state-supplied educational opportunity for which the women are fit, and (2) bar like discrimination in the future. (Scalia, J., dissented from this holding; Rehnquist, Ch. J., dissented in part from this holding.)

Syllabus

Virginia Military Institute (VMI) is the sole single-sex school among Virginia's public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. Using an "adversative method" of training not available elsewhere in Virginia, VMI endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. Reflecting the high value alumni place on their VMI training, VMI has the largest per-student endowment of all public undergraduate institutions [****2] in the Nation. The United States sued Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Fourteenth Amendment's Equal Protection Clause. The District Court ruled in VMI's favor. The Fourth Circuit reversed and ordered Virginia to remedy the constitutional violation. In response, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL), located at Mary Baldwin College, a private liberal arts school for women. The District Court found that Virginia's proposal

satisfied the Constitution's equal protection requirement, and the Fourth Circuit affirmed. The appeals court deferentially reviewed Virginia's plan and determined that provision of single-gender educational options was a legitimate objective. Maintenance of single-sex programs, the court concluded, was essential to that objective. The court recognized, however, that its analysis risked bypassing equal protection scrutiny, so it fashioned an additional test, asking whether VMI and VWIL students would receive "substantively comparable" benefits. Although the Court of Appeals acknowledged that the VWIL degree lacked the historical benefit and prestige of a VMI [****3] degree, the court nevertheless found the educational opportunities at the two schools sufficiently comparable.

Held:

1. Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action. *E. g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724. Neither federal nor state government acts compatibly with equal protection when a law or official policy denies to women, simply because they are women, full citizenship stature -- equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities. To meet the burden of justification, a State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Ibid.*, quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, [****4] capacities, or preferences of males and females. See, *e. g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 643, 648. The heightened review standard applicable to sex-based classifications does not make sex a proscribed classification, but it does

mean that categorization by sex may not be used to create or perpetuate the legal, social, and economic inferiority of women. Pp. 531-534.

2. Virginia's categorical exclusion of women from the educational opportunities VMI provides denies equal protection to women. Pp. 534-546.

(a) Virginia contends that single-sex education yields important educational benefits and that provision of an option for such education fosters diversity in educational approaches. Benign justifications proffered in defense of categorical exclusions, however, must describe actual state purposes, not rationalizations for actions in fact differently grounded. Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth. A purpose genuinely to advance an array of educational options is not served by VMI's historic and [****5] constant plan to afford a unique educational benefit only to males. However well this plan serves Virginia's sons, it makes no provision whatever for her daughters. Pp. 535-540.

(b) Virginia also argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women, and that alterations to accommodate women would necessarily be so drastic as to destroy VMI's program. It is uncontested that women's admission to VMI would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. It is also undisputed, however, that neither the goal of producing citizen-soldiers, VMI's *raison d'être*, nor VMI's implementing methodology is inherently unsuitable to women. The District Court made "findings" on "gender-based developmental differences" that restate the opinions of Virginia's expert witnesses about typically male or typically female "tendencies." Courts, however, must take "a hard look" at generalizations or tendencies of the kind Virginia

pressed, for state actors controlling gates to opportunity have no warrant to exclude qualified individuals based on "fixed notions [****6] concerning the roles and abilities of males and females." [*Mississippi Univ. for Women*, 458 U.S. at 725](#). The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other "self-fulfilling prophec[ies], see [*id.*, at 730](#), once routinely used to deny rights or opportunities. Women's successful entry into the federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for VMI's future may not be solidly grounded. The Commonwealth's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, does not rank as "exceedingly persuasive." Pp. 540-546.

3. The remedy proffered by Virginia -- maintain VMI as a male-only college and create VWIL as a separate program for women -- does not cure the constitutional violation. Pp. 546-558.

(a) A remedial decree must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would [****7] have occupied in the absence of discrimination. See [*Milliken v. Bradley*, 433 U.S. 267, 280](#). The constitutional violation in this case is the categorical exclusion of women, in disregard of their individual merit, from an extraordinary educational opportunity afforded men. Virginia chose to leave untouched VMI's exclusionary policy, and proposed for women only a separate program, different in kind from VMI and unequal in tangible and intangible facilities. VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. Kept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training, VWIL students will not know the feeling of tremendous accomplishment commonly experienced by VMI's successful cadets.

Virginia maintains that methodological differences are justified by the important differences between men and women in learning and developmental needs, but generalizations about "the way women are," estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. In myriad respects [****8] other than military training, VWIL does not qualify as VMI's equal. The VWIL program is a pale shadow of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence. Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supports at VWIL and VMI. Cf. [*Sweatt v. Painter*, 339 U.S. 629](#). Pp. 547-554.

(b) The Fourth Circuit failed to inquire whether the proposed remedy placed women denied the VMI advantage in the position they would have occupied in the absence of discrimination, [*Milliken*, 433 U.S. at 280](#), and considered instead whether the Commonwealth could provide, with fidelity to equal protection, separate and unequal educational programs for men and women. In declaring the substantially different and significantly unequal VWIL program satisfactory, the appeals court displaced the exacting standard developed by this Court with a deferential standard, and added an inquiry of its own invention, the "substantive comparability" test. The Fourth Circuit plainly erred in exposing Virginia's VWIL plan to such a deferential analysis, for "all [****9] genderbased classifications today" warrant "heightened scrutiny." See [*J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 136](#). Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth's obligation to afford them genuinely equal protection. Pp. 554-558.

Briefs of amici curiae urging affirmance in No. 94-1941 were filed for the State of South Carolina et al. by Charles Molony Condon, Attorney General, Treva Ashworth, Deputy Attorney General, Kenneth P. Woodington, Senior Assistant Attorney

General, Reginald I. Lloyd, Assistant Attorney General, and M. Dawes Cooke, Jr.; and for Kenneth E. Clark et al. by James C. Roberts and George A. Somerville.

Briefs of amici curiae were filed in both cases for the State of Wyoming et al. by William U. Hill, Attorney General of Wyoming, Thomas W. Corbett, Jr., Attorney General of Pennsylvania, and Bradley B. Cavedo; for Bennett College et al. by Wendy S. White; for the Center for Military Readiness et al. by Mellissa Wells-Petry and Jordan W. Lorence; for the Employment Law Center et al. by Patricia A. Shiu and Judith Kurtz; for the Independent Women's Forum et al. by Anita K. Blair [****10] and C. Douglas Welty; for Mary Baldwin College by Craig T. Merritt and Richard K. Willard; for the South Carolina Institute of Leadership for Women by Julianne Farnsworth; for Wells College et al. by David M. Lascell; for Women's Schools Together, Inc., et al. by John C. Danforth and Thomas C. Walsh; and for Nancy Mellette by Valorie K. Vojdik, Henry Weisburg, Suzanne E. Coe, and Robert R. Black.

Briefs of amici curiae were filed in No. 94-1941 for the American Association of University Professors et al. by Joan E. Bertin and Ann H. Franke; and for Rhonda Cornum et al. by Allan L. Gropper.

Daniel F. Kolb, Herbert J. Hansell, Paul C. Saunders, Norman Redlich, Barbara R. Arnwine, Thomas J. Henderson, and Richard T. Seymour filed a brief for the Lawyers' Committee for Civil Rights Under Law as amicus curiae in No. 94-2107.

Judges: GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in the judgment, post, p. 558. SCALIA, J., filed a dissenting opinion, post, p. 566. THOMAS, J., took no part in the consideration or decision of the case.

Opinion by: GINSBURG

Opinion

[***743] [****11] [**2269] [*519] JUSTICE GINSBURG delivered the opinion of the Court.

[\[LeHN/1A\]](#) [1A]Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute (VMI). The United States maintains that [HN1](#) the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. We agree.

[*520] I

Founded in 1839, VMI is today the sole single-sex school among Virginia's 15 public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. VMI pursues this mission through pervasive training of a kind not available anywhere else in Virginia. Assigning prime place to character development, VMI uses an "adversative [***744] method" modeled on English public schools and once characteristic of military instruction. VMI constantly endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. The school's graduates leave VMI with heightened [****12] comprehension of their capacity to deal with duress and stress, and a large sense of accomplishment for completing the hazardous course.

VMI has notably succeeded in its mission to produce leaders; among its alumni are military generals, Members of Congress, and business executives. The school's alumni overwhelmingly perceive that their VMI training helped them to realize their personal goals. VMI's endowment reflects the loyalty of its graduates; VMI has the largest per-student endowment of all public undergraduate institutions in the Nation.

Neither the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women. And the school's impressive

record in producing leaders has made admission desirable to some women. Nevertheless, Virginia has elected to preserve exclusively for men the advantages and opportunities a VMI education affords.

II

A

From its establishment in 1839 as one of the Nation's first state military colleges, see [**2270] 1839 Va. Acts, ch. 20, VMI has remained financially supported by Virginia and "subject to [*521] the control of the [Virginia] General Assembly," Va. Code Ann. § 23-92 (1993). First southern [****13] college to teach engineering and industrial chemistry, see H. Wise, *Drawing Out the Man: The VMI Story* 13 (1978) (The VMI Story), VMI once provided teachers for the Commonwealth's schools, see 1842 Va. Acts, ch. 24, § 2 (requiring every cadet to teach in one of the Commonwealth's schools for a 2-year period).¹ Civil War strife threatened the school's vitality, but a resourceful superintendent regained legislative support by highlighting "VMI's great potential[,] through its technical know-how," to advance Virginia's postwar recovery. The VMI Story 47.

VMI today enrolls about 1,300 men as cadets.² Its academic offerings in the liberal arts, sciences, and engineering are also available at other public

¹ During the Civil War, school teaching became a field dominated by women. See A. Scott, *The Southern Lady: From Pedestal to Politics, 1830-1930*, p. 82 (1970).

² Historically, most of Virginia's public colleges and universities were single sex; by the mid-1970's, however, all except VMI had become coeducational. [766 F. Supp. 1407, 1418-1419 \(WD Va. 1991\)](#). For example, Virginia's legislature incorporated Farmville Female Seminary Association in 1839, the year VMI opened. 1839 Va. Acts, ch. 167. Originally providing instruction in "English, Latin, Greek, French, and piano" in a "home atmosphere," R. Sprague, *Longwood College: A History* 7-8, 15 (1989) (Longwood College), Farmville Female Seminary became a public institution in 1884 with a mission to train "white female teachers for public schools," 1884 Va. Acts, ch. 311. The school became Longwood College in 1949, Longwood College 136, and introduced coeducation in 1976, [id.](#), at 133.

colleges and universities in Virginia. But VMI's mission is special. It is the mission of the school

"to produce educated and honorable men, [****14] prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers [***745] to defend their country in [*522] time of national peril." [766 F. Supp. 1407, 1425 \(WD Va. 1991\)](#) (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16, 1986).

In contrast to the federal service academies, institutions maintained "to prepare cadets for career service in the armed forces," VMI's program "is directed at preparation for both military and civilian life"; "only about 15% of VMI cadets enter career military service." [766 F. Supp., at 1432](#).

[****15] VMI produces its "citizen-soldiers" through "an adversative, or doubting, model of education" which features "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values." [Id., at 1421](#). As one Commandant of Cadets described it, the adversative method "'dissects the young student,'" and makes him aware of his "'limits and capabilities,'" so that he knows "'how far he can go with his anger, . . . how much he can take under stress, . . . exactly what he can do when he is physically exhausted.'" [Id., at 1421-1422](#) (quoting Col. N. Bissell).

VMI cadets live in spartan barracks where surveillance is constant and privacy nonexistent; they wear uniforms, eat together in the mess hall, and regularly participate in drills. [Id., at 1424, 1432](#). Entering students are incessantly exposed to the rat line, "an extreme form of the adversative model," comparable in intensity to Marine Corps boot camp. [Id., at 1422](#). Tormenting and punishing,

the rat line bonds new cadets to their fellow sufferers and, when they have completed the 7-month experience, to their former tormentors. *Ibid.*

VMI's [****16] "adversative model" is further characterized by a hierarchical "class system" of privileges and responsibilities, a "dyke system" for assigning a senior class mentor to each entering class "rat," and a stringently enforced "honor code," which prescribes that a cadet "'does not lie, cheat, steal nor tolerate those who do.'" [Id., at 1422-1423](#).

[*523] VMI attracts some applicants because of its reputation as an extraordinarily challenging military school, and "because its [**2271] alumni are exceptionally close to the school." [Id., at 1421](#). "Women have no opportunity anywhere to gain the benefits of [the system of education at VMI]." *Ibid.*

B

In 1990, prompted by a complaint filed with the Attorney General by a female high-school student seeking admission to VMI, the United States sued the Commonwealth of Virginia and VMI, alleging that VMI's exclusively male admission policy violated the [Equal Protection Clause](#) of the [HN2 Fourteenth Amendment](#). [Id., at 1408](#).³ Trial of the action consumed six days and involved an array of expert witnesses on each side. *Ibid.*

[****17] In the two years preceding the lawsuit, the District Court noted, VMI had received inquiries from 347 women, but had responded to none of them. [Id., at 1436](#). "Some women, at least," the court said, "would want to attend the school if they had the opportunity." [Id., at 1414](#). The court further recognized that, with recruitment, VMI could "achieve at least [***746] 10% female enrollment" -- "a sufficient 'critical mass' to provide the female cadets with a positive educational experience." [Id., at 1437-1438](#). And it was also established that "some women are capable of all of

³The District Court allowed the VMI Foundation and the VMI Alumni Association to intervene as defendants. [766 F. Supp., at 1408](#).

the individual activities required of VMI cadets." *Id.*, at 1412. In addition, experts agreed that if VMI admitted women, "the VMI ROTC experience would become a better training program from the perspective of the armed forces, because it would provide training in dealing with a mixed-gender army." *Id.*, at 1441.

The District Court ruled in favor of VMI, however, and rejected the equal protection challenge pressed by the United States. That court correctly recognized that *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982), [****18] was [*524] the closest guide. 766 F. Supp., at 1410. There, this Court underscored that *HN3* a party seeking to uphold government action based on sex must establish an "exceedingly persuasive justification" for the classification. *Mississippi Univ. for Women*, 458 U.S. at 724 (internal quotation marks omitted). To succeed, the defender of the challenged action must show "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Ibid.* (internal quotation marks omitted).

The District Court reasoned that education in "a single gender environment, be it male or female," yields substantial benefits. 766 F. Supp., at 1415. VMI's school for men brought diversity to an otherwise coeducational Virginia system, and that diversity was "enhanced by VMI's unique method of instruction." *Ibid.* If single-gender education for males ranks as an important governmental objective, it becomes obvious, the District Court concluded, that [****19] the *only* means of achieving the objective "is to exclude women from the all-male institution -- VMI." *Ibid.*

"Women are [indeed] denied a unique educational opportunity that is available only at VMI," the District Court acknowledged. *Id.*, at 1432. But "[VMI's] single-sex status would be lost, and some aspects of the [school's] distinctive method would be altered" if women were admitted, *id.*, at 1413:

"Allowance for personal privacy would have to be made," *id.*, at 1412; "physical education requirements would have to be altered, at least for the women," *id.*, at 1413; the adversative environment could not survive unmodified, *id.*, at 1412-1413. Thus, "sufficient constitutional justification" had been shown, the District Court held, "for continuing [VMI's] single-sex policy." *Id.*, at 1413.

The Court of Appeals for the Fourth Circuit disagreed and vacated the District Court's judgment. The appellate court held: "The Commonwealth of Virginia has not . . . advanced any state policy by which it can justify its determination, [*525] under an announced policy of diversity, [****20] to afford VMI's unique type of program to men and not to women." 976 F.2d 890, 892 (1992).

[**2272] The appeals court greeted with skepticism Virginia's assertion that it offers single-sex education at VMI as a facet of the Commonwealth's overarching and undisputed policy to advance "autonomy and diversity." The court underscored Virginia's nondiscrimination commitment: "It is extremely important that [colleges and universities] deal with faculty, staff, [***747] and students *without regard to sex, race, or ethnic origin.*" *Id.*, at 899 (quoting 1990 Report of the Virginia Commission on the University of the 21st Century). "That statement," the Court of Appeals said, "is the only explicit one that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions." 976 F.2d, at 899. Furthermore, the appeals court observed, in urging "diversity" to justify an all-male VMI, the Commonwealth had supplied "no explanation for the movement away from [single-sex education] in Virginia by public colleges and universities." *Ibid.* In short, the court concluded, "[a] policy of diversity [****21] which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender." *Ibid.*

The parties agreed that "some women can meet the physical standards now imposed on men," *id.*, at 896, and the court was satisfied that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women," *id.*, at 899. The Court of Appeals, however, accepted the District Court's finding that "at least these three aspects of VMI's program -- physical training, the absence of privacy, and the adversative approach -- would be materially affected by coeducation." *Id.*, at 896-897. Remanding the case, the appeals court assigned to Virginia, in the first instance, responsibility for selecting a remedial course. The court suggested these options for the Commonwealth: Admit women to VMI; establish parallel institutions [*526] or programs; or abandon state support, leaving VMI free to pursue its policies as a private institution. *Id.*, at 900. In May 1993, this Court denied certiorari. See 508 U.S. 946; see also [****22] *ibid.* (opinion of SCALIA, J., noting the interlocutory posture of the litigation).

C

In response to the Fourth Circuit's ruling, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL). The 4-year, state-sponsored undergraduate program would be located at Mary Baldwin College, a private liberal arts school for women, and would be open, initially, to about 25 to 30 students. Although VWIL would share VMI's mission -- to produce "citizen-soldiers" -- the VWIL program would differ, as does Mary Baldwin College, from VMI in academic offerings, methods of education, and financial resources. See 852 F. Supp. 471, 476-477 (WD Va. 1994).

The average combined SAT score of entrants at Mary Baldwin is about 100 points lower than the score for VMI freshmen. See *id.*, at 501. Mary Baldwin's faculty holds "significantly fewer Ph. D.'s than the faculty at VMI," *id.*, at 502, and receives significantly lower salaries, see Tr. 158 (testimony of James Lott, Dean of Mary Baldwin

College), reprinted in 2 App. in Nos. 94-1667 and 94-1717 (CA4) (hereinafter Tr.). While VMI offers degrees in liberal arts, the sciences, [****23] and engineering, Mary Baldwin, at the time of trial, offered only bachelor of arts degrees. See 852 F. Supp., at 503. A VWIL student seeking to earn an engineering degree could gain one, without public support, by attending Washington University in St. Louis, Missouri, for two years, paying the required private tuition. See *ibid.*

Experts in educating women at the college level composed the Task [***748] Force charged with designing the VWIL program; Task Force members were drawn from Mary Baldwin's own faculty and staff. *Id.*, at 476. Training its attention on methods of instruction appropriate for "most women," the [*527] Task Force determined that a military model would be "wholly inappropriate" for VWIL. *Ibid.*; see 44 F.3d 1229, 1233 (CA4 1995).

VWIL students would participate in ROTC programs and a newly established, "largely ceremonial" Virginia Corps of Cadets, *id.*, at 1234, but the VWIL House would not have a military format, 852 F. Supp., at 477, and [***2273] VWIL would not require its students to eat meals together or to wear uniforms during the schoolday, *id.*, at 495. [****24] In lieu of VMI's adversative method, the VWIL Task Force favored "a cooperative method which reinforces self-esteem." *Id.*, at 476. In addition to the standard bachelor of arts program offered at Mary Baldwin, VWIL students would take courses in leadership, complete an off-campus leadership externship, participate in community service projects, and assist in arranging a speaker series. See 44 F.3d, at 1234.

Virginia represented that it will provide equal financial support for in-state VWIL students and VMI cadets, 852 F. Supp., at 483, and the VMI Foundation agreed to supply a \$ 5.4625 million endowment for the VWIL program, *id.*, at 499. Mary Baldwin's own endowment is about \$ 19 million; VMI's is \$ 131 million. *Id.*, at 503. Mary Baldwin will add \$ 35 million to its endowment

based on future commitments; VMI will add \$ 220 million. *Ibid.* The VMI Alumni Association has developed a network of employers interested in hiring VMI graduates. The Association has agreed to open its network to VWIL graduates, [id., at 499](#), but those graduates will not have the advantage afforded by a VMI degree.

[****25] D

Virginia returned to the District Court seeking approval of its proposed remedial plan, and the court decided the plan met the requirements of the [Equal Protection Clause](#). [Id., at 473](#). The District Court again acknowledged evidentiary support for these determinations: "The VMI methodology could be used to educate women and, in fact, some [*528] women . . . may prefer the VMI methodology to the VWIL methodology." [Id., at 481](#). But the "controlling legal principles," the District Court decided, "do not require the Commonwealth to provide a mirror image VMI for women." *Ibid.* The court anticipated that the two schools would "achieve substantially similar outcomes." *Ibid.* It concluded: "If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination." [Id., at 484](#).

A divided Court of Appeals affirmed the District Court's judgment. [44 F.3d 1229 \(CA4 1995\)](#). This time, the appellate court determined to give "greater scrutiny to the selection of means than to the [Commonwealth's] proffered objective." [Id., at 1236](#). [****26] The official objective or purpose, the court said, should be reviewed deferentially. *Ibid.* Respect for the "legislative will," the court reasoned, meant that the judiciary should take a "cautious approach," inquiring into the "legitimacy" of the governmental objective and refusing approval for any purpose revealed to be "pernicious." *Ibid.*

"Providing the option of a single-gender [***749] college education may be considered a legitimate and important aspect of a public system of higher

education," the appeals court observed, [id., at 1238](#); that objective, the court added, is "not pernicious," [id., at 1239](#). Moreover, the court continued, the adversative method vital to a VMI education "has never been tolerated in a sexually heterogeneous environment." *Ibid.* The method itself "was not designed to exclude women," the court noted, but women could not be accommodated in the VMI program, the court believed, for female participation in VMI's adversative training "would destroy . . . any sense of decency that still permeates the relationship between the sexes." *Ibid.*

Having determined, deferentially, the legitimacy of Virginia's purpose, [****27] the court considered the question of means. [*529] Exclusion of "men at Mary Baldwin College and women at VMI," the court said, was essential to Virginia's purpose, for without such exclusion, the Commonwealth could not "accomplish [its] objective of providing single-gender education." *Ibid.*

The court recognized that, as it analyzed the case, means merged into end, and the merger risked "bypassing any equal protection scrutiny." [Id., at 1237](#). The court therefore added another inquiry, a decisive test it called "substantive comparability." *Ibid.* The key question, the court said, was whether men at VMI and women at VWIL would obtain "substantively comparable benefits at their institution or through other [**2274] means offered by the State." *Ibid.* Although the appeals court recognized that the VWIL degree "lacks the historical benefit and prestige" of a VMI degree, it nevertheless found the educational opportunities at the two schools "sufficiently comparable." [Id., at 1241](#).

Senior Circuit Judge Phillips dissented. The court, in his judgment, had not held Virginia to the burden of showing an "exceedingly persuasive [justification]" [****28] "for the Commonwealth's action. [Id., at 1247](#) (quoting [Mississippi Univ. for Women, 458 U.S. at 724](#)). In Judge Phillips' view, the court had accepted "rationalizations compelled by the exigencies of this litigation," and had not

confronted the Commonwealth's "actual overriding purpose." [44 F.3d, at 1247](#). That purpose, Judge Phillips said, was clear from the historical record; it was "not to create a new type of educational opportunity for women, . . . nor to further diversify the Commonwealth's higher education system[,] . . . but [was] simply . . . to allow VMI to continue to exclude women in order to preserve its historic character and mission." *Ibid*.

Judge Phillips suggested that the Commonwealth would satisfy the Constitution's equal protection requirement if it "simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extra-curricular programs, funding, physical plant, administration [*530] and support services, and faculty and library resources." *Id.*, at 1250. But he thought it evident that the proposed VWIL program, in comparison to VMI, fell "far [****29] short . . . from providing substantially equal tangible and intangible educational benefits to men and women." *Ibid*.

The Fourth Circuit denied rehearing en banc. [52 F.3d 90 \(1995\)](#). Circuit Judge Motz, joined by Circuit Judges Hall, Murnaghan, and Michael, [***750] filed a dissenting opinion. ⁴ Judge Motz agreed with Judge Phillips that Virginia had not shown an "'exceedingly persuasive justification'" for the disparate opportunities the Commonwealth supported. *Id.*, at 92 (quoting [Mississippi Univ. for Women, 458 U.S. at 724](#)). She asked: "[H]ow can a degree from a yet to be implemented supplemental program at Mary Baldwin be held 'substantively comparable' to a degree from a venerable Virginia military institution that was established more than 150 years ago?" [52 F.3d, at 93](#). "Women need not be guaranteed equal 'results,'" Judge Motz said, "but the [Equal Protection Clause](#) does require

equal opportunity . . . [and] that opportunity is being denied here." *Ibid*.

[****30] III

[LEdHN\[1B\]](#) [1B] [LEdHN\[2A\]](#) [2A]The cross-petitions in this case present two ultimate issues. First, does Virginia's exclusion of women from the educational opportunities provided by VMI -- extraordinary opportunities for military training and civilian leadership development -- deny to women "capable of all of the individual activities required of VMI cadets," [766 F. Supp., at 1412](#), the equal protection of the laws guaranteed by the [Fourteenth Amendment](#)? Second, if VMI's "unique" situation, *id.*, at 1413 -- as Virginia's sole single-sex public institution of [*531] higher education -- offends the Constitution's equal protection principle, what is the remedial requirement?

IV

[LEdHN\[3\]](#) [3]We note, once again, the core instruction of this Court's pathmarking decisions in [J. E. B. v. Alabama ex rel. T. B., 511 U.S. 127, 136-137, 128 L. Ed. 2d 89, 114 S. Ct. 1419, and n. 6 \(1994\)](#), and [Mississippi Univ. for Women, 458 U.S. at 724](#) (internal quotation marks omitted): Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.

Today's skeptical scrutiny of official action denying [****31] rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate [**2275] history of sex discrimination." [Frontiero v. Richardson, 411 U.S. 677, 684, 36 L. Ed. 2d 583, 93 S. Ct. 1764 \(1973\)](#). Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; ⁵

⁴ Six judges voted to rehear the case en banc, four voted against rehearing, and three were recused. The Fourth Circuit's local Rule permits rehearing en banc only on the vote of a majority of the Circuit's judges in regular active service (currently 13) without regard to recusals. See [52 F.3d, at 91](#), and n. 1.

⁵ As Thomas Jefferson stated the view prevailing when the Constitution was new:

"Were our State a pure democracy . . . there would yet be excluded from their deliberations . . . women, who, to prevent deprivation of

not until 1920 did women gain a constitutional right to the franchise. *Id.*, at 685. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination. [***751] See, e. g., *Goesaert v. Cleary*, 335 U.S. 464, 467, 93 L. Ed. 163, 69 S. Ct. 198 (1948) (rejecting challenge of female tavern owner and her daughter to Michigan law denying bartender licenses to females -- except for wives and daughters of male tavern owners; Court would not "give ear" to the contention that "an unchivalrous desire of male [*532] bartenders to . . . monopolize [****32] the calling" prompted the legislation).

In 1971, for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws. *Reed v. Reed*, 404 U.S. 71, 73, 30 L. Ed. 2d 225, 92 S. Ct. 251 (holding unconstitutional Idaho Code prescription that, among "several persons claiming and equally entitled to administer [a decedent's estate], males must be preferred to females"). Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts [****33] compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature -- equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities. See, e. g., *Kirchberg v. Feenstra*, 450 U.S. 455, 462-463, 67 L. Ed. 2d 428, 101 S. Ct. 1195 (1981) (affirming invalidity of Louisiana law that made husband "head and master" of property jointly owned with his wife, giving him unilateral right to dispose of such property without his wife's consent); *Stanton v. Stanton*, 421 U.S. 7, 43 L. Ed. 2d 688, 95 S. Ct.

1373 (1975) (invalidating Utah requirement that parents support boys until age 21, girls only until age 18).

Without equating gender classifications, for all purposes, to classifications based on race or national origin,⁶ the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). See *J. E. B.*, 511 U.S. at 152 (KENNEDY, J., concurring in judgment) (case law evolving since 1971 "reveal[s] a strong presumption [****34] that gender classifications are invalid"). To summarize the Court's current directions *HN4* for cases of official classification based on gender: Focusing on the differential [*533] treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. See *Mississippi Univ. for Women*, 458 U.S. at 724. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Ibid.* (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150, 64 L. Ed. 2d 107, 100 S. Ct. 1540 (1980)). The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. See [**2276] *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648, 43 L. Ed. 2d 514, [***752] 95 S. Ct. 1225 (1975); [****35] *Califano v. Goldfarb*, 430 U.S. 199, 223-224, 51 L. Ed. 2d 270, 97 S. Ct. 1021 (1977) (STEVENS, J., concurring in judgment).

morals and ambiguity of issue, could not mix promiscuously in the public meetings of men." Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816), in 10 Writings of Thomas Jefferson 45-46, n. 1 (P. Ford ed. 1899).

⁶The Court has thus far reserved *HN5* most stringent judicial scrutiny for classifications based on race or national origin, but last Term observed that strict scrutiny of such classifications is not inevitably "fatal in fact." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995) (internal quotation marks omitted).

[LEdHN\[1C\]](#) [1C] [LEdHN\[4A\]](#) [4A] [LEdHN\[5\]](#) [5]The heightened review standard our precedent establishes does not make sex a proscribed classification. [HN6](#) Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. See [Loving v. Virginia](#), 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967). [\[****36\]](#) Physical differences between men and women, however, are enduring: "The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." [Ballard v. United States](#), 329 U.S. 187, 193, 91 L. Ed. 181, 67 S. Ct. 261 (1946).

[LEdHN\[4B\]](#) [4B] [LEdHN\[6\]](#) [6]"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. [HN7](#) Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," [Califano v. Webster](#), 430 U.S. 313, 320, 51 L. Ed. 2d 360, 97 S. Ct. 1192 (1977) (*per curiam*), to "promote equal employment opportunity," see [California Fed. Sav. & Loan Assn. v. Guerra](#), 479 U.S. 272, 289, 93 L. Ed. 2d 613, 107 S. Ct. 683 (1987), to advance full development of the talent and capacities of our Nation's people.⁷ [\[*534\]](#) But such classifications

⁷ Several *amici* have urged that diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity. Indeed, it is the mission of some single-sex schools "to dissipate, rather than perpetuate, traditional gender classifications." See Brief for Twenty-six Private Women's Colleges as *Amici Curiae* 5. We do not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as "unique," see [766 F. Supp., at 1413, 1432; 976 F.2d, at 892](#), an opportunity available only at Virginia's premier military institute, the Commonwealth's sole single-sex public university or college. Cf. [Mississippi Univ. for Women v. Hogan](#), 458 U.S. 718, 720, n. 1, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982) ("Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males

may not be used, as they once [\[****37\]](#) were, see [Goesaert](#), 335 U.S. at 467, to create or perpetuate the legal, social, and economic inferiority of women.

[\[****38\]](#) [LEdHN\[1D\]](#) [1D] [LEdHN\[2B\]](#) [2B]Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no "exceedingly persuasive justification" for excluding all women from the citizen-soldier training afforded by VMI. We therefore affirm the Fourth Circuit's initial judgment, which held that Virginia had violated the [Fourteenth Amendment's Equal Protection Clause](#). Because the remedy proffered by Virginia -- the Mary Baldwin VWIL program -- does not cure the constitutional violation, *i.e.*, it does not provide equal opportunity, we reverse the Fourth Circuit's final judgment in this case.

V

[LEdHN\[1E\]](#) [1E]The Fourth Circuit initially held that Virginia had advanced no state policy by which it could justify, under equal protection principles, its determination "to afford VMI's unique type of program to men and not to women." [976 F.2d, at 892](#). Virginia challenges that "liability" ruling and asserts two justifications in defense of VMI's exclusion of [\[*535\]](#) women. First, the Commonwealth contends, "single-sex education provides important [\[****753\]](#) educational benefits," Brief for Cross-Petitioners 20, and the option of single-sex education contributes to "diversity [\[****39\]](#) in educational approaches," *id.*, at 25. Second, the Commonwealth argues, "the unique VMI method of character development and leadership training," the school's adversative approach, would have to be modified were VMI to admit women. *Id.*, at 33-36 (internal quotation marks omitted). We consider these two justifications in turn.

A

and females.").

[LEdHN\[1F\]](#) [1F] [LEdHN\[7\]](#) [7]Single-sex education affords pedagogical benefits to at least some students, **[**2277]** Virginia emphasizes, and that reality is uncontested in this litigation.⁸ Similarly, it is not disputed that diversity among public educational institutions can serve the public good. But Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth. In cases of this genre, our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions **[*536]** in fact differently grounded. See [Wiesenfeld, 420 U.S. at 648](#), and n. 16 ("mere recitation of a benign **[****40]** [or] compensatory purpose" does not block "inquiry into the actual purposes" of government-maintained gender-based classifications); [Goldfarb, 430 U.S. at 212-213](#) (rejecting government-proffered purposes after "inquiry into the actual purposes") (internal quotation marks omitted).

[**41]** *Mississippi Univ. for Women* is immediately in point. There the State asserted, in justification of its exclusion of men from a nursing school, that it was engaging in "educational affirmative action" by "compensating for discrimination against women." [458 U.S. at 727](#).

⁸On this point, the dissent sees fire where there is no flame. See *post*, at 596-598, 598-600. "Both men and women can benefit from a single-sex education," the District Court recognized, although "the beneficial effects" of such education, the court added, apparently "are stronger among women than among men." [766 F. Supp., at 1414](#). The United States does not challenge that recognition. Cf. C. Jencks & D. Riesman, *The Academic Revolution* 297-298 (1968):

"The pluralistic argument for preserving all-male colleges is uncomfortably similar to the pluralistic argument for preserving all-white colleges The all-male college would be relatively easy to defend if it emerged from a world in which women were established as fully equal to men. But it does not. It is therefore likely to be a witting or unwitting device for preserving tacit assumptions of male superiority -- assumptions for which women must eventually pay."

Undertaking a "searching analysis," *id.*, at 728, the Court found no close resemblance between "the alleged objective" and "the actual purpose underlying the discriminatory classification," *id.*, at 730. Pursuing a similar inquiry here, we reach the same conclusion.

Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options. In 1839, when the Commonwealth established VMI, a range of educational opportunities for men and women was scarcely contemplated. Higher education at the time was considered dangerous for **[***754]** women;⁹ reflecting **[*537]** widely held views about women's proper place, the Nation's first universities and colleges -- for example, Harvard in Massachusetts, William and Mary in Virginia -- admitted only men. See E. Farello, *A History of the Education of Women in the United States* **[****42]** 163 (1970). VMI was not at all novel in this respect: In admitting no women, VMI followed the lead of the Commonwealth's flagship school, the University of Virginia, founded in 1819.

[**43]** "No struggle for the admission of women to a state university," a historian has recounted, "was longer drawn out, or developed more bitterness, than that at the University of

⁹Dr. Edward H. Clarke of Harvard Medical School, whose influential book, *Sex in Education*, went through 17 editions, was perhaps the most well-known speaker from the medical community opposing higher education for women. He maintained that the physiological effects of hard study and academic competition with boys would interfere with the development of girls' reproductive organs. See E. Clarke, *Sex in Education* 38-39, 62-63 (1873); *id.*, at 127 ("identical education of the two sexes is a crime before God and humanity, that physiology protests against, and that experience weeps over"); see also H. Maudsley, *Sex in Mind and in Education* 17 (1874) ("It is not that girls have not ambition, nor that they fail generally to run the intellectual race [in coeducational settings], but it is asserted that they do it at a cost to their strength and health which entails life-long suffering, and even incapacitates them for the adequate performance of the natural functions of their sex."); C. Meigs, *Females and Their Diseases* 350 (1848) (after five or six weeks of "mental and educational discipline," a healthy woman would "lose . . . the habit of menstruation" and suffer numerous ills as a result of depriving her body for the sake of her mind).

Virginia." 2 T. Woody, *A History of Women's Education in the United States* 254 (1929) (History of Women's Education). In **[**2278]** 1879, the State Senate resolved to look into the possibility of higher education for women, recognizing that Virginia "has never, at any period of her history," provided for the higher education of her daughters, though she "has liberally provided for the higher education of her sons." *Ibid.* (quoting 10 Educ. J. Va. 212 (1879)). Despite this recognition, no new opportunities were instantly open to women.¹⁰

[**44]** Virginia eventually provided for several women's seminaries and colleges. Farmville Female Seminary became a public institution in 1884. See [supra](#), at 521, n. 2. Two women's schools, Mary Washington College and James Madison University, were founded in 1908; another, Radford University, was founded in 1910. [766 F. Supp., at 1418-1419](#). By the mid-1970's, all four schools had become coeducational. *Ibid.*

Debate concerning women's admission as undergraduates at the main university continued well past the century's midpoint. Familiar arguments were rehearsed. If women **[*538]** were admitted, it was feared, they "would encroach on the rights of men; there would be new problems of government, perhaps scandals; the old honor system would have to be changed; standards would be lowered to those of other coeducational schools; and the glorious reputation of the university, as a school for men, would be trailed in the dust." 2 History of Women's Education 255.

Ultimately, in 1970, "the most prestigious institution of higher education in Virginia," the University of Virginia, introduced coeducation **[***755]** and, in 1972, began to admit women on an equal basis with **[****45]** men. See

[Kirstein v. Rector and Visitors of Univ. of Virginia, 309 F. Supp. 184, 186 \(ED Va. 1970\)](#). A three-judge Federal District Court confirmed: "Virginia may not now deny to women, on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the State." *Id.*, at 187.

Virginia describes the current absence of public single-sex higher education for women as "an historical anomaly." Brief for Cross-Petitioners 30. But the historical record indicates action more deliberate than anomalous: First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation. The state legislature, prior to the advent of this controversy, had repealed "all Virginia statutes requiring individual institutions to admit only men or women." [766 F. Supp., at 1419](#). And in 1990, an official commission, "legislatively established to chart the future goals of higher education in Virginia," reaffirmed the policy "of affording broad access" while maintaining "autonomy **[****46]** and diversity." [976 F.2d, at 898-899](#) (quoting Report of the Virginia Commission on the University of the 21st Century). Significantly, the Commission reported:

"Because colleges and universities provide opportunities for students to develop values and learn from role **[*539]** models, it is extremely important that they deal with faculty, staff, and students without regard to sex, race, or ethnic origin." *Id.*, at 899 (emphasis supplied by Court of Appeals deleted).

This statement, the Court of Appeals observed, "is the only explicit one that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions." *Ibid.*

Our 1982 decision in *Mississippi Univ. for Women* prompted VMI to reexamine its male-only admission policy. See [766 F. Supp., at 1427-1428](#). Virginia relies on that reexamination as a legitimate

¹⁰ Virginia's Superintendent of Public Instruction dismissed the coeducational idea as "repugnant to the prejudices of the people" and proposed a female college similar in quality to Girton, Smith, or Vassar. 2 History of Women's Education 254 (quoting Dept. of Interior, 1 Report of Commissioner of Education, H. R. Doc. No. 5, 58th Cong., 2d Sess., 438 (1904)).

basis for maintaining VMI's single-sex character. See Reply Brief for Cross-Petitioners 6. A Mission Study Committee, appointed by the VMI Board of Visitors, studied the problem from October 1983 until May 1986, and in that month counseled against "change of VMI status [****47] as a single-sex college." See [766 F. Supp. at 1429](#) (internal quotation marks [**2279] omitted). Whatever internal purpose the Mission Study Committee served -- and however well meaning the framers of the report -- we can hardly extract from that effort any commonwealth policy evenhandedly to advance diverse educational options. As the District Court observed, the Committee's analysis "primarily focused on anticipated difficulties in attracting females to VMI," and the report, overall, supplied "very little indication of how the conclusion was reached." *Ibid.*

[LEdHN\[1G\]](#) [1G]In sum, we find no persuasive evidence in this record that VMI's male-only admission policy "is in furtherance of a state policy of 'diversity.'" See [976 F.2d, at 899](#). No such policy, the Fourth Circuit observed, can be discerned from the movement of all other public colleges and universities in Virginia away from single-sex education. See *ibid.* That court also questioned "how one institution with autonomy, but with no authority over any other state institution, can give effect to a state [***756] policy of diversity among institutions." *Ibid.* A purpose genuinely to advance an array [****48] of educational [*540] options, as the Court of Appeals recognized, is not served by VMI's historic and constant plan -- a plan to "afford a unique educational benefit only to males." *Ibid.* However "liberally" this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not *equal* protection.

B

[LEdHN\[1H\]](#) [1H]Virginia next argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women. Alterations to accommodate women

would necessarily be "radical," so "drastic," Virginia asserts, as to transform, indeed "destroy," VMI's program. See Brief for Cross-Petitioners 34-36. Neither sex would be favored by the transformation, Virginia maintains: Men would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would "eliminate the very aspects of [the] program that distinguish [VMI] from . . . other institutions of higher education in Virginia." *Id.*, at 34.

The District Court forecast from expert witness testimony, and the Court of Appeals accepted, that coeducation would materially affect "at least these [****49] three aspects of VMI's program -- physical training, the absence of privacy, and the adversative approach." [976 F.2d, at 896-897](#). And it is uncontested that women's admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. See Brief for Cross-Respondent 11, 29-30. It is also undisputed, however, that "the VMI methodology could be used to educate women." [852 F. Supp., at 481](#). The District Court even allowed that some women may prefer it to the methodology a women's college might pursue. See *ibid.* "Some women, at least, would want to attend [VMI] if they had the opportunity," the District Court recognized, [766 F. Supp., at 1414](#), and "some women," the expert testimony established, "are [*541] capable of all of the individual activities required of VMI cadets," *id.*, at 1412. The parties, furthermore, agree that "some women can meet the physical standards [VMI] now impose[s] on men." [976 F.2d, at 896](#). In sum, as the Court of Appeals stated, "neither the goal of producing citizen soldiers," VMI's *raison d'etre*, "nor VMI's implementing [****50] methodology is inherently unsuitable to women." *Id.*, at 899.

In support of its initial judgment for Virginia, a judgment rejecting all equal protection objections presented by the United States, the District Court made "findings" on "gender-based developmental

differences." [766 F. Supp., at 1434-1435](#). These "findings" restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female "tendencies." *Id.*, at 1434. For example, "males tend to need an atmosphere of adversativeness," while "females tend to thrive in a cooperative atmosphere." *Ibid.* "I'm not saying that some women don't do well under [the] adversative model," VMI's expert on educational institutions testified, "undoubtedly there are some [women] who do"; but educational experiences must be designed "around the rule," this expert maintained, and not "around the exception." *Ibid.* (internal quotation marks omitted).

[***757] [****2280**] The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and again since this [******51**] Court's turning point decision in [Reed v. Reed, 404 U.S. 71, 30 L. Ed. 2d 225, 92 S. Ct. 251 \(1971\)](#), we have cautioned reviewing courts [HN8](#) to take a "hard look" at generalizations or "tendencies" of the kind pressed by Virginia, and relied upon by the District Court. See O'Connor, Portia's Progress, [66 N. Y. U. L. Rev. 1546, 1551 \(1991\)](#). State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." [Mississippi Univ. for Women, 458 U.S. at 725](#); see *J. E. B.*, 511 U.S. at 139, n. 11 (equal protection principles, as applied to gender classifications, mean [***542**] state actors may not rely on "overbroad" generalizations to make "judgments about people that are likely to . . . perpetuate historical patterns of discrimination").

It may be assumed, for purposes of this decision, that most women would not choose VMI's adversative method. As Fourth Circuit Judge Motz observed, however, in her dissent from the [******52**] Court of Appeals' denial of rehearing en banc, it is also probable that "many men would not want to be educated in such an environment." [52 F.3d, at 93](#). (On that point, even our dissenting

colleague might agree.) Education, to be sure, is not a "one size fits all" business. The issue, however, is not whether "women -- or men -- should be forced to attend VMI"; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords. *Ibid.*

The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, ¹¹ is a judgment hardly proved, ¹² a prediction [***543**] hardly different from other "self-fulfilling prophec[ies]," see [Mississippi Univ. for Women, 458 U.S. at 730](#), once routinely used to deny rights or [*****758**] opportunities. When women first sought admission to the bar and access to legal education, concerns of the same order were expressed. For example, in 1876, the Court of

¹¹ See *post*, at 566, 598-599, 603. Forecasts of the same kind were made regarding admission of women to the federal military academies. See, e. g., Hearings on H. R. 9832 et al. before Subcommittee No. 2 of the House Committee on Armed Services, 93d Cong., 2d Sess., 137 (1975) (statement of Lt. Gen. A. P. Clark, Superintendent of U.S. Air Force Academy) ("It is my considered judgment that the introduction of female cadets will inevitably erode this vital atmosphere."); *id.*, at 165 (statement of Hon. H. H. Callaway, Secretary of the Army) ("Admitting women to West Point would irrevocably change the Academy. . . . The Spartan atmosphere -- which is so important to producing the final product -- would surely be diluted, and would in all probability disappear.").

¹² See [766 F. Supp., at 1413](#) (describing testimony of expert witness David Riesman: "If VMI were to admit women, it would eventually find it necessary to drop the adversative system altogether, and adopt a system that provides more nurturing and support for the students."). Such judgments have attended, and impeded, women's progress toward full citizenship stature throughout our Nation's history. Speaking in 1879 in support of higher education for females, for example, Virginia State Senator C. T. Smith of Nelson recounted that legislation proposed to protect the property rights of women had encountered resistance. 10 Educ. J. Va. 213 (1879). A Senator opposing the measures objected that "there [was] no formal call for the [legislation]," and "depicted in burning eloquence the terrible consequences such laws would produce." *Ibid.* The legislation passed, and a year or so later, its sponsor, C. T. Smith, reported that "not one of [the forecast "terrible consequences"] has or ever will happen, even unto the sounding of Gabriel's trumpet." *Ibid.* See also [supra](#), at 537-538.

Common Pleas of Hennepin County, Minnesota, explained why women were thought ineligible for [****53] the practice of law. Women train and educate the young, the court said, which

"forbids that they shall bestow that time (early and late) and labor, so essential in attaining to the eminence to which the true lawyer should ever aspire. It cannot therefore be said that the opposition of courts to the admission of females to practice . . . is to any extent the outgrowth of . . . 'old fogyism[.]' . . . It arises rather from a comprehension of the magnitude of the responsibilities connected with the successful [**2281] practice of law, and a desire to *grade up* the profession." In re Application of Martha Angle Dorsett to Be Admitted to Practice as Attorney and Counselor at Law (Minn. C. P. Hennepin Cty., 1876), in *The Syllabi*, Oct. 21, 1876, pp. 5, 6 (emphasis added).

A like fear, according to a 1925 report, accounted for Columbia Law School's resistance to women's admission, although

"the faculty . . . never maintained that women could not master legal learning No, its argument has been . . . more practical. If women were admitted to [*544] the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates [****54] of our great universities would go to the Harvard Law School!" *The Nation*, Feb. 18, 1925, p. 173.

[****55] Medical faculties similarly resisted men and women as partners in the study of medicine. See R. Morantz-Sanchez, *Sympathy and Science: Women Physicians in American Medicine* 51-54, 250 (1985); see also M. Walsh, "Doctors Wanted: No Women Need Apply" 121-122 (1977) (quoting E. Clarke, *Medical Education of Women*, 4 *Boston Med. & Surg. J.* 345, 346 (1869) ("God forbid that I should ever see men and women aiding each other to display with the scalpel the secrets of the reproductive system")); cf. [supra](#), at 536-537,

[n. 9](#). More recently, women seeking careers in policing encountered resistance based on fears that their presence would "undermine male solidarity," see F. Heidensohn, *Women in Control?* 201 (1992); deprive male partners of adequate assistance, see [id.](#), at 184-185; and lead to sexual misconduct, see C. Milton et al., *Women in Policing* 32-33 (1974). Field studies did not confirm these fears. See Heidensohn, *supra*, at 92-93; P. Bloch & D. Anderson, *Policewomen on Patrol: Final Report* (1974).

Women's successful entry into the federal military academies,¹³ and their participation in the Nation's military forces,¹⁴ [****57] indicate that Virginia's fears for the future [****56] of VMI [*545] may [***759] not be solidly grounded.¹⁵ The Commonwealth's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, cannot rank as "exceedingly persuasive," as we have explained and applied that standard.

Virginia and VMI trained their argument on "means" rather than "end," and thus misperceived

¹³ Women cadets have graduated at the top of their class at every federal military academy. See Brief for Lieutenant Colonel Rhonda Cornum et al. as *Amici Curiae* 11, n. 25; cf. Defense Advisory Committee on Women in the Services, *Report on the Integration and Performance of Women at West Point* 64 (1992).

¹⁴ Brief for Lieutenant Colonel Rhonda Cornum, *supra*, at 5-9 (reporting the vital contributions and courageous performance of women in the military); see Mintz, *President Nominates 1st Woman to Rank of Three-Star General*, *Washington Post*, Mar. 27, 1996, p. A19, col. 1 (announcing President's nomination of Marine Corps Major General Carol Mutter to rank of Lieutenant General; Mutter will head corps manpower and planning); Tousignant, *A New Era for the Old Guard*, *Washington Post*, Mar. 23, 1996, p. C1, col. 2 (reporting admission of Sergeant Heather Johnsen to elite Infantry unit that keeps round-the-clock vigil at Tomb of the Unknowns in Arlington National Cemetery).

¹⁵ Inclusion of women in settings where, traditionally, they were not wanted inevitably entails a period of adjustment. As one West Point cadet squad leader recounted: "The classes of '78 and '79 see the women as women, but the classes of '80 and '81 see them as classmates." U.S. Military Academy, A. Vitters, *Report of Admission of Women (Project Athena II)* 84 (1978) (internal quotation marks omitted).

our precedent. Single-sex education at VMI serves an "important governmental objective," they maintained, and exclusion of women is not only "substantially related," it is essential to that objective. By this notably circular argument, the "straightforward" test *Mississippi Univ. for Women* described, see [458 U.S. at 724-725](#), was bent and bowed.

The Commonwealth's misunderstanding and, in turn, the District Court's, is apparent from VMI's mission: to produce "citizen-soldiers," individuals

"imbued with love of learning, confident in the functions and attitudes of leadership, possessing [****58] a high sense of public service, advocates of the American democracy and free enterprise system, and ready [**2282] . . . to defend their country in time of national peril." [766 F. Supp., at 1425](#) (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16, 1986).

Surely that goal is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men. Just as surely, the Commonwealth's [*546] great goal is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the Commonwealth's premier "citizen-soldier" corps.¹⁶ Virginia, in sum, "has fallen far short of establishing the 'exceedingly persuasive justification,'" [Mississippi Univ. for Women, 458 U.S. at 731](#), that must be the solid base for any gender-defined classification.

¹⁶VMI has successfully managed another notable change. The school admitted its first African-American cadets in 1968. See The VMI Story 347-349 (students no longer sing "Dixie," salute the Confederate flag or the tomb of General Robert E. Lee at ceremonies and sports events). As the District Court noted, VMI established a program on "retention of black cadets" designed to offer academic and social-cultural support to "minority members of a dominantly white and tradition-oriented student body." [766 F. Supp., at 1436-1437](#). The school maintains a "special recruitment program for blacks" which, the District Court found, "has had little, if any, effect on VMI's method of accomplishing its mission." [Id., at 1437](#).

[****59] VI

[LEdHN\[2C\]](#) [2C]In the second phase of the litigation, Virginia presented its remedial plan -- maintain VMI as a male-only college and create VWIL as a separate program for women. The plan met District Court approval. The Fourth Circuit, in turn, deferentially reviewed the Commonwealth's proposal and decided that the two single-sex programs directly served Virginia's[***760] reasserted purposes: single-gender education, and "achieving the results of an adversative method in a military environment." See [44 F.3d, at 1236, 1239](#). Inspecting the VMI and VWIL educational programs to determine whether they "afforded to both genders benefits comparable in substance, [if] not in form and detail," [id., at 1240](#), the Court of Appeals concluded that Virginia had arranged for men and women opportunities "sufficiently comparable" to survive equal protection evaluation, [id., at 1240-1241](#). The United States challenges this "remedial" ruling as pervasively misguided.

[*547] A

[HN9](#) A remedial decree, this Court has said, must closely fit the constitutional violation; [****60] it must be shaped to place persons unconstitutionally denied an opportunity or advantage in "the position they would have occupied in the absence of [discrimination]." See [Milliken v. Bradley, 433 U.S. 267, 280, 53 L. Ed. 2d 745, 97 S. Ct. 2749 \(1977\)](#) (internal quotation marks omitted). The constitutional violation in this case is the categorical exclusion of women from an extraordinary educational opportunity afforded men. A proper remedy for an unconstitutional exclusion, we have explained, aims to "eliminate [so far as possible] the discriminatory effects of the past" and to "bar like discrimination in the future." [Louisiana v. United States, 380 U.S. 145, 154, 13 L. Ed. 2d 709, 85 S. Ct. 817 \(1965\)](#).

Virginia chose not to eliminate, but to leave untouched, VMI's exclusionary policy. For women only, however, Virginia proposed a separate

program, different in kind from VMI and unequal in tangible and intangible facilities.¹⁷ Having violated the Constitution's equal protection requirement, Virginia was obliged to show that its remedial proposal "directly addressed and related [****2283**] to" the violation, see *Milliken*, 433 U.S. at 282, [******61**] i. e., the equal protection denied to women ready, willing, and able to benefit from educational [***548**] opportunities of the kind VMI offers. Virginia described VWIL as a "parallel program," and asserted that VWIL shares VMI's mission of producing "citizen-soldiers" and VMI's goals of providing "education, military training, mental and physical discipline, character . . . and leadership development." Brief for Respondents 24 (internal quotation marks omitted). If the VWIL program could not "eliminate the discriminatory effects of the past," could it at least "bar like discrimination in the future"? See *Louisiana*, 380 U.S. at 154. A comparison of the programs said to be "parallel" informs our answer. In exposing the character of, and differences in, the VMI and VWIL programs, we recapitulate facts earlier presented. See [*****761**] *supra*, at 520-523, 526-527.

[******62**] VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. See 766 F. Supp., at 1413-1414 ("No other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI.");

¹⁷ As earlier observed, see *supra*, at 529, Judge Phillips, in dissent, measured Virginia's plan against a paradigm arrangement, one that "could survive equal protection scrutiny": single-sex schools with "substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, . . . faculty[,], and library resources." 44 F.3d 1229, 1250 (CA4 1995). Cf. *Bray v. Lee*, 337 F. Supp. 934 (Mass. 1972) (holding inconsistent with the *Equal Protection Clause* admission of males to Boston's Boys Latin School with a test score of 120 or higher (up to a top score of 200) while requiring a score, on the same test, of at least 133 for admission of females to Girls Latin School, but not ordering coeducation). Measuring VMI/VWIL against the paradigm, Judge Phillips said, "reveals how far short the [Virginia] plan falls from providing substantially equal tangible and intangible educational benefits to men and women." 44 F.3d, at 1250.

id., at 1421 (VMI "is known to be the most challenging military school in the United States"). Instead, the VWIL program "deemphasize[s]" military education, 44 F.3d, at 1234, and uses a "cooperative method" of education "which reinforces self-esteem," 852 F. Supp., at 476.

VWIL students participate in ROTC and a "largely ceremonial" Virginia Corps of Cadets, see 44 F.3d, at 1234, but Virginia deliberately did not make VWIL a military institute. The VWIL House is not a military-style residence and VWIL students need not live together throughout the 4-year program, eat meals together, or wear uniforms during the school day. See 852 F. Supp., at 477, 495. VWIL students thus do not experience the "barracks" life "crucial to the VMI experience," the spartan living arrangements designed to foster an "egalitarian ethic." See [******63**] 766 F. Supp., at 1423-1424. "The most important aspects of the VMI educational experience occur in the barracks," the District Court [***549**] found, *id.*, at 1423, yet Virginia deemed that core experience nonessential, indeed inappropriate, for training its female citizen-soldiers.

VWIL students receive their "leadership training" in seminars, externships, and speaker series, see 852 F. Supp., at 477, episodes and encounters lacking the "physical rigor, mental stress, . . . minute regulation of behavior, and indoctrination in desirable values" made hallmarks of VMI's citizen-soldier training, see 766 F. Supp., at 1421.¹⁸ Kept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training, see *id.*, at 1422, VWIL students will not know the "feeling of tremendous accomplishment" commonly experienced by VMI's successful cadets, *id.*, at 1426.

¹⁸ Both programs include an honor system. Students at VMI are expelled forthwith for honor code violations, see 766 F. Supp., at 1423; the system for VWIL students, see 852 F. Supp., at 496-497, is less severe, see Tr. 414-415 (testimony of Mary Baldwin College President Cynthia Tyson).

[****64] Virginia maintains that these methodological differences are "justified pedagogically," based on "important differences between men and women in learning and developmental needs," "psychological and sociological differences" Virginia describes as "real" and "not stereotypes." Brief for Respondents 28 (internal quotation marks omitted). The Task Force charged with developing the leadership program for women, drawn from the staff and faculty at Mary Baldwin College, "determined that a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training *most women*." [852 F. Supp., at 476](#) (emphasis added). See also [44 F.3d, at 1233-1234](#) (noting Task Force conclusion that, while "some women would be suited to and interested in [a VMI-style experience]," VMI's adversative method "would not be effective for *women as a group*") (emphasis added). The Commonwealth [*550] embraced [****762] the Task Force view, as did expert witnesses who testified for Virginia. See [852 F. Supp., at 480-481](#).

[LEdHN\[2D\]](#) [2D] [LEdHN\[8\]](#) [8] [**2284] As earlier stated, see [supra, at 541-542](#), generalizations about "the way women are," estimates [****65] of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. Notably, Virginia never asserted that VMI's method of education suits *most men*. It is also revealing that Virginia accounted for its failure to make the VWIL experience "the entirely militaristic experience of VMI" on the ground that VWIL "is planned for women who do not necessarily expect to pursue military careers." [852 F. Supp., at 478](#). By that reasoning, VMI's "entirely militaristic" program would be inappropriate for men in general or *as a group*, for "only about 15% of VMI cadets enter career military service." See [766 F. Supp., at 1432](#).

[LEdHN\[2E\]](#) [2E] [LEdHN\[9\]](#) [9] In contrast to the generalizations about women on which Virginia rests, we note again these dispositive realities:

VMI's "implementing methodology" is not "inherently unsuitable to women," [976 F.2d, at 899](#); "some women . . . do well under [the] adversative model," [766 F. Supp., at 1434](#) (internal quotation marks omitted); "some women, at least, would want to attend [VMI] if they had the opportunity," [id., at 1414](#); [****66] "some women are capable of all of the individual activities required of VMI cadets," [id., at 1412](#), and "can meet the physical standards [VMI] now impose[s] on men," [976 F.2d, at 896](#). It is on behalf of these women that the United States has instituted this suit, and it is for them that a remedy must be crafted,¹⁹ a remedy that will end their [*551] exclusion from a state-supplied educational opportunity for which they are fit, a decree that will "bar like discrimination in the future." [Louisiana, 380 U.S. at 154](#).

[****67] B

[LEdHN\[2G\]](#) [2G] In myriad respects other than military training, VWIL does not qualify as VMI's equal. VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network.

¹⁹ [LEdHN\[2F\]](#) [2F]

Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs. See Brief for Petitioner 27-29; cf. note following 10 U.S.C. § 4342 (academic and other standards for women admitted to the Military, Naval, and Air Force Academies "shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals"). Experience shows such adjustments are manageable. See U.S. Military Academy, A. Vitters, N. Kinzer, & J. Adams, Report of Admission of Women (Project Athena I-IV) (1977-1980) (4-year longitudinal study of the admission of women to West Point); Defense Advisory Committee on Women in the Services, Report on the Integration and Performance of Women at West Point 17-18 (1992).

Mary Baldwin College, whose degree VWIL students will gain, enrolls first-year women with an average combined SAT score about 100 points lower than the average score for VMI freshmen. [852 F. Supp., at 501](#). The Mary Baldwin faculty holds "significantly fewer Ph. D.'s," [id., at 502](#), and receives substantially lower salaries, see Tr. 158 (testimony of James Lott, Dean of Mary Baldwin College), than the faculty at VMI. [***763]

Mary Baldwin does not offer a VWIL student the range of curricular choices available to a VMI cadet. VMI awards baccalaureate degrees in liberal arts, biology, chemistry, civil engineering, electrical and computer engineering, and mechanical engineering. See [852 F. Supp., at 503](#); Virginia Military Institute: More than an Education 11 (Govt. exh. 75, [*552] lodged with Clerk of this Court). VWIL [****68] students attend a school that "does not have a math and science focus," [852 F. Supp., at 503](#); they cannot take at Mary Baldwin any courses in engineering or the advanced math and physics courses VMI offers, see [id., at 477](#).

For physical training, Mary Baldwin has "two multi-purpose fields" and "one gymnasium." [Id., at 503](#). VMI has "an NCAA competition level indoor track and field facility; a number of multi-purpose fields; baseball, soccer and lacrosse fields; an obstacle course; large boxing, wrestling and martial arts facilities; an 11-laps-to-the-mile indoor [**2285] running course; an indoor pool; indoor and outdoor rifle ranges; and a football stadium that also contains a practice field and outdoor track." *Ibid.*

Although Virginia has represented that it will provide equal financial support for in-state VWIL students and VMI cadets, [id., at 483](#), and the VMI Foundation has agreed to endow VWIL with \$ 5.4625 million, [id., at 499](#), the difference between the two schools' financial reserves is pronounced. Mary Baldwin's endowment, currently about \$ 19 million, will gain an additional \$ 35 million [****69] based on future commitments;

VMI's current endowment, \$ 131 million -- the largest public college per-student endowment in the Nation -- will gain \$ 220 million. [Id., at 503](#).

The VWIL student does not graduate with the advantage of a VMI degree. Her diploma does not unite her with the legions of VMI "graduates [who] have distinguished themselves" in military and civilian life. See [976 F.2d, at 892-893](#). "[VMI] alumni are exceptionally close to the school," and that closeness accounts, in part, for VMI's success in attracting applicants. See [766 F. Supp., at 1421](#). A VWIL graduate cannot assume that the "network of business owners, corporations, VMI graduates and non-graduate employers . . . interested in hiring VMI graduates," [852 F. Supp., at 499](#), will be equally responsive to her search for employment, [*553] see [44 F.3d, at 1250](#) (Phillips, J., dissenting) ("the powerful political and economic ties of the VMI alumni network cannot be expected to open" for graduates of the fledgling VWIL program).

Virginia, in sum, while maintaining VMI for men only, has failed to provide any "comparable single-gender women's [****70] institution." [Id., at 1241](#). Instead, the Commonwealth has created a VWIL program fairly appraised as a "pale shadow" of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence. See [id., at 1250](#) (Phillips, J., dissenting).

Virginia's VWIL solution is reminiscent of the remedy Texas proposed 50 years ago, in response to a state trial court's 1946 ruling that, given the equal protection guarantee, African Americans could not be denied a legal education at a state facility. See [Sweatt v. Painter, 339 U.S. 629, 94 L. Ed. 1114, \[***764\] 70 S. Ct. 848 \(1950\)](#). Reluctant to admit African Americans to its flagship University of Texas Law School, the State set up a separate school for Heman Sweatt and other black law students. [Id., at 632](#). As originally opened, the new school had no independent faculty or library, and it lacked accreditation. [Id., at 633](#).

Nevertheless, the state trial and appellate courts were satisfied that the new school offered Sweatt opportunities for the study of law "substantially equivalent to those offered by the State [****71] to white students at the University of Texas." *Id.*, at 632 (internal quotation marks omitted).

Before this Court considered the case, the new school had gained "a faculty of five full-time professors; a student body of 23; a library of some 16,500 volumes serviced by a full-time staff; a practice court and legal aid association; and one alumnus who had become a member of the Texas Bar." *Id.*, at 633. This Court contrasted resources at the new school with those at the school from which Sweatt had been excluded. The University of Texas Law School had a full-time faculty of 16, a student body of 850, a library containing over [*554] 65,000 volumes, scholarship funds, a law review, and moot court facilities. *Id.*, at 632-633.

More important than the tangible features, the Court emphasized, are "those qualities which are incapable of objective measurement but which make for greatness" in a school, including "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." *Id.*, at 634. Facing the marked differences reported in the [****72] *Sweatt* opinion, the Court unanimously ruled that Texas had not shown "substantial equality in the [separate] educational opportunities" the State offered. *Id.*, at 633. Accordingly, the Court held, the *Equal Protection Clause* required Texas to admit African Americans to the University of Texas Law School. *Id.*, at [**2286] 636. In line with *Sweatt*, we rule here that Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supports at VWIL and VMI.

C

When Virginia tendered its VWIL plan, the Fourth Circuit did not inquire whether the proposed remedy, approved by the District Court, placed

women denied the VMI advantage in "the position they would have occupied in the absence of [discrimination]." *Milliken*, 433 U.S. at 280 (internal quotation marks omitted). Instead, the Court of Appeals considered whether the Commonwealth could provide, with fidelity to the equal protection principle, separate and unequal educational programs for men and women.

The Fourth Circuit acknowledged that "the VWIL degree from Mary Baldwin College lacks the historical benefit and prestige of [****73] a degree from VMI." 44 F.3d, at 1241. The Court of Appeals further observed that VMI is "an ongoing and successful institution with a long history," and there remains no "comparable single-gender women's institution." *Ibid.* Nevertheless, the appeals court declared the substantially different and significantly unequal VWIL program satisfactory. [*555] The court reached that result by revising the applicable standard of review. The Fourth Circuit displaced the standard developed in our precedent, see *supra*, at 532-534, [****765] and substituted a standard of its own invention.

We have earlier described the deferential review in which the Court of Appeals engaged, see *supra*, at 528-529, a brand of review inconsistent with the more exacting standard our precedent requires, see *supra*, at 532-534. Quoting in part from *Mississippi Univ. for Women*, the Court of Appeals candidly described its own analysis as one capable of checking a legislative purpose ranked as "pernicious," but generally according "deference to [the] legislative will." 44 F.3d, at 1235, 1236. Recognizing that it had extracted from our decisions a test yielding "little [****74] or no scrutiny of the effect of a classification directed at [single-gender education]," the Court of Appeals devised another test, a "substantive comparability" inquiry, *id.*, at 1237, and proceeded to find that new test satisfied, *id.*, at 1241.

The Fourth Circuit plainly erred in exposing Virginia's VWIL plan to a deferential analysis, for *HN10* "all gender-based classifications today"

warrant "heightened scrutiny." See *J. E. B.*, 511 U.S. at 136. Valuable as VWIL may prove for students who seek the program offered, Virginia's remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade. See *supra*, at 549-554.²⁰ In **[**2287]** sum, Virginia's **[*556]** remedy does not match the constitutional violation; the Commonwealth has shown no "exceedingly persuasive justification" for withholding from women qualified for the experience premier training of the kind VMI affords.

[**75]** VII

[LEdHN\[1I\]](#) [1I] [LEdHN\[2H\]](#) [2H]A generation ago, "the authorities controlling Virginia higher

education," despite long established tradition, agreed "to innovate and favorably entertained the [then] **[***766]** relatively new idea that there must be no discrimination by sex in offering educational opportunity." *Kirstein*, 309 F. Supp., at 186. Commencing in 1970, Virginia opened to women "educational opportunities at the Charlottesville campus that [were] not afforded in other [state-operated] institutions." *Id.*, at 187; see *supra*, at 538. A federal court approved the Commonwealth's innovation, emphasizing that the University of Virginia "offered courses of instruction . . . not available elsewhere." 309 F. Supp., at 187. The court further noted: "There exists at Charlottesville a 'prestige' factor **[*557]** [not paralleled in] other Virginia educational institutions." *Ibid.*

VMI, too, offers an educational opportunity no other Virginia institution provides, and the school's "prestige" -- associated with its success in developing "citizen-soldiers" -- is unequalled. Virginia has closed this facility to its daughters and, instead, has devised for **[****76]** them a "parallel program," with a faculty less impressively credentialed and less well paid, more limited course offerings, fewer opportunities for military training and for scientific specialization. Cf. *Sweatt*, 339 U.S. at 633. VMI, beyond question, "possesses to a far greater degree" than the VWIL program "those qualities which are incapable of objective measurement but which make for greatness in a . . . school," including "position and influence of the alumni, standing in the community, traditions and prestige." *Id.*, at 634. Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth's obligation to afford them genuinely equal protection.

A prime part of the history of our Constitution, historian Richard Morris recounted, is the story of the extension of constitutional rights and protections to people once ignored or excluded.²¹

²⁰ Virginia's prime concern, it appears, is that "placing men and women into the adversative relationship inherent in the VMI program . . . would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes." 44 F.3d, at 1239; see *supra*, at 540-546. It is an ancient and familiar fear. Compare *In re Lavinia Goodell*, 39 Wis. 232, 246 (1875) (denying female applicant's motion for admission to the bar of its court, Wisconsin Supreme Court explained: "Discussions are habitually necessary in courts of justice, which are unfit for female ears. The habitual presence of women at these would tend to relax the public sense of decency and propriety."), with Levine, Closing Comments, 6 Law & Inequality 41 (1988) (presentation at Eighth Circuit Judicial Conference, Colorado Springs, Colo., July 17, 1987) (footnotes omitted):

"Plato questioned whether women should be afforded equal opportunity to become guardians, those elite Rulers of Platonic society. Ironically, in that most undemocratic system of government, the Republic, women's native ability to serve as guardians was not seriously questioned. The concern was over the wrestling and exercise class in which all candidates for guardianship had to participate, for rigorous physical and mental training were prerequisites to attain the exalted status of guardian. And in accord with Greek custom, those exercise classes were conducted in the nude. Plato concluded that their virtue would clothe the women's nakedness and that Platonic society would not thereby be deprived of the talent of qualified citizens for reasons of mere gender."

For Plato's full text on the equality of women, see 2 The Dialogues of Plato 302-312 (B. Jowett transl., 4th ed. 1953). Virginia, not bound to ancient Greek custom in its "rigorous physical and mental training" programs, could more readily make the accommodations necessary to draw on "the talent of [all] qualified citizens." Cf. *supra*, at 550-551, n. 19.

²¹ R. Morris, *The Forging of the Union, 1781-1789*, p. 193 (1987); see *id.*, at 191, setting out letter to a friend from Massachusetts

VMI's story continued as our comprehension of "We the People" expanded. See [supra](#), at 546, n. 16. [*558] There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance [****77] its capacity to serve the "more perfect Union."

* * *

For the reasons stated, the initial judgment of the Court of [Appeals, 976 F.2d 890 \(CA4 1992\)](#), is [****78] affirmed, the final judgment of the Court of [Appeals, 44 F.3d 1229 \(CA4 1995\)](#), is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS took no part in the consideration or decision of this case.

Concur by: REHNQUIST

Concur

[***767] CHIEF JUSTICE REHNQUIST, concurring in the judgment.

The Court holds first that Virginia violates the [Equal Protection Clause](#) by maintaining the Virginia Military Institute's (VMI's) all-male admissions policy, and second that establishing the Virginia Women's Institute for Leadership (VWIL) program does not remedy that violation. While I

patriot (later second President) John Adams, on the subject of qualifications for voting in his home State:

"It is dangerous to open so fruitful a source of controversy and altercation as would be opened by attempting to alter the qualifications of voters; there will be no end of it. New claims will arise; women will demand a vote; lads from twelve to twenty-one will think their rights not enough attended to; and every man who has not a farthing, will demand an equal voice with any other, in all acts of state. It tends to confound and destroy all distinctions, and prostrate all ranks to one common level." Letter from John Adams to James Sullivan (May 26, 1776), in 9 Works of John Adams 378 (C. Adams ed. 1854).

agree with these conclusions, I disagree with the Court's analysis and so I write separately.

[**2288] I

Two decades ago in [Craig v. Boren, 429 U.S. 190, 197, 50 L. Ed. 2d 397, 97 S. Ct. 451 \(1976\)](#), we announced that "to withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." We have adhered to that standard of scrutiny ever since. See [Califano v. Goldfarb, 430 U.S. 199, 210-211, 51 L. Ed. 2d 270, 97 S. Ct. 1021 \(1977\)](#); [****79] [Califano v. Webster, 430 U.S. 313, 316-317, 51 L. Ed. 2d 360, 97 S. Ct. 1192 \(1977\)](#); [Orr v. Orr, 440 U.S. 268, 279, 59 L. Ed. 2d 306, 99 S. Ct. 1102 \(1979\)](#); [Caban v. Mohammed, 441 U.S. 380, 388, 60 L. Ed. 2d 297, 99 S. Ct. 1760 \(1979\)](#); [Davis v. Passman, 442 U.S. 228, 234-235, 235, n. 9, 60 L. Ed. 2d 846, 99 S. Ct. 2264 \(1979\)](#); [Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273, 60 L. Ed. 2d 870, 99 S. Ct. 2282 \(1979\)](#); [*559] [Califano v. Westcott, 443 U.S. 76, 85, 61 L. Ed. 2d 382, 99 S. Ct. 2655 \(1979\)](#); [Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150, 64 L. Ed. 2d 107, 100 S. Ct. 1540 \(1980\)](#); [Kirchberg v. Feenstra, 450 U.S. 455, 459-460, 67 L. Ed. 2d 428, 101 S. Ct. 1195 \(1981\)](#); [Michael M. v. Superior Court, Sonoma Cty., 450 U.S. 464, 469, 67 L. Ed. 2d 437, 101 S. Ct. 1200 \(1981\)](#); [Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 \(1982\)](#); [Heckler v. Mathews, 465 U.S. 728, 744, 79 L. Ed. 2d 646, 104 S. Ct. 1387 \(1984\)](#); [****80] [J. E. B. v. Alabama ex rel. T. B., 511 U.S. 127, 137, n. 6, 128 L. Ed. 2d 89, 114 S. Ct. 1419 \(1994\)](#). While the majority adheres to this test today, *ante*, at 524, 533, it also says that the Commonwealth must demonstrate an "exceedingly persuasive justification" to support a gender-based classification. See *ante*, at 524, 529, 530, 531, 533, 534, 545, 546, 556. It is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test.

While terms like "important governmental objective" and "substantially related" are hardly models of precision, they have more content and specificity than does the phrase "exceedingly persuasive justification." That phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself. See, e. g., *Feeney*, [supra](#), at 273 ("These precedents dictate that any state law overtly or covertly designed to prefer males over females in public employment require an exceedingly persuasive justification"). To avoid introducing potential confusion, I would have adhered more closely to our traditional, [****81] "firmly established," *Hogan*, [supra](#), at 723; *Heckler*, [supra](#), at 744, standard that a gender-based classification "must bear a close and substantial relationship [***768] to important governmental objectives." *Feeney*, [supra](#), at 273.

Our cases dealing with gender discrimination also require that the proffered purpose for the challenged law be the actual purpose. See *ante*, at 533, 535-536. It is on this ground that the Court rejects the first of two justifications Virginia offers for VMI's single-sex admissions policy, namely, the goal of diversity among its public educational institutions. While I ultimately agree that the Commonwealth [*560] has not carried the day with this justification, I disagree with the Court's method of analyzing the issue.

VMI was founded in 1839, and, as the Court notes, *ante*, at 536-537, admission was limited to men because under the then-prevailing view men, not women, were destined for higher education. However misguided this point of view may be by present-day standards, it surely was not unconstitutional in 1839. The adoption of the [Fourteenth Amendment](#), with its [Equal Protection Clause](#), [****82] was nearly 30 years in the future. The interpretation of the [Equal Protection Clause](#) to require heightened scrutiny for gender discrimination was yet another century away.

Long after the adoption of the [Fourteenth](#)

[Amendment](#), and well into this century, legal distinctions between men and women were thought to raise no question under the [Equal Protection Clause](#). The Court refers to our decision in *Goesaert v. Cleary*, 335 U.S. 464, 93 L. Ed. 163, 69 S. Ct. 198 (1948). Likewise representing that now abandoned view was [**2289] *Hoyt v. Florida*, 368 U.S. 57, 7 L. Ed. 2d 118, 82 S. Ct. 159 (1961), where the Court upheld a Florida system of jury selection in which men were automatically placed on jury lists, but women were placed there only if they expressed an affirmative desire to serve. The Court noted that despite advances in women's opportunities, the "woman is still regarded as the center of home and family life." *Id.*, at 62.

Then, in 1971, we decided *Reed v. Reed*, 404 U.S. 71, 30 L. Ed. 2d 225, 92 S. Ct. 251, which the Court correctly refers to as a seminal case. But its facts have nothing to do with [****83] admissions to any sort of educational institution. An Idaho statute governing the administration of estates and probate preferred men to women if the other statutory qualifications were equal. The statute's purpose, according to the Idaho Supreme Court, was to avoid hearings to determine who was better qualified as between a man and a woman both applying for letters of administration. This Court held that such a rule violated the [Fourteenth Amendment](#) because "a mandatory preference to members of either [*561] sex over members of the other, merely to accomplish the elimination of hearings," was an "arbitrary legislative choice forbidden by the [Equal Protection Clause](#)." *Id.*, at 76. The brief opinion in *Reed* made no mention of either *Goesaert* or *Hoyt*.

Even at the time of our decision in *Reed v. Reed*, therefore, Virginia and VMI were scarcely on notice that its holding would be extended across the constitutional board. They were entitled to believe that "one swallow doesn't make a summer" and await further developments. Those developments were 11 years in coming. In *Mississippi Univ. for Women v. Hogan*, [supra](#), a case actually [****84] [***769] involving a single-sex admissions policy

in higher education, the Court held that the exclusion of men from a nursing program violated the [Equal Protection Clause](#). This holding did place Virginia on notice that VMI's men-only admissions policy was open to serious question.

The VMI Board of Visitors, in response, appointed a Mission Study Committee to examine "the legality and wisdom of VMI's single-sex policy in light of" [Hogan](#). 766 F. Supp. 1407, 1427 (WD Va. 1991). But the committee ended up cryptically recommending against changing VMI's status as a single-sex college. After three years of study, the committee found "no information" that would warrant a change in VMI's status. [Id.](#), at 1429. Even the District Court, ultimately sympathetic to VMI's position, found that "the Report provided very little indication of how [its] conclusion was reached" and that "the one and one-half pages in the committee's final report devoted to analyzing the information it obtained primarily focuses on anticipated difficulties in attracting females to VMI." *Ibid.* The reasons given in the report for not changing the policy were the changes that [****85] admission of women to VMI would require, and the likely effect of those changes on the institution. That VMI would have to change is simply not helpful in addressing the constitutionality of the status after *Hogan*.

[*562] Before this Court, Virginia has sought to justify VMI's single-sex admissions policy primarily on the basis that diversity in education is desirable, and that while most of the public institutions of higher learning in the Commonwealth are coeducational, there should also be room for single-sex institutions. I agree with the Court that there is scant evidence in the record that this was the real reason that Virginia decided to maintain VMI as men only. * But, unlike

the majority, [**2290] I would consider only evidence that postdates our decision in *Hogan*, and would draw no negative inferences from the Commonwealth's actions before that time. I think that after *Hogan*, the Commonwealth was entitled to reconsider its policy with respect to VMI, and not to have earlier justifications, or lack thereof, held against it.

[****86] Even if diversity in educational opportunity were the Commonwealth's actual objective, the Commonwealth's position would still be problematic. The difficulty with its position is that the diversity benefited only one sex; there was single-sex public education available for men at VMI, but no corresponding single-sex public education available for women. When *Hogan* placed Virginia on notice that [*563] VMI's admissions policy possibly was unconstitutional, [***770] VMI could have dealt with the problem by admitting women; but its governing body felt strongly that the admission of women would have seriously harmed the institution's educational approach. Was there something else the Commonwealth could have done to avoid an equal protection violation? Since the Commonwealth did nothing, we do not have to definitively answer that question.

I do not think, however, that the Commonwealth's options were as limited as the majority may imply. The Court cites, without expressly approving it, a statement from the opinion of the dissenting judge in the Court of Appeals, to the effect that the Commonwealth could have "simultaneously opened single-gender undergraduate institutions having [****87] substantially comparable

find that diversity was not the Commonwealth's real reason without suggesting, or having to show, that the real reason was "antifeminism," *post*, at 580. Our cases simply require that the proffered purpose for the challenged gender classification be the actual purpose, although not necessarily recorded. See *ante*, at 533, 535-536. The dissent also says that the interest in diversity is so transparent that having to articulate it is "absurd on its face." *Post*, at 592. Apparently, that rationale was not obvious to the Mission Study Committee which failed to list it among its reasons for maintaining VMI's all-men admissions policy.

*The dissent equates our conclusion that VMI's "asserted interest in promoting diversity" is not "genuine," with a "charge" that the diversity rationale is "a pretext for discriminating against women." *Post*, at 579-580. Of course, those are not the same thing. I do not read the Court as saying that the diversity rationale is a pretext for discrimination, and I would not endorse such a proposition. We may

curricular and extra-curricular programs, funding, physical plant, administration and support services, and faculty and library resources." *Ante*, at 529-530 (internal quotation marks omitted). If this statement is thought to exclude other possibilities, it is too stringent a requirement. VMI had been in operation for over a century and a half, and had an established, successful, and devoted group of alumni. No legislative wand could instantly call into existence a similar institution for women; and it would be a tremendous loss to scrap VMI's history and tradition. In the words of Grover Cleveland's second inaugural address, the Commonwealth faced a condition, not a theory. And it was a condition that had been brought about, not through defiance of decisions construing gender bias under the [Equal Protection Clause](#), but, until the decision in *Hogan*, a condition that had not appeared to offend the Constitution. Had Virginia made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan, it might well have avoided an equal protection violation. I do not believe the Commonwealth was faced with the [****88] stark choice of either admitting women to VMI, on the [*564] one hand, or abandoning VMI and starting from scratch for both men and women, on the other.

But, as I have noted, neither the governing board of VMI nor the Commonwealth took any action after 1982. If diversity in the form of single-sex, as well as coeducational, institutions of higher learning were to be available to Virginians, that diversity had to be available to women as well as to men.

The dissent criticizes me for "disregarding the four all-women's private colleges in Virginia (generously assisted by public funds)." *Post*, at 595. The private women's colleges are treated by the Commonwealth *exactly* as all other private schools are treated, which includes the provision of tuition-assistance grants to Virginia residents. Virginia gives no special support to the women's single-sex education. But obviously, the same is not true for men's education. Had the Commonwealth provided

the kind of support for the private women's schools that it provides for VMI, this may have been a very different case. For in so doing, the Commonwealth would have demonstrated that its interest in providing a single-sex education [****89] for men was to some measure matched by an interest in providing the same opportunity for women.

Virginia offers a second justification for the single-sex admissions policy: maintenance of the adversative method. I agree with the Court that this justification does not serve [***771] an important governmental objective. A State does not have substantial interest in the adversative methodology unless it is pedagogically beneficial. While considerable evidence shows that a single-sex education is [**2291] pedagogically beneficial for some students, see [766 F. Supp., at 1414](#), and hence a State may have a valid interest in promoting that methodology, there is no similar evidence in the record that an adversative method is pedagogically beneficial or is any more likely to produce character traits than other methodologies.

[*565] II

The Court defines the constitutional violation in these cases as "the categorical exclusion of women from an extraordinary educational opportunity afforded to men." *Ante*, at 547. By defining the violation in this way, and by emphasizing that a remedy for a constitutional violation must place the victims of discrimination in "the [****90] position they would have occupied in the absence of [discrimination]," *ibid.*, the Court necessarily implies that the only adequate remedy would be the admission of women to the all-male institution. As the foregoing discussion suggests, I would not define the violation in this way; it is not the "exclusion of women" that violates the [Equal Protection Clause](#), but the maintenance of an all-men school without providing any -- much less a comparable -- institution for women.

Accordingly, the remedy should not necessarily require either the admission of women to VMI or

the creation of a VMI clone for women. An adequate remedy in my opinion might be a demonstration by Virginia that its interest in educating men in a single-sex environment is matched by its interest in educating women in a single-sex institution. To demonstrate such, the Commonwealth does not need to create two institutions with the same number of faculty Ph. D.'s, similar SAT scores, or comparable athletic fields. See *ante*, at 551-552. Nor would it necessarily require that the women's institution offer the same curriculum as the men's; one could be strong in computer science, the other could be strong in liberal [****91] arts. It would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall caliber.

If a State decides to create single-sex programs, the State would, I expect, consider the public's interest and demand in designing curricula. And rightfully so. But the State should avoid assuming demand based on stereotypes; it must not assume *a priori*, without evidence, that there would be [*566] no interest in a women's school of civil engineering, or in a men's school of nursing.

In the end, the women's institution Virginia proposes, VWIL, fails as a remedy, because it is distinctly inferior to the existing men's institution and will continue to be for the foreseeable future. VWIL simply is not, in any sense, the institution that VMI is. In particular, VWIL is a program appended to a private college, not a self-standing institution; and VWIL is substantially underfunded as compared to VMI. I therefore ultimately agree with the Court that Virginia has not provided an adequate remedy.

Dissent by: SCALIA

Dissent

JUSTICE SCALIA, dissenting.

Today the Court shuts down an institution that has

served the people [***772] [****92] of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people. As to facts: It explicitly rejects the finding that there exist "gender-based developmental differences" supporting Virginia's restriction of the "adversative" method to only a men's institution, and the finding that the all-male composition of the Virginia Military Institute (VMI) is essential to that institution's character. As to precedent: It drastically revises our established standards for reviewing sex-based classifications. And as to history: It counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government.

Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed minded they were -- as every age is, including our own, with regard [****93] to matters it cannot guess, because it simply does not [*567] consider them debatable. The [**2292] virtue of a democratic system with a [First Amendment](#) is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter majoritarian preferences of the society's law-trained elite) into our Basic Law. Today it enshrines the notion that no substantial educational value is to be served by

an all-men's military academy -- so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others. Since it is entirely clear that the Constitution of the United States [****94] -- the old one -- takes no sides in this educational debate, I dissent.

I

I shall devote most of my analysis to evaluating the Court's opinion on the basis of our current equal protection jurisprudence, which regards this Court as free to evaluate everything under the sun by applying one of three tests: "rational basis" scrutiny, intermediate scrutiny, or strict scrutiny. These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case. Strict scrutiny, we have said, is reserved for state "classifications based on race or national origin and classifications affecting fundamental rights," [*Clark v. Jeter*, 486 U.S. 456, 461, 100 L. Ed. 2d 465, 108 S. Ct. 1910 \(1988\)](#) (citation omitted). It is my position that the term "fundamental rights" should be limited to "interest[s] traditionally protected by our society," [*Michael H. \[*568\] v. Gerald D.*, 491 U.S. 110, 122, 105 L. Ed. 2d 91, \[***773\] 109 S. Ct. 2333 \(1989\)](#) (plurality opinion of SCALIA, J.); but the Court has not accepted that view, so that strict scrutiny will [****95] be applied to the deprivation of whatever sort of right we consider "fundamental." We have no established criterion for "intermediate scrutiny" either, but essentially apply it when it seems like a good idea to load the dice. So far it has been applied to content-neutral restrictions that place an incidental burden on speech, to disabilities attendant to illegitimacy, and to discrimination on the basis of sex. See, e. g., [*Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662, 129 L. Ed. 2d 497, 114 S. Ct. 2445 \(1994\)](#); [*Mills v. Habluetzel*, 456 U.S. 91, 98-99, 71 L. Ed. 2d 770, 102 S. Ct. 1549 \(1982\)](#); [*Craig v. Boren*, 429 U.S. 190, 197, 50 L. Ed. 2d 397, 97 S. Ct. 451 \(1976\)](#).

I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it). Such formulas are essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with that "equal protection" our society has always accorded in the past. But in my [****96] view the function of this Court is to *preserve* our society's values regarding (among other things) equal protection, not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede -- and indeed ought to be crafted *so as to reflect* -- those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts. More specifically, it is my view that "when a practice not expressly prohibited by the text of the [*Bill of Rights*](#) bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." [*Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95, 111 L. Ed. 2d 52, 110 S. Ct. 2729 \(1990\)](#) (SCALIA, J., [*569] dissenting). The same applies, *mutatis mutandis*, to a practice asserted [**2293] to be in violation of the post-Civil War [*Fourteenth Amendment*](#). See, [****97] e. g., [*Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 109 L. Ed. 2d 631, 110 S. Ct. 2105 \(1990\)](#) (plurality opinion of SCALIA, J.) (Due Process Clause); [*J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 156-163, 128 L. Ed. 2d 89, 114 S. Ct. 1419 \(1994\)](#) (SCALIA, J., dissenting) ([*Equal Protection Clause*](#)); [*Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 979-984, 1000-1001, 120 L. Ed. 2d 674, 112 S. Ct. 2791 \(1992\)](#) (SCALIA, J., dissenting) (various alleged "penumbras").

The all-male constitution of VMI comes squarely

within such a governing tradition. Founded by the Commonwealth of Virginia in 1839 and continuously maintained by it since, VMI has always admitted only men. And in that regard it has not been unusual. For almost all of VMI's more than a century and a half of existence, its single-sex status reflected the uniform practice for government-supported military colleges. Another famous Southern institution, The Citadel, has existed as a state-funded school of South Carolina since 1842. And all the federal military colleges -- West Point, the Naval Academy at Annapolis, and even the Air [****98] Force Academy, which was not established [***774] until 1954 -- admitted only males for most of their history. Their admission of women in 1976 (upon which the Court today relies, see *ante*, at 544-545, nn. 13, 15) came not by court decree, but because the people, through their elected representatives, decreed a change. See, e. g., § 803(a), 89 Stat. 537, note following 10 U.S.C. § 4342. In other words, the tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat. The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law.

And the same applies, more broadly, to single-sex education in general, which, as I shall discuss, is threatened by [*570] today's decision with the cutoff of all state and federal support. Government-run *nonmilitary* educational institutions for the two sexes have until very recently also been part of our national tradition. "[It is] coeducation, [****99] historically, [that] is a novel educational theory. From grade school through high school, college, and graduate and professional training, much of the Nation's population during much of our history has been educated in sexually segregated classrooms." Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 736, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982) (Powell, J., dissenting); see *id.*, at 736-739. These

traditions may of course be changed by the democratic decisions of the people, as they largely have been.

Today, however, change is forced upon Virginia, and reversion to single-sex education is prohibited nationwide, not by democratic processes but by order of this Court. Even while bemoaning the sorry, bygone days of "fixed notions" concerning women's education, see *ante*, at 536-537, and n. 10, 537-539, 542-545, the Court favors current notions so fixedly that it is willing to write them into the Constitution of the United States by application of custom-built "tests." This is not the interpretation of a Constitution, but the creation of one.

II

To reject the Court's disposition today, however, it is not necessary to accept my view that [****100] the Court's made-up tests cannot displace longstanding national traditions as the primary determinant of what the Constitution means. It is only necessary to apply honestly the test the Court has been applying to sex-based classifications for the past two decades. It is well settled, as JUSTICE O'CONNOR stated some time ago for a unanimous Court, that we evaluate a statutory classification based on sex under a standard that lies "between the extremes of rational basis review and strict scrutiny." Clark v. Jeter, 486 U.S. at 461. We have denominated this standard "intermediate scrutiny" and under it have inquired whether the statutory classification is "substantially [*571] related to an important governmental objective." *Ibid.* See, e. g., Heckler v. Mathews, 465 U.S. 728, 744, [***2294] 79 L. Ed. 2d 646, 104 S. Ct. 1387 (1984); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150, 64 L. Ed. 2d 107, 100 S. Ct. 1540 (1980); Craig v. Boren, 429 U.S. at 197. [***775]

Before I proceed to apply this standard to VMI, I must comment upon the manner in which the Court avoids doing so. [****101] Notwithstanding our above-described precedents and their "'firmly established principles,'" Heckler, supra, at 744 (quoting Hogan, supra, at 723), the United States

urged us to hold in this litigation "that strict scrutiny is the correct constitutional standard for evaluating classifications that deny opportunities to individuals based on their sex." Brief for United States in No. 94-2107, p. 16. (This was in flat contradiction of the Government's position below, which was, in its own words, to "state *unequivocally* that the appropriate standard in this case is 'intermediate scrutiny.'" 2 Record, Doc. No. 88, p. 3 (emphasis added).) The Court, while making no reference to the Government's argument, effectively accepts it.

Although the Court in two places recites the test as stated in *Hogan*, see *ante*, at 524, 532-533, which asks whether the State has demonstrated "that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives," [458 U.S. at 724](#) (internal quotation marks omitted), the Court never answers the question [****102] presented in anything resembling that form. When it engages in analysis, the Court instead prefers the phrase "exceedingly persuasive justification" from *Hogan*. The Court's nine invocations of that phrase, see *ante*, at 524, 529, 530, 531, 533, 534, 545, 546, 556, and even its fanciful description of that imponderable as "the core instruction" of the Court's decisions in [J. E. B. v. Alabama ex rel. T. B.](#), [511 U.S. 127](#), [128 L. Ed. 2d 89](#), [114 S. Ct. 1419](#) (1994), and *Hogan*, *supra*, see *ante*, at 531, would be unobjectionable if the Court acknowledged that *whether* a "justification" is "exceedingly persuasive" must be assessed by asking [*572] "[whether] the classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives." Instead, however, the Court proceeds to interpret "exceedingly persuasive justification" in a fashion that contradicts the reasoning of *Hogan* and our other precedents.

That is essential to the Court's result, which can only be achieved by establishing that intermediate

scrutiny is not survived if there [****103] are *some* women interested in attending VMI, capable of undertaking its activities, and able to meet its physical demands. Thus, the Court summarizes its holding as follows:

"In contrast to the generalizations about women on which Virginia rests, we note again these *dispositive* realities: VMI's implementing methodology is not *inherently* unsuitable to women; *some* women do well under the adversative model; *some* women, at least, would want to attend VMI if they had the opportunity; *some* women are capable of all of the individual activities required of VMI cadets and can meet the physical standards VMI now imposes on men." *Ante*, at 550 (internal quotation marks, citations, and punctuation omitted; emphasis added).

[***776] Similarly, the Court states that "the Commonwealth's justification for excluding all women from 'citizen-soldier' training for which some are qualified . . . cannot rank as 'exceedingly persuasive' . . ." *Ante*, at 545.¹

[****104] [*573] Only the amorphous "exceedingly persuasive justification" phrase, and not the [**2295] standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court's reasoning, a single woman) willing and able to

¹ Accord, *ante*, at 541 ("In sum . . . , neither the goal of producing citizen-soldiers, VMI's *raison d'être*, nor VMI's implementing methodology is *inherently unsuitable* to women") (internal quotation marks omitted; emphasis added); *ante*, at 542 ("The question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords"); *ante*, at 547-548 (the "violation" is that "equal protection [has been] denied to women ready, willing, and able to benefit from educational opportunities of the kind VMI offers"); *ante*, at 550 ("As earlier stated, see [supra](#), at [541-542](#), generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description").

undertake VMI's program. Intermediate scrutiny has never required a least-restrictive-means analysis, but only a "substantial relation" between the classification and the state interests that it serves. Thus, in [Califano v. Webster](#), 430 U.S. 313, 51 L. Ed. 2d 360, 97 S. Ct. 1192 (1977) (*per curiam*), we upheld a congressional statute that provided higher Social Security benefits for women than for men. We reasoned that "women . . . as such have been unfairly hindered from earning as much as men," but we did not require proof that each woman so benefited had suffered discrimination or that each disadvantaged man had not; it was sufficient that even under the former congressional scheme "women on the average received lower retirement benefits than men." *Id.*, at 318, and n. 5 [****105] (emphasis added). The reasoning in our other intermediate-scrutiny cases has similarly required only a substantial relation between end and means, not a perfect fit. In [Rostker v. Goldberg](#), 453 U.S. 57, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981), we held that selective-service registration could constitutionally exclude women, because even "assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans." *Id.*, at 81. In [Metro Broadcasting, Inc. v. FCC](#), 497 U.S. 547, 579, 582-583, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990), overruled on other grounds, [Adarand Constructors, Inc. v. Peña](#), 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995), we held that a classification need not be accurate "in every case" to survive intermediate scrutiny so long as, "in the aggregate," it advances the underlying [*574] objective. There is simply no support in our cases for the notion that a sex-based classification is invalid unless it relates to characteristics that hold true in every instance.

[****106] Not content to execute a *de facto* abandonment of the intermediate scrutiny that has been our standard for sex-based classifications for some two decades, the Court purports to reserve the question whether, even [***777] in principle, a higher standard (*i. e.*, strict scrutiny) should apply.

"The Court has," it says, "*thus far* reserved most stringent judicial scrutiny for classifications based on race or national origin . . .," *ante*, at 532, n. 6 (emphasis added); and it describes our earlier cases as having done no more than decline to "equate gender classifications, *for all purposes*, to classifications based on race or national origin," *ante*, at 532 (emphasis added). The wonderful thing about these statements is that they are not actually false -- just as it would not be actually false to say that "our cases have thus far reserved the 'beyond a reasonable doubt' standard of proof for criminal cases," or that "we have not equated tort actions, for all purposes, to criminal prosecutions." But the statements are misleading, insofar as they suggest that we have not already categorically *held* strict scrutiny to be inapplicable to sex-based classifications. [****107] See, *e. g.*, [Heckler v. Mathews](#), 465 U.S. 728, 79 L. Ed. 2d 646, 104 S. Ct. 1387 (1984) (upholding state action after applying *only* intermediate scrutiny); [Michael M. v. Superior Court, Sonoma Cty.](#), 450 U.S. 464, 67 L. Ed. 2d 437, 101 S. Ct. 1200 (1981) (same) (plurality and both concurring opinions); [Califano v. Webster](#), *supra* (same) (*per curiam*). And the statements are irresponsible, insofar as they are calculated to destabilize current law. Our task is to clarify the law -- not to muddy the waters, and not to exact overcompliance by intimidation. The States and the Federal Government are entitled to know *before they act* the standard to which they will be held, rather than be compelled to guess about the outcome of Supreme Court peek-a-boo.

The Court's intimations are particularly out of place because it is perfectly clear that, if the question of the applicable [*575] standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to [**2296] strict scrutiny, but for reducing it to [****108] rational-basis review. The latter certainly has a firmer foundation in our past jurisprudence: Whereas no majority of the Court has ever applied strict scrutiny in a case involving sex-based classifications, we routinely applied

rational-basis review until the 1970's, see, e. g., [*Hoyt v. Florida*, 368 U.S. 57, 7 L. Ed. 2d 118, 82 S. Ct. 159 \(1961\)](#); [*Goesaert v. Cleary*, 335 U.S. 464, 93 L. Ed. 163, 69 S. Ct. 198 \(1948\)](#). And of course normal, rational-basis review of sex-based classifications would be much more in accord with the genesis of heightened standards of judicial review, the famous footnote in [*United States v. Carolene Products Co.*, 304 U.S. 144, 82 L. Ed. 1234, 58 S. Ct. 778 \(1938\)](#), which said (intimately) that we did not have to inquire in the case at hand

"whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." [*Id.*, at 152-153, n. 4.](#)

It is hard to [****109] consider women a "discrete and insular minority" unable to employ the "political processes ordinarily to be relied upon," when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same [***778] paternalism that the Court so roundly condemns. See, e. g., *ante*, at 536-537, 542-545 (and accompanying notes). Moreover, a long list of legislation proves the proposition false. See, e. g., Equal Pay Act of 1963, [29 U.S.C. § 206\(d\)](#); Title VII of the Civil Rights Act of 1964, [42 U.S.C. § 2000e-2](#); Title IX of the Education Amendments of 1972, [20 U.S.C. § 1681](#); Women's Business Ownership Act of 1988, Pub. L. 100-533, 102 Stat. 2689; [*576] Violence Against Women Act of 1994, Pub. L. 103-322, Title IV, 108 Stat. 1902.

III

With this explanation of how the Court has succeeded in making its analysis seem orthodox -- and indeed, if intimations are to be believed, even overly generous to VMI -- I now proceed to describe how the analysis should have been

conducted. The question to be answered, I repeat, is whether the exclusion of [****110] women from VMI is "substantially related to an important governmental objective."

A

It is beyond question that Virginia has an important state interest in providing effective college education for its citizens. That single-sex instruction is an approach substantially related to that interest should be evident enough from the long and continuing history in this country of men's and women's colleges. But beyond that, as the Court of Appeals here stated: "That single-gender education at the college level is beneficial to both sexes is a *fact established in this case*." [44 F.3d 1229, 1238 \(CA4 1995\)](#) (emphasis added).

The evidence establishing that fact was overwhelming -- indeed, "virtually uncontradicted" in the words of the court that received the evidence, [766 F. Supp. 1407, 1415 \(WD Va. 1991\)](#). As an initial matter, Virginia demonstrated at trial that "[a] substantial body of contemporary scholarship and research supports the proposition that, although males and females have significant areas of developmental overlap, they also have differing developmental needs that are deep-seated." [*Id.*, at 1434](#). While no one questioned that for many [****111] students a coeducational environment was nonetheless not inappropriate, that could not obscure the demonstrated benefits of single-sex colleges. For example, the District Court stated as follows:

"One empirical study in evidence, not questioned by any expert, demonstrates that single-sex colleges provide [*577] better educational experiences than coeducational institutions. Students of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience (the sole exception is social life)

compared with their counterparts in coeducational institutions. Attendance at an all-male college substantially increases the likelihood that a student will carry out career plans in law, business **[**2297]** and college teaching, and also has a substantial positive effect on starting salaries in business. Women's colleges increase the chances that those who attend will obtain positions of leadership, complete the baccalaureate degree, and aspire to higher degrees." *Id.*, at 1412.

See also *id.*, at 1434-1435 (factual **[****112]** findings). "In the light of this very **[***779]** substantial authority favoring single-sex education," the District Court concluded that "the VMI Board's decision to maintain an all-male institution is fully justified even without taking into consideration the other unique features of VMI's teaching and training." *Id.*, at 1412. This finding alone, which even this Court cannot dispute, see *ante*, at 535, should be sufficient to demonstrate the constitutionality of VMI's all-male composition.

But besides its single-sex constitution, VMI is different from other colleges in another way. It employs a "distinctive educational method," sometimes referred to as the "adversative, or doubting, model of education." 766 F. Supp., at 1413, 1421. "Physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values are the salient attributes of the VMI educational experience." *Id.*, at 1421. No one contends that this method is appropriate for all individuals; education is not a "one size fits all" business. Just as a State may wish to support junior colleges, vocational **[****113]** institutes, or a law school that emphasizes case **[*578]** practice instead of classroom study, so too a State's decision to maintain within its system one school that provides the adversative method is "substantially related" to its goal of good education. Moreover, it was uncontested that "if the state were to establish a women's VMI-type [*i. e.*, adversative] program, the program would attract an insufficient number of

participants to make the program work," 44 F.3d, at 1241; and it was found by the District Court that if Virginia were to include women in VMI, the school "would eventually find it necessary to drop the adversative system altogether," 766 F. Supp., at 1413. Thus, Virginia's options were an adversative method that excludes women or no adversative method at all.

There can be no serious dispute that, as the District Court found, single-sex education and a distinctive educational method "represent legitimate contributions to diversity in the Virginia higher education system." *Ibid.* As a theoretical matter, Virginia's educational interest would have been *best* served (insofar as the two factors we have mentioned are concerned) by **[****114]** six different types of public colleges -- an all-men's, an all-women's, and a coeducational college run in the "adversative method," and an all-men's, an all-women's, and a coeducational college run in the "traditional method." But as a practical matter, of course, Virginia's financial resources, like any State's, are not limitless, and the Commonwealth must select among the available options. Virginia thus has decided to fund, in addition to some 14 coeducational 4-year colleges, one college that is run as an all-male school on the adversative model: the Virginia Military Institute.

Virginia did not make this determination regarding the make-up of its public college system on the unrealistic assumption that no other colleges exist. Substantial evidence in the District Court demonstrated that the Commonwealth has long proceeded on the principle that "higher education resources should be viewed as a whole -- public and private" **[*579]** -- because such an approach enhances diversity and because "it is academic and economic waste to permit unwarranted duplication." *Id.*, at 1420-1421 (quoting 1974 Report of the General Assembly Commission on Higher Education to **[****115]** the General Assembly of Virginia). It is **[***780]** thus significant that, whereas there are "four all-female private [colleges] in Virginia," there is only "one

private all-male college," which "indicates that the private sector is providing for the [former] form of education to a much greater extent that it provides for all-male education." [766 F. Supp., at 1420-1421](#). In these circumstances, Virginia's election to fund one public all-male institution and one on the adversative model -- and to concentrate its resources in a single entity that serves both these interests in diversity -- is substantially related to the Commonwealth's important educational interests.

[2298] B**

The Court today has no adequate response to this clear demonstration of the conclusion produced by application of intermediate scrutiny. Rather, it relies on a series of contentions that are irrelevant or erroneous as a matter of law, foreclosed by the record in this litigation, or both.

1. I have already pointed out the Court's most fundamental error, which is its reasoning that VMI's all-male composition is unconstitutional because "some women are capable of all of the individual activities [****116] required of VMI cadets," [766 F. Supp., at 1412](#), and would prefer military training on the adversative model. See [supra, at 571-574](#). This unacknowledged adoption of what amounts to (at least) strict scrutiny is without antecedent in our sex-discrimination cases and by itself discredits the Court's decision.

2. The Court suggests that Virginia's claimed purpose in maintaining VMI as an all-male institution -- its asserted interest in promoting diversity of educational options -- is not "genuine," but is a pretext for discriminating against women. *Ante*, at 539; see *ante*, at 535-540. To support this [*580] charge, the Court would have to impute that base motive to VMI's Mission Study Committee, which conducted a 3-year study from 1983 to 1986 and recommended to VMI's Board of Visitors that the school remain all male. The committee, a majority of whose members consisted of non-VMI graduates, "read materials on education and on women in the military," "made site visits to single-sex and newly coeducational

institutions" including West Point and the Naval Academy, and "considered the reasons that other institutions had changed from single-sex to coeducational [****117] status"; its work was praised as "thorough" in the accreditation review of VMI conducted by the Southern Association of Colleges and Schools. See [766 F. Supp., at 1413, 1428](#); see also *id.*, [at 1427-1430](#) (detailed findings of fact concerning the Mission Study Committee). The Court states that "whatever internal purpose the Mission Study Committee served -- and however well meaning the framers of the report -- we can hardly extract from that effort any commonwealth policy evenhandedly to advance diverse educational options." *Ante*, at 539. But whether it is part of the evidence to prove that diversity was the Commonwealth's objective (its short report said nothing on that particular subject) is quite separate from whether it is part of the evidence to prove that antifeminism was *not*. The relevance of the Mission Study Committee is that its very creation, its sober 3-year study, and the analysis it produced utterly refute the claim that VMI has elected to maintain its all-male student-body composition for some misogynistic reason.

[***781] The Court also supports its analysis of Virginia's "actual state purposes" in maintaining VMI's student [****118] body as all male by stating that there is no explicit statement in the record "in which the Commonwealth has expressed itself" concerning those purposes. *Ante*, at 535, 539 (quoting [976 F.2d 890, 899 \(CA4 1992\)](#)); see also *ante*, at 525. That is wrong on numerous grounds. First and foremost, in its implication that such an explicit statement of "actual purposes" [*581] is needed. The Court adopts, in effect, the argument of the United States that since the exclusion of women from VMI in 1839 was based on the "assumptions" of the time "that men alone were fit for military and leadership roles," and since "before this litigation was initiated, Virginia never sought to supply a valid, contemporary rationale for VMI's exclusionary policy," "that failure itself renders the VMI policy invalid." Brief for United States in No. 94-2107, at 10. This is an unheard-of doctrine.

Each state decision to adopt or maintain a governmental policy need not be accompanied -- in anticipation of litigation and on pain of being found to lack a relevant state interest -- by a lawyer's contemporaneous recitation of the State's purposes. The Constitution is not some giant Administrative [****119] Procedure Act, which imposes upon the States the obligation to set forth a "statement of basis and purpose" for their sovereign Acts, see [5 U.S.C. § 553\(c\)](#). The situation would be different if what the Court assumes to have been the 1839 policy *had* been enshrined *and remained enshrined* in legislation -- a VMI charter, perhaps, pronouncing that the institution's purpose is to keep women in their place. But since the [**2299] 1839 policy was no more explicitly recorded than the Court contends the present one is, the mere fact that *today's* Commonwealth continues to fund VMI "is enough to answer [the United States'] contention that the [classification] was the 'accidental by-product of a traditional way of thinking about females.'" [Michael M., 450 U.S. at 471, n. 6](#) (plurality opinion) (quoting [Califano v. Webster, 430 U.S. at 320](#)) (internal quotation marks omitted).

It is, moreover, not true that Virginia's contemporary reasons for maintaining VMI are not explicitly recorded. It is hard to imagine a more authoritative source on this subject than the 1990 Report of the Virginia Commission on the University [****120] of the 21st Century (1990 Report). As the parties stipulated, that report "notes that the hallmarks of Virginia's educational policy are 'diversity and autonomy.'" Stipulations [*582] of Fact 37, reprinted in Lodged Materials from the Record 64 (Lodged Materials). It said: "The formal system of higher education in Virginia includes a great array of institutions: state-supported and independent, two-year and senior, research and highly specialized, traditionally black *and single-sex*." 1990 Report, quoted in relevant part at Lodged Materials 64-65 (emphasis added). ² The

Court's only response to this is repeated reliance on the Court [***782] of Appeals' assertion that "'the only explicit [statement] that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions'" (namely, the statement in the 1990 Report that the Commonwealth's institutions must "deal with faculty, staff, and students without regard to sex") had nothing to do with the purpose of diversity. *Ante*, at 525, 539 (quoting [976 F.2d, at 899](#)). This proves, I suppose, that the Court of Appeals did not find a statement dealing with sex and diversity [****121] in the record; but the pertinent question (accepting the need for such a statement) is *whether it was there*. And the plain fact, which the Court does not deny, is that it was.

[****122] [*583] The Court contends that "[a] purpose genuinely to advance an array of educational options . . . is not served" by VMI. *Ante*, at 539-540. It relies on the fact that all of Virginia's *other* public colleges have become coeducational. *Ibid.*; see also *ante*, at 521, n. 2. The apparent theory of this argument is that unless Virginia pursues a great deal of diversity, its pursuit of some diversity must be a sham. This fails to take account of the fact that Virginia's resources cannot support all possible permutations of schools, see [supra, at 578](#), and of the fact that Virginia

demonstrating, by reference to both public and private institutions, that Virginia actively seeks to foster its "rich heritage of pluralism and diversity in higher education," 1969 Report of the Virginia Commission on Constitutional Revision, quoted in relevant part at Lodged Materials 53; that Virginia views "one special characteristic of the Virginia system [as being] its diversity," 1989 Virginia Plan for Higher Education, quoted in relevant part at Lodged Materials 64; and that in the Commonwealth's view "higher education resources should be viewed as a whole -- public and private" because "Virginia needs the diversity inherent in a dual system of higher education," 1974 Report of the General Assembly Commission on Higher Education to the General Assembly of Virginia, quoted in [766 F. Supp. 1407, 1420 \(WD Va. 1991\)](#). See also Budget Initiatives for 1990-1992 of State Council of Higher Education for Virginia 10 (June 21, 1989) (Budget Initiatives), quoted at n. 3, *infra*. It should be noted (for this point will be crucial to my later discussion) that these official reports quoted here, in text and footnote, regard the Commonwealth's educational system -- public *and private* -- as a unitary one.

²This statement is supported by other evidence in the record

coordinates its public educational offerings with the offerings of in-state private educational institutions that the Commonwealth provides money for its residents to attend and otherwise assists -- which include four women's colleges.³

[****123] [**2300] Finally, the Court unreasonably suggests that there is some pretext in Virginia's reliance upon decentralized decisionmaking [*584] to achieve diversity -- its granting of substantial autonomy to each institution with [***783] regard to student-body composition and other matters, see *766 F. Supp., at 1419*. The Court adopts the suggestion of the Court of Appeals that it is not possible for "one institution with autonomy, but with no authority over any other state institution, [to] give effect to a state policy of diversity among institutions." *Ante*, at 539 (internal quotation marks omitted). If it were impossible for individual human beings (or groups of human beings) to act autonomously in effective pursuit of a common goal, the game of soccer would not

exist. And where the goal is diversity in a free market for services, that tends to be achieved even by autonomous actors who act out of entirely selfish interests and make no effort to cooperate. Each Virginia institution, that is to say, has a natural incentive to make itself distinctive in order to attract a particular segment of student applicants. And of course none of the institutions is [****124] *entirely* autonomous; if and when the legislature decides that a particular school is not well serving the interest of diversity -- if it decides, for example, that a men's school is not much needed -- funding will cease.⁴

[****125] [*585] 3. In addition to disparaging Virginia's claim that VMI's single-sex status serves a state interest in diversity, the Court finds fault with Virginia's failure to offer education based on the adversative training method to women. It dismisses the District Court's "'findings' on 'gender-based developmental differences'" on the ground that "these 'findings' restate the opinions of

³The Commonwealth provides tuition assistance, scholarship grants, guaranteed loans, and work-study funds for residents of Virginia who attend private colleges in the Commonwealth. See, e. g., Va. Code Ann. §§ 23-38.11 to 23-38.19 (1993 and Supp. 1995) (Tuition Assistance Grant Act); §§ 23-38.30 to 23-38.44:3 (Virginia Student Assistance Authorities); Va. Code Ann. §§ 23-38.45 to 23-38.53 (1993) (College Scholarship Assistance Act); §§ 23-38.53:1 to 23-38.53:3 (Virginia Scholars Program); §§ 23-38.70, 23-38.71 (Virginia Work-Study Program). These programs involve substantial expenditures: for example, Virginia appropriated \$ 4,413,750 (not counting federal funds it also earmarked) for the College Scholarship Assistance Program for both 1996 and 1997, and for the Tuition Assistance Grant Program appropriated \$ 21,568,000 for 1996 and \$ 25,842,000 for 1997. See 1996 Va. Appropriations Act, ch. 912, pt. 1, § 160.

In addition, as the parties stipulated in the District Court, the Commonwealth provides other financial support and assistance to private institutions -- including single-sex colleges -- through low-cost building loans, state-funded services contracts, and other programs. See, e. g., Va. Code Ann. §§ 23-30.39 to 23-30.58 (1993) (Educational Facilities Authority Act). The State Council of Higher Education for Virginia, in a 1989 document not created for purposes of this litigation but introduced into evidence, has described these various programs as a "means by which the Commonwealth can provide funding to its independent institutions, thereby helping to maintain a diverse system of higher education." Budget Initiatives 10.

⁴The Court, unfamiliar with the Commonwealth's policy of diverse and independent institutions, and in any event careless of state and local traditions, must be forgiven by Virginians for quoting a reference to "'the Charlottesville campus'" of the University of Virginia. See *ante*, at 538. The University of Virginia, an institution even older than VMI, though not as old as another of the Commonwealth's universities, the College of William and Mary, occupies the portion of Charlottesville known, not as the "campus," but as "the grounds." More importantly, even if it were a "campus," there would be no need to specify "the Charlottesville campus," as one might refer to the Bloomington or Indianapolis campus of Indiana University. Unlike university systems with which the Court is perhaps more familiar, such as those in New York (e. g., the State University of New York at Binghamton or Buffalo), Illinois (University of Illinois at Urbana-Champaign or at Chicago), and California (University of California, Los Angeles, or University of California, Berkeley), there is only *one* University of Virginia. It happens (because Thomas Jefferson lived near there) to be located at Charlottesville. To many Virginians it is known, simply, as "the University," which suffices to distinguish it from the Commonwealth's other institutions offering 4-year college instruction, which include Christopher Newport College, Clinch Valley College, the College of William and Mary, George Mason University, James Madison University, Longwood College, Mary Washington University, Norfolk State University, Old Dominion University, Radford University, Virginia Commonwealth University, Virginia Polytechnic Institute and State University, Virginia State University -- and, of course, VMI.

Virginia's expert witnesses, opinions about typically male or typically female 'tendencies.'" *Ante*, at 541 (quoting [766 F. Supp., at 1434-1435](#)). How remarkable to criticize the District Court on the ground that its findings rest on the evidence (*i. e.*, the testimony of Virginia's witnesses)! That is what findings are supposed to do. It is indefensible to tell the Commonwealth that "the burden of justification is demanding and it rests entirely on [you]," *ante*, at 533, and then to ignore the District Court's findings *because* they rest on the evidence put forward by the Commonwealth -- particularly when, as the District Court said, "the evidence in the case . . . is [****2301**] *virtually uncontradicted*," [766 F. Supp., at 1415](#) (emphasis added).

[*****784**] [******126**] Ultimately, in fact, the Court does not deny the evidence supporting these findings. See *ante*, at 541-546. It instead makes evident that the parties to this litigation could have saved themselves a great deal of time, trouble, and expense by omitting a trial. The Court simply dispenses with the evidence submitted at trial -- it never says that a single finding of the District Court is clearly erroneous -- in favor of the Justices' own view of the world, which the Court proceeds to support with (1) references to observations of someone [***586**] who is not a witness, nor even an educational expert, nor even a judge who reviewed the record or participated in the judgment below, but rather a judge who merely dissented from the Court of Appeals' decision not to rehear this litigation en banc, see *ante*, at 542, (2) citations of nonevidentiary materials such as *amicus curiae* briefs filed in this Court, see *ante*, at 544-545, nn. 13, 14, and (3) various historical anecdotes designed to demonstrate that Virginia's support for VMI as currently constituted reminds the Justices of the "bad old days," see *ante*, at 542-544.

It is not too much to say that this approach to [******127**] the litigation has rendered the trial a sham. But treating the evidence as irrelevant is absolutely necessary for the Court to reach its conclusion. Not a single witness contested, for example, Virginia's "substantial body of

'exceedingly persuasive' evidence . . . that some students, both male and female, benefit from attending a single-sex college" and "[that] for those students, the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement." [766 F. Supp., at 1411-1412](#). Even the United States' expert witness "called himself a 'believer in single-sex education,'" although it was his "personal, philosophical preference," not one "born of educational-benefit considerations," "that single-sex education should be provided only by the private sector." *Id.*, at 1412.

4. The Court contends that Virginia, and the District Court, erred, and "misperceived our precedent," by "training their argument on 'means' rather than 'end,'" *ante*, at 545. The Court focuses on "VMI's mission," which is to produce individuals "imbued with love of learning, confident in the functions and attitudes of leadership, [******128**] possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready . . . to defend their country in time of national peril." [766 F. Supp., at 1425](#) (quoting Mission Study Committee of the VMI Board of [***587**] Visitors, Report, May 16, 1986). "Surely," the Court says, "that goal is great enough to accommodate women." *Ante*, at 545.

This is lawmaking by indirection. What the Court describes as "VMI's mission" is no less the mission of *all* Virginia colleges. Which of them would the Old Dominion continue to fund if they did *not* aim to create individuals "imbued with love of learning, etc.," right down to being ready "to defend their country in time of national peril"? It can be summed up as "learning, leadership, and patriotism." To be sure, those general educational values are described in a particularly martial fashion in VMI's mission statement, in accordance with the military, adversative, and all-male character of the institution. But imparting [*****785**] those values *in that fashion* -- *i. e.*, in a military, adversative, all-male environment -- is the

distinctive mission of VMI. And as I have discussed [****129] (and both courts below found), *that* mission is *not* "great enough to accommodate women."

The Court's analysis at least has the benefit of producing foreseeable results. Applied generally, it means that whenever a State's ultimate objective is "great enough to accommodate women" (as it always will be), then the State will be held to have violated the [Equal Protection Clause](#) if it restricts to men even one means by which it pursues that objective -- no matter how few women are interested in pursuing the objective by that means, no matter how much the single-sex program will have to be changed if both sexes are admitted, and no matter how beneficial that program has theretofore been to its participants.

5. The Court argues that VMI would not have to change very much if it were to admit women. See, e. g., *ante*, at 540-542. The [**2302] principal response to that argument is that it is irrelevant: If VMI's single-sex status is substantially related to the government's important educational objectives, as I have demonstrated above and as the Court refuses to discuss, [*588] that concludes the inquiry. There should be no debate in the federal judiciary over "how much" [****130] VMI would be required to change if it admitted women and whether that would constitute "too much" change.

But if such a debate were relevant, the Court would certainly be on the losing side. The District Court found as follows: "The evidence establishes that key elements of the adversative VMI educational system, with its focus on barracks life, would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were forced to admit females and to make changes necessary to accommodate their needs and interests." [766 F. Supp., at 1411](#). Changes that the District Court's detailed analysis found would be required include new allowances for personal privacy in the barracks, such as locked doors and coverings on windows, which would detract from VMI's

approach of regulating minute details of student behavior, "contradict the principle that everyone is constantly subject to scrutiny by everyone else," and impair VMI's "total egalitarian approach" under which every student must be "treated alike"; changes in the physical training program, which would reduce "the intensity and aggressiveness of the current program"; and various modifications in other [****131] respects of the adversative training program that permeates student life. See *id.*, at 1412-1413, 1435-1443. As the Court of Appeals summarized it, "the record supports the district court's findings that at least these three aspects of VMI's program -- physical training, the absence of privacy, and the adversative approach -- would be materially affected by coeducation, leading to a substantial change in the egalitarian ethos that is a critical aspect of VMI's training." [976 F.2d, at 896-897](#).

In the face of these findings by two courts below, amply supported by the evidence, and resulting in the conclusion that VMI would be fundamentally altered if it admitted women, this Court simply pronounces that "the notion that [*589] admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a [***786] judgment hardly proved." *Ante*, at 542 (footnote omitted). The point about "downgrading VMI's stature" is a straw man; no one has made any such claim. The point about "destroying the adversative system" is simply false; the District Court not only stated that "evidence supports this theory," but specifically [****132] concluded that while "without a doubt" VMI could assimilate women, "it is equally without a doubt that VMI's present methods of training and education would have to be changed" by a "move away from its adversative new cadet system." [766 F. Supp., at 1413](#), and n. 8, 1440. And the point about "destroying the school," depending upon what that ambiguous phrase is intended to mean, is either false or else sets a standard much higher than VMI had to meet. It sufficed to establish, as the District Court stated, that VMI would be "significantly different" upon the admission of

women, [766 F. Supp., at 1412](#), and "would eventually find it necessary to drop the adversative system altogether," [id., at 1413](#).⁵

[****133] [*590] 6. Finally, the absence of a precise "all-women's analogue" to VMI is irrelevant. In [Mississippi Univ. for Women v. Hogan, \[**2303\] 458 U.S. 718, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 \(1982\)](#), we attached no constitutional significance to the absence of an all-male nursing school. As Virginia notes, if a program restricted to one sex is necessarily unconstitutional unless there is a parallel program restricted to the other sex, "the opinion in *Hogan* could have ended with its first footnote, which observed that 'Mississippi maintains no other single-sex public university or college.'" Brief for Cross-Petitioners in No. 94-2107, at 38 (quoting [Mississippi Univ. for Women v. Hogan, supra, at 720, n. 1](#)).

Although there is no precise female-only analogue to VMI, Virginia has created during this litigation the Virginia Women's Institute for Leadership (VWIL), a state-funded all-women's program run by Mary Baldwin College. I have thus far said nothing about VWIL because it is, under our established test, irrelevant, so long as VMI's all-male character is "substantially related" to an

important state goal. But VWIL now exists, [****134] and the Court's treatment of it shows how far reaching today's decision is.

VWIL was carefully designed by professional educators who have long experience in educating young women. The program *rejects* the proposition that there is a "difference in the respective spheres and destinies of man and woman," [Bradwell v. State, 83 U.S. 130, 16 Wall. 130, 141, 21 L. Ed. 442 \[***787\] \(1873\)](#), and is designed to "provide an all-female program that will achieve substantially similar outcomes [to VMI's] in an all-female environment," [852 F. Supp. 471, 481 \(WD Va. 1994\)](#). After holding a trial where voluminous evidence was submitted and making detailed findings of fact, the District Court concluded that "there is a legitimate pedagogical basis for the different means employed [by VMI and VWIL] to achieve the substantially [*591] similar ends." *Ibid.* The Court of Appeals undertook a detailed review of the record and affirmed. [44 F.3d 1229 \(CA4 1995\)](#).⁶ But it is Mary Baldwin College, which runs VWIL, that has made the point most succinctly:

"It would have been possible to develop the VWIL program to more closely resemble VMI, [****135] with adversative techniques associated with the rat line and barracks-like living quarters. Simply replicating an existing

⁵The Court's do-it-yourself approach to factfinding, which throughout is contrary to our well-settled rule that we will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error," [Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275, 93 L. Ed. 672, 69 S. Ct. 535 \(1949\)](#) (and cases cited), is exemplified by its invocation of the experience of the federal military academies to prove that not much change would occur. See *ante*, at 542, n. 11; 544-545, and n. 15; 550-551, n. 19. In fact, the District Court noted that "the West Point experience" supported the theory that a coeducational VMI would have to "adopt a [different] system," for West Point found it necessary upon becoming coeducational to "move away" from its adversative system. [766 F. Supp., at 1413, 1440](#). "Without a doubt . . . VMI's present methods of training and education would have to be changed as West Point's were." [Id., at 1413, n. 8](#); accord, [976 F.2d 890, 896-897 \(CA4 1992\)](#) (upholding District Court's findings that "the unique characteristics of VMI's program," including its "unique methodology," "would be destroyed by coeducation").

⁶The Court is incorrect in suggesting that the Court of Appeals applied a "deferential" "brand of review inconsistent with the more exacting standard our precedent requires." *Ante*, at 555. That court "inquired (1) whether the state's objective is 'legitimate and important,' and (2) whether 'the requisite direct, substantial relationship between objective and means is present,'" [44 F.3d, at 1235](#) (quoting [Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 \(1982\)](#)). To be sure, such review is "deferential" to a degree that the Court's new standard is not, for it is *intermediate scrutiny*. (The Court cannot evade this point or prove the Court of Appeals too deferential by stating that that court "devised another test, a 'substantive comparability' inquiry," *ante*, at 555 (quoting [44 F.3d, at 1237](#)), for as that court explained, its "substantive comparability" inquiry was an "additional step" that it engrafted on "the traditional test" of intermediate scrutiny, *ibid.* (emphasis added).)

program would have required far less thought, research, and educational expertise. But such a facile approach would have produced a paper program with no real prospect of successful implementation." Brief for Mary Baldwin College as *Amicus Curiae* 5.

It is worth noting that none of the United States' own experts in the remedial phase of this litigation was willing to testify that VMI's adversative method was an appropriate methodology for educating women. This Court, however, does not care. Even though VWIL was carefully designed by professional educators who have tremendous experience in the area, and survived the test of adversarial litigation, the Court simply declares, with no basis in the evidence, that [*592] these professionals acted on "'overbroad' generalizations," *ante*, at 542, 550.

[****136] C

A few words are appropriate in response to the concurrence, which finds VMI unconstitutional on a basis that is more moderate than the Court's but only at the expense of being even more implausible. The concurrence offers three reasons: First, that there is "scant evidence in the record," *ante*, at 562, that diversity of educational offering was the real reason for Virginia's maintaining VMI. "Scant" has the advantage of being [**2304] an imprecise term. I have cited the clearest statements of diversity as a goal for higher education in the 1990 Report, the 1989 Virginia Plan for Higher Education, the Budget Initiatives prepared in 1989 by the State Council of Higher Education for Virginia, the 1974 Report of the General Assembly Commission on Higher Education to the General Assembly of Virginia, and the 1969 Report of the Virginia Commission [***788] on Constitutional Revision. See *supra*, at 579, 581-582, and n. 2, 583, n. 3. There is *no* evidence to the contrary, once one rejects (as the concurrence rightly does) the relevance of VMI's founding in days when attitudes toward the education of women were different. Is this conceivably not enough to foreclose

rejecting [****137] as clearly erroneous the District Court's determination regarding "the Commonwealth's objective of educational diversity"? *766 F. Supp., at 1413*. Especially since it is absurd on its face even to *demand* "evidence" to prove that the Commonwealth's reason for maintaining a men's military academy is that a men's military academy provides a distinctive type of educational experience (*i. e.*, fosters diversity). What other purpose *would* the Commonwealth have? One may argue, as the Court does, that this *type* of diversity is designed only to indulge hostility toward women -- but that is a separate point, explicitly rejected by the concurrence, and amply refuted by the evidence I have mentioned in discussing [*593] the Court's opinion.⁷ What is now under discussion -- the concurrence's making central to the disposition of this litigation the supposedly "scant" evidence that Virginia maintained VMI in order to offer a diverse educational experience -- is rather like making crucial to the lawfulness of the United States Army record "evidence" that its purpose is to do battle. A legal culture that has forgotten the concept of *res ipsa loquitur* deserves [****138] the fate that it today decrees for VMI.

Second, the concurrence dismisses out of hand what it calls Virginia's "second justification for the single-sex admissions policy: maintenance of the adversative method." *Ante*, at 564. The concurrence reasons that "this justification does not serve an important governmental objective" because, whatever the record may show about [****139] the pedagogical benefits of *single-sex* education, "there is no similar evidence in the record that an

⁷ The concurrence states that it "read[s] the Court" not "as saying that the diversity rationale is a pretext" for discriminating against women, but as saying merely that the diversity rationale is not genuine. *Ante*, at 562, n. The Court itself makes no such disclaimer, which would be difficult to credit inasmuch as the foundation for its conclusion that the diversity rationale is not "genuine," *ante*, at 539, is its antecedent discussion of Virginia's "deliberate" actions over the past century and a half, based on "familiar arguments," that sought to enforce once "widely held views about women's proper place," *ante*, at 537, 538.

adversative method is pedagogically beneficial or is any more likely to produce character traits than other methodologies." *Ibid.* That is simply wrong. See, e. g., [766 F. Supp., at 1426](#) (factual findings concerning character traits produced by VMI's adversative methodology); [id., at 1434](#) (factual findings concerning benefits for many college-age men of an adversative approach in general). In reality, the pedagogical benefits of VMI's adversative approach were not only proved, but were a *given* in this litigation. The reason the woman applicant who prompted this suit wanted to enter VMI was assuredly not that she wanted to go to an all-male school; it would cease being all-male as [*594] soon as she entered. She wanted the distinctive adversative education that VMI provided, and the battle was joined (in the main) over whether VMI had a basis for excluding women from that approach. The Court's opinion recognizes this, and devotes much of [***789] its opinion to demonstrating that "'some women . . . do well under [the] adversative [****140] model'" and that "it is on behalf of these women that the United States has instituted this suit." *Ante*, at 550 (quoting [766 F. Supp., at 1434](#)). Of course, in the last analysis it does not matter whether there are any benefits to the adversative method. The concurrence does not contest that there are benefits to *single-sex* education, and that alone suffices to make Virginia's case, since admission of a woman will even more surely put an end to VMI's single-sex education [**2305] than it will to VMI's adversative methodology.

A third reason the concurrence offers in support of the judgment is that the Commonwealth and VMI were not quick enough to react to the "further developments" in this Court's evolving jurisprudence. *Ante*, at 561. Specifically, the concurrence believes it should have been clear after *Hogan* that "the difficulty with [Virginia's] position is that the diversity benefited only one sex; there was single-sex public education available for men at VMI, but no corresponding single-sex public education available for women." *Ante*, at 562. If only, the concurrence asserts, Virginia had "made a

genuine effort to devote comparable public [****141] resources to a facility for women, and followed through on such a plan, it might well have avoided an equal protection violation." *Ante*, at 563. That is to say, the concurrence believes that after our decision in *Hogan* (which held a program of the Mississippi University for Women to be unconstitutional -- without any reliance on the fact that there was no corresponding Mississippi all-men's program), the Commonwealth should have known that what this Court expected of it was . . . yes!, the creation of a state all-women's program. Any lawyer who gave that advice to the Commonwealth [*595] ought to have been either disbarred or committed. (The proof of that pudding is today's 6-Justice majority opinion.) And any Virginia politician who proposed such a step when there were already four 4-year women's colleges in Virginia (assisted by state support that may well exceed, in the aggregate, what VMI costs, see n. 3, *supra*) ought to have been recalled.

In any event, "diversity in the form of single-sex, as well as coeducational, institutions of higher learning" is "available to women as well as to men" in Virginia. *Ante*, at 564. The concurrence is able to assert the [****142] contrary only by disregarding the four all-women's private colleges in Virginia (generously assisted by public funds) and the Commonwealth's longstanding policy of coordinating public with private educational offerings, see [supra, at 579, 581-582](#), and n. 2, 583-584, and n. 3. According to the concurrence, the *reason* Virginia's assistance to its four all-women's private colleges does not count is that "the private women's colleges are treated by the State *exactly* as all other private schools are treated." *Ante*, at 564. But if Virginia cannot get *credit* for assisting women's education if it only treats women's private schools as it does all other private schools, then why should it get *blame* for assisting men's education if it only treats VMI as it does all other public schools? This is a great puzzlement.

[***790] IV

As is frequently true, the Court's decision today will have consequences that extend far beyond the parties to the litigation. What I take to be the Court's unease with these consequences, and its resulting unwillingness to acknowledge them, cannot alter the reality.

A

Under the constitutional principles announced and applied today, single-sex [****143] public education is unconstitutional. By going through the motions of applying a balancing test -- asking [*596] whether the State has adduced an "exceedingly persuasive justification" for its sex-based classification -- the Court creates the illusion that government officials in some future case will have a clear shot at justifying some sort of single-sex public education. Indeed, the Court seeks to create even a greater illusion than that: It purports to have said nothing of relevance to *other* public schools at all. "We address specifically and only an educational opportunity recognized . . . as 'unique.'" *Ante*, at 534, n. 7.

The Supreme Court of the United States does not sit to announce "unique" dispositions. Its principal function is to establish *precedent* -- that is, to set forth principles of law that every court in America must follow. As we said only this Term, we expect both ourselves and lower courts to adhere to the "*rationale* upon which the Court based the results of its earlier decisions." [*Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67, 134 L. Ed. 2d 252, 116 S. Ct. 1114 \(1996\)](#) (emphasis added). That is the principal reason [****144] we publish our opinions.

[**2306] And the rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny. See [supra](#), at 571-574. Indeed, the Court indicates that if any program restricted to one sex is "unique," it must be opened to members of the opposite sex "who have the will and capacity" to participate in it. *Ante*, at 542. I suggest that the single-sex program that will

not be capable of being characterized as "unique" is not only unique but nonexistent.⁸

In any event, regardless of whether the [****145] Court's rationale leaves some small amount of room for lawyers to argue, it ensures that single-sex public education is functionally dead. [*597] The costs of litigating the constitutionality of a single-sex education program, and the risks of ultimately losing that litigation, are simply too high to be embraced by public officials. Any person with standing to challenge any sex-based classification can haul the State into federal court and compel it to establish by evidence (presumably in the form of expert testimony) that there is an "exceedingly persuasive justification" for the classification. Should the courts happen to interpret that vacuous phrase as establishing a standard that is not utterly impossible of achievement, there is considerable risk that whether the standard [***791] has been met will not be determined on the basis of the record evidence -- indeed, that will necessarily be the approach of any court that seeks to walk the path the Court has trod today. No state official in his right mind will buy such a high-cost, high-risk lawsuit by commencing a single-sex program. The enemies of single-sex education have won; by persuading only seven Justices (five would [****146] have been enough) that their view of the world is enshrined in the Constitution, they have effectively imposed that view on all 50 States.

This is especially regrettable because, as the District Court here determined, educational experts in recent years have increasingly come to "support [the] view that substantial educational benefits flow from a single-gender environment, be it male or female, *that cannot be replicated in a coeducational setting*." [766 F. Supp., at 1415](#)

⁸ In this regard, I note that the Court -- which I concede is under no obligation to do so -- provides no example of a program that *would* pass muster under its reasoning today: not even, for example, a football or wrestling program. On the Court's theory, any woman ready, willing, and physically able to participate in such a program would, *as a constitutional matter*, be entitled to do so.

(emphasis added). "The evidence in this case," for example, "is virtually uncontradicted" to that effect. *Ibid.* Until quite recently, some public officials have attempted to institute new single-sex programs, at least as experiments. In 1991, for example, the Detroit Board of Education announced a program to establish three boys-only schools for inner-city youth; it was met with a lawsuit, a preliminary injunction was swiftly entered by a District Court that purported to rely on *Hogan*, see [Garrett v. Board of Ed. of School Dist. of Detroit](#), 775 F. Supp. 1004, 1006 (ED Mich. 1991), and the [*598] Detroit Board of Education voted to abandon the litigation and thus [****147] abandon the plan, see Detroit Plan to Aid Blacks with All-Boy Schools Abandoned, Los Angeles Times, Nov. 8, 1991, p. A4, col. 1. Today's opinion assures that no such experiment will be tried again.

B

There are few extant single-sex public educational programs. The potential of today's decision for widespread disruption of existing institutions lies in its application to *private* single-sex education. Government support is immensely important to private educational institutions. Mary Baldwin College -- which designed and runs VWIL -- notes that private institutions of higher education in the 1990-1991 school year derived approximately 19 percent of their budgets from federal, state, and local government funds, *not including financial aid to students*. See Brief for Mary Baldwin College as *Amicus Curiae* 22, n. 13 (citing U.S. Dept. of Education, National Center for Education Statistics, Digest of Education Statistics, p. 38 and Note (1993)). Charitable status under the tax laws is also highly significant for private educational institutions, and it is certainly not beyond the Court that rendered today's decision to hold [**2307] that a donation to a single-sex college [****148] should be deemed contrary to public policy and therefore not deductible if the college discriminates on the basis of sex. See Note, The Independent Sector and the Tax Laws: Defining Charity in an Ideal Democracy, 64 S. Cal. L. Rev. 461, 476

(1991). See also [Bob Jones Univ. v. United States](#), 461 U.S. 574, 76 L. Ed. 2d 157, 103 S. Ct. 2017 (1983).

The Court adverts to private single-sex education only briefly, and only to make the assertion (mentioned above) that "we address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as 'unique.'" *Ante*, at 534, n. 7. As I have already remarked, see [supra](#), at 596, that assurance assures nothing, [***792] unless it is to be taken as a promise that in the future [*599] the Court will disclaim the reasoning it has used today to destroy VMI. The Government, in its briefs to this Court, at least purports to address the consequences of its attack on VMI for public support of private single-sex education. It contends that private colleges that are the direct or indirect beneficiaries of government funding are not thereby necessarily converted into [****149] state actors to which the [Equal Protection Clause](#) is then applicable. See Brief for United States in No. 94-2107, at 35-37 (discussing [Rendell-Baker v. Kohn](#), 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982), and [Blum v. Yaretsky](#), 457 U.S. 991, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982)). That is true. It is also virtually meaningless.

The issue will be not whether government assistance turns private colleges into state actors, but whether the government *itself* would be violating the Constitution by providing state support to single-sex colleges. For example, in [Norwood v. Harrison](#), 413 U.S. 455, 37 L. Ed. 2d 723, 93 S. Ct. 2804 (1973), we saw no room to distinguish between state operation of racially segregated schools and state support of privately run segregated schools. "Racial discrimination in state-operated schools is barred by the Constitution and 'it is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'" *Id.*, at 465 (quoting [Lee v. Macon County Bd. of Ed.](#), 267 F. Supp. 458, 475-476 (MD Ala. 1967)); [****150] see also [Cooper v. Aaron](#),

[358 U.S. 1, 19, 3 L. Ed. 2d 5, 78 S. Ct. 1401 \(1958\)](#) ("State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws"); [Grove City College v. Bell, 465 U.S. 555, 565, 79 L. Ed. 2d 516, 104 S. Ct. 1211 \(1984\)](#) (case arising under Title IX of the Education Amendments of 1972 and stating that "the economic effect of direct and indirect assistance often is indistinguishable"). When the Government was pressed at oral argument concerning the implications of these cases for private single-sex education if government-provided single-sex education is unconstitutional, [*600] it stated that the implications will not be so disastrous, since States *can* provide funding to *racially* segregated private schools, "depending on the circumstances," Tr. of Oral Arg. 56. I cannot imagine what those "circumstances" might be, and it would be as foolish for private-school administrators to think that that assurance from the Justice Department [****151] will outlive the day it was made, as it was for VMI to think that the Justice Department's "unequivocal" support for an intermediate-scrutiny standard in this litigation would survive the Government's loss in the courts below.

The only hope for state-assisted single-sex private schools is that the Court will not apply in the future the principles of law it has applied today. That is a substantial hope, I am happy and ashamed to say. After all, did not the Court today abandon the principles of law it has applied in our earlier sex-classification cases? And does not the Court positively invite private colleges to rely upon our ad-hocery by assuring them this litigation is "unique"? I would not advise the foundation of any new single-sex college (especially an all-male one) with [***793] the expectation of being allowed to receive any government support; but it is too soon to abandon in despair those single-sex colleges already in existence. It will certainly be possible for [***2308] this Court to write a future opinion that

ignores the broad principles of law set forth today, and that characterizes as utterly dispositive the opinion's perceptions that VMI was a uniquely prestigious [****152] all-male institution, conceived in chauvinism, etc., etc. I will not join that opinion.

* * *

Justice Brandeis said it is "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." [New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 76 L. Ed. 747, 52 S. Ct. 371 \[*601\] \(1932\)](#) (dissenting opinion). But it is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members' personal view of what would make a "more perfect Union," *ante*, at 558 (a criterion only slightly more restrictive than a "more perfect world"), can impose its own favored social and economic dispositions nationwide. As today's disposition, and others this single Term, show, this places it beyond the power of a "single courageous State," not only to introduce novel dispositions that the Court frowns upon, but to reintroduce, or indeed even adhere to, disfavored dispositions that are centuries old. See, e. g., [BMW of North America, Inc. v. Gore, 517 U.S. 559, 134 L. Ed. 2d 809, 116 S. Ct. 1589 \(1996\)](#); [****153] [Romer v. Evans, 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620 \(1996\)](#). The sphere of self-government reserved to the people of the Republic is progressively narrowed.

In the course of this dissent, I have referred approvingly to the opinion of my former colleague, Justice Powell, in [Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 \(1982\)](#). Many of the points made in his dissent apply with equal force here -- in particular, the criticism of judicial opinions that purport to be "narrow" but whose "logic" is "sweeping." *Id.*, at 745-746, n. 18. But there is one statement with which I cannot agree. Justice Powell observed that

the Court's decision in *Hogan*, which struck down a single-sex program offered by the Mississippi University for Women, had thereby "left without honor . . . an element of diversity that has characterized much of American education and enriched much of American life." *Id.*, at 735. Today's decision does not leave VMI without honor; no court opinion can do that.

In an odd sort of way, it is precisely VMI's attachment to such old-fashioned concepts [****154] as manly "honor" that has made it, and the system it represents, the target of those who today succeed in abolishing public single-sex education. The record contains a booklet that all first-year VMI students [*602] (the so-called "rats") were required to keep in their possession at all times. Near the end there appears the following period piece, entitled "The Code of a Gentleman":

"Without a strict observance of the fundamental Code of Honor, no man, no matter how 'polished,' can be considered a gentleman. The honor of a gentleman demands the inviolability of his word, and the incorruptibility of his principles. He is the descendant of the knight, the crusader; he is the defender of [***794] the defense-less and the champion of justice . . . or he is not a Gentleman.

"A Gentleman . . .

"Does not discuss his family affairs in public or with acquaintances.

"Does not speak more than casually about his girl friend.

"Does not go to a lady's house if he is affected by alcohol. He is temperate in the use of alcohol.

"Does not lose his temper; nor exhibit anger, fear, hate, embarrassment, ardor or hilarity in public.

"Does not hail a lady from a club window.

"A gentleman [****155] never discusses the merits or demerits of a lady.

"Does not mention names exactly as he avoids the mention of what things cost.

"Does not borrow money from a friend, except in dire need. Money borrowed is a debt of honor, and must be repaid as promptly as possible. Debts incurred by a deceased parent, brother, sister or grown child are assumed by honorable men as a debt of honor.

" [**2309] Does not display his wealth, money or possessions.

"Does not put his manners on and off, whether in the club or in a ballroom. He treats people with courtesy, no matter what their social position may be.

[*603] "Does not slap strangers on the back nor so much as lay a finger on a lady.

"Does not 'lick the boots of those above' nor 'kick the face of those below him on the social ladder.'

"Does not take advantage of another's helplessness or ignorance and assumes that no gentleman will take advantage of him.

"A Gentleman respects the reserves of others, but demands that others respect those which are his.

"A Gentleman can become what he wills to be. . . ."

I do not know whether the men of VMI lived by this code; perhaps not. But it is powerfully impressive that a public institution [****156] of higher education still in existence sought to have them do so. I do not think any of us, women included, will be better off for its destruction.

References

518 U.S. 515, *603; 116 S. Ct. 2264, **2309; 135 L. Ed. 2d 735, ***794; 1996 U.S. LEXIS 4259, ****156

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Questioned

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

Wash. v. Glucksberg

Supreme Court of the United States

January 8, 1997, Argued ; June 26, 1997, Decided

No. 96-110

Reporter

521 U.S. 702 *; 117 S. Ct. 2258 **; 117 S. Ct. 2302 ***; 138 L. Ed. 2d 772 ****; 1997 U.S. LEXIS 4039; 65 U.S.L.W. 4669; 97 Cal. Daily Op. Service 5008; 97 Daily Journal DAR 8150; 11 Fla. L. Weekly Fed. S 190

WASHINGTON, ET AL., PETITIONERS v.
HAROLD GLUCKSBERG ET AL.

Prior History: [1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, Reported at: [1996 U.S. App. LEXIS 20704](#).

Disposition: [79 F.3d 790](#), reversed and remanded.

Core Terms

suicide, patient, terminally ill, pain, assisted suicide, due process clause, hasten, dying, liberty interest, physician-assisted, euthanasia, medical treatment, abortion, commit suicide, terminal, ban, common-law, assisted-suicide, dignity, substantive due process, due process, withdrawal, depression, imminent, unwanted, life-sustaining, contraception, intimate, adult, invalidate

Case Summary

Procedural Posture

Petitioners challenged the judgment of the United States Court of Appeal for the Ninth Circuit which ruled that the State of Washington's ban on assisted suicide, as articulated in Wash. Rev. Code § 9A.26.060(1) (1994), was violative of the [U.S. Const. amend. XIV](#).

Overview

Respondents brought a suit seeking a declaration that Washington state's ban on physician-assisted suicide, [Wash. Rev. Code § 9A.36.060\(1\)](#) (1994), was unconstitutional on its face. On review, the United States Supreme Court held that history, legal traditions, and practice support criminalizing assisted suicide. The Court held that the assisted-suicide ban was rationally related to a legitimate government interest because Washington sought to preserve human life and also uphold the integrity and ethics of the medical profession. Additionally, Washington's statute sought to protect vulnerable groups, such as the poor, elderly, and disabled from abuse, neglect, and mistakes. Finally, the Court held that Washington's ban on assisted-suicide effectively prevented a broader license to voluntary or involuntary euthanasia. Thus, the Court reversed judgment in favor of petitioners.

Outcome

The Court reversed judgment in favor of petitioners because Washington's ban on assisted suicide was rationally related to a legitimate government interest and did not violate the [Due Process Clause of the Fourteenth Amendment](#).

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Homicide,

Manslaughter & Murder > Assisted
Suicide > Elements

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Criminal Law & Procedure > ... > Homicide,
Manslaughter & Murder > Assisted
Suicide > General Overview

Criminal Law & Procedure > ... > Homicide,
Manslaughter & Murder > Assisted
Suicide > Penalties

Criminal Law &
Procedure > Sentencing > Fines

Healthcare Law > Medical Treatment > End-of-
Life Decisions > General Overview

HN1 Assisted Suicide, Elements

See [Wash. Rev. Code § 9A.36.060\(1\)](#) (1994).

Criminal Law & Procedure > ... > Homicide,
Manslaughter & Murder > Assisted
Suicide > General Overview

HN2 Homicide, Manslaughter & Murder, Assisted Suicide

See [Wash. Rev. Code §§ 9A.36.060\(2\)](#) and [9A.20.021\(1\)\(c\)](#).

Healthcare Law > Medical Treatment > End-of-
Life Decisions > General Overview

HN3 Medical Treatment, End-of-Life Decisions

See [Wash. Rev. Code § 70.122.070\(1\)](#).

Criminal Law & Procedure > ... > Homicide,
Manslaughter & Murder > Assisted
Suicide > General Overview

Healthcare Law > Medical Treatment > End-of-
Life Decisions > Assisted Suicide

Healthcare Law > Medical Treatment > General
Overview

HN4 Homicide, Manslaughter & Murder, Assisted Suicide

A blanket prohibition on assisted suicide is the norm among western democracies.

Criminal Law & Procedure > ... > Homicide,
Manslaughter & Murder > Assisted
Suicide > General Overview

HN5 Homicide, Manslaughter & Murder, Assisted Suicide

Suicide is an act of criminal self-destruction.

Criminal Law & Procedure > ... > Homicide,
Manslaughter & Murder > Assisted
Suicide > General Overview

HN6 Homicide, Manslaughter & Murder, Assisted Suicide

A person who purposely aids or solicits another to commit suicide is guilty of a felony in the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor.

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > General
Overview

Constitutional Law > Substantive Due
Process > Scope

HN7 Fundamental Rights, Procedural Due Process

The [Due Process Clause, U.S. Const. amend. XIV](#),

guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests.

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

Healthcare Law > Medical Treatment > Failures & Refusals to Treat > General Overview

Constitutional Law > Bill of Rights > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > Substantive Due Process > Privacy > General Overview

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due Process > Scope

Healthcare Law > Medical Treatment > End-of-Life Decisions > General Overview

Healthcare Law > Medical Treatment > Abortion > Right to Privacy

Healthcare Law > Medical Treatment > End-of-Life Decisions > Lifesaving Treatment

Healthcare Law > Medical Treatment > Patient Consent > General Overview

Healthcare Law > Medical Treatment > Patient Consent > Right to Refuse Treatment

HN8 Bill of Rights, Fundamental Rights

In addition to the specific freedoms protected by the [Bill of Rights](#), the "liberty" specially protected by the [Due Process Clause, U.S. Const. amend. XIV](#), includes the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion, the United States Supreme Court has also assumed that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.

Constitutional Law > Substantive Due Process > Scope

HN9 Constitutional Law, Substantive Due Process

The [U.S. Const. amend. XIV](#) forbids the government to infringe fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.

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

HN10 Judicial Review, Standards of Review

If a thing has been practiced for two hundred years by common consent, it will need a strong case for the [Fourteenth Amendment, U.S. Const. amend. XIV](#), to affect it.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Healthcare Law > Medical Treatment > General Overview

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due
Process > Scope

Healthcare Law > Medical Treatment > End-of-
Life Decisions > General Overview

HN11 Fundamental Rights, Procedural Due Process

The United States Constitution requires that a ban
on assisted-suicide be rationally related to
legitimate government interests.

Criminal Law & Procedure > ... > Homicide,
Manslaughter & Murder > Assisted
Suicide > Elements

Healthcare Law > Medical Treatment > End-of-
Life Decisions > Assisted Suicide

Criminal Law & Procedure > Criminal
Offenses > Homicide, Manslaughter &
Murder > General Overview

Healthcare Law > Medical Treatment > General
Overview

HN12 Assisted Suicide, Elements

The interests in the sanctity of life that are
represented by the criminal homicide laws are
threatened by one who expresses a willingness to
participate in taking the life of another.

Estate, Gift & Trust Law > Estate
Planning > Living Wills

Healthcare Law > Medical Treatment > End-of-
Life Decisions > Assisted Suicide

Public Health & Welfare Law > ... > Mental
Health Services > Commitment > Involuntary
Commitment of Adults

Constitutional Law > Substantive Due

Process > Privacy > General Overview

Criminal Law & Procedure > ... > Homicide,
Manslaughter & Murder > Assisted
Suicide > General Overview

Criminal Law & Procedure > ... > Homicide,
Manslaughter & Murder > Assisted
Suicide > Elements

Estate, Gift & Trust Law > Estate
Planning > Powers of Attorney > General
Overview

Estate, Gift & Trust Law > Estate
Planning > Powers of Attorney > Durable
Powers

Healthcare Law > Medical Treatment > General
Overview

Public Health & Welfare Law > ... > Mental
Health Services > Commitment > General
Overview

HN13 Estate Planning, Living Wills

Nearly all states expressly disapprove of suicide
and assisted suicide either in statutes dealing with
durable powers of attorney in health-care situations,
or in "living will" statutes. In addition, all states
provide for the involuntary commitment of persons
who may harm themselves as the result of mental
illness, and a number of states allow the use of
nondeadly force to thwart suicide attempts.

Public Health & Welfare
Law > Healthcare > General Overview

HN14 Public Health & Welfare Law, Healthcare

Suicide is a serious public-health problem,
especially among vulnerable groups such as the
young, disabled, and elderly.

Lawyers' Edition Display

Decision

Washington state statute, which provides that person who knowingly causes or aids another person to attempt suicide is guilty of felony of promoting suicide attempt, held not violative of [Fourteenth Amendment's due process clause](#).

Summary

A Washington state statute enacted in 1975 provided that a person was guilty of the felony of promoting a suicide attempt when the person knowingly caused or aided another person to attempt suicide. In 1994, an action was brought in the United States District Court for the Western District of Washington by several plaintiffs, among whom were (1) physicians who occasionally treated terminally ill, suffering patients, and (2) individuals who were then in the terminal phases of serious and painful illnesses. The plaintiffs, asserting the existence of a liberty interest protected by the [Federal Constitution's Fourteenth Amendment](#) which extended to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide, sought a declaratory judgment that the Washington statute was unconstitutional on its face. The District Court, granting motions for summary judgment by the physicians and the individuals, ruled that the statute was unconstitutional because it placed an undue burden on the exercise of the asserted liberty interest ([850 F. Supp 1454, 1994 US Dist LEXIS 5831](#)). On appeal, the United States Court of Appeals for the Ninth Circuit, ultimately affirming en banc, expressed the view that (1) the Constitution encompassed a due process liberty interest in controlling the time and manner of one's death; and (2) the Washington statute was unconstitutional as applied to terminally ill, competent adults who wished to hasten their deaths with medication prescribed by their physicians ([79 F.3d 790, 1996 US App LEXIS 3944](#)).

On certiorari, the United States Supreme Court reversed. In an opinion by Rehnquist, Ch. J., joined by O'Connor, Scalia, Kennedy, and Thomas, JJ., it was held that the Washington statute did not violate the due process clause--either on the statute's face or as the statute was applied to competent, terminally ill adults who wished to hasten their deaths by obtaining medication prescribed by their physicians--because (1) pursuant to careful formulation of the interest at stake, the question was whether the liberty specially protected by the due process clause included a right to commit suicide which itself included a right to assistance in doing so; (2) an examination of the nation's history, legal traditions, and practices revealed that the asserted right to assistance in committing suicide was not a fundamental liberty interest protected by the due process clause; (3) the asserted right to assistance in committing suicide was not consistent with the Supreme Court's substantive due process line of cases; and (4) the state's assisted suicide ban was at least reasonably related to the promotion and protection of a number of Washington's important and legitimate interests.

O'Connor, J., concurring, (1) joined the court's opinion, but (2) expressed the view that since the parties agreed that a patient who was suffering from a terminal illness and experiencing great pain had no legal barriers to obtaining medication, from qualified physicians, to alleviate such suffering--even to the point of causing unconsciousness and hastening death--there was no need in the case at hand to reach the question whether a mentally competent person who was experiencing great suffering had a constitutionally cognizable interest in controlling the circumstances of his or her imminent death.

Stevens, J., concurring in the judgment, (1) agreed that the liberty protected by the due process clause did not include a categorical right to commit suicide which itself included a right to assistance in doing so, but (2) expressed the view that a terminally ill, mentally competent patient seeking to hasten death, or a doctor whose assistance was

sought, might prevail in a more particularized challenge to a general rule banning the practice of physician-assisted suicide.

Souter, J., concurring in the judgment, expressed the view that (1) given the substantial dispute about the effectiveness of assisted suicide guidelines in the Netherlands, Washington's asserted interest in protecting terminally ill patients from involuntary suicide and euthanasia, both voluntary and involuntary, was sufficiently serious to uphold the Washington statute against the claim that the statute violated the due process clause; and (2) as between the institutions of a legislature and a court, the legislative institutional competence was the better one to deal with an emerging issue like assisted suicide.

Ginsburg, J., concurred in the judgment substantially for the reasons stated in the opinion of O'Connor, J.

Breyer, J., (1) concurred in the judgment; (2) joined the opinion of O'Connor, J., except insofar as such opinion joined the court's opinion; and (3) expressed the view that (a) the core of a liberty interest in dying with dignity included the avoidance of unnecessary and severe physical suffering, and (b) a state law's impact upon the right to such avoidance would be more directly at issue if the legal circumstances were different--for example, if state law prevented the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life.

Headnotes

CONSTITUTIONAL LAW §528.5 > due process -- crime -- assisting suicide -- protection of liberty --
> Headnote:

[LEdHN\[1A\]](#) [1A][LEdHN\[1B\]](#) [1B][LEdHN\[1C\]](#) [1C][LEdHN\[1D\]](#) [1D][LEdHN\[1E\]](#) [1E][LEdHN\[1F\]](#) [1F][LEdHN\[1G\]](#) [1G][LEdHN\[1H\]](#) [1H]

A state statute which provides that a person is guilty of the felony of promoting a suicide attempt when the person knowingly causes or aids another person to attempt suicide does not violate the due process clause of the [Federal Constitution's Fourteenth Amendment](#)--either on the statute's face or as the statute is applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their physicians--because (1) pursuant to careful formulation of the interest at stake, the question is whether the liberty specially protected by the due process clause includes a right to commit suicide which itself includes a right to assistance in doing so; (2) an examination of the nation's history, legal traditions, and practices reveals that the asserted right to assistance in committing suicide is not a fundamental liberty interest protected by the due process clause, in that (a) in almost every state, and in almost every western democracy, it is a crime to assist a suicide, (b) for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide, (c) the prohibitions against assisting suicide never contained exceptions for those who were near death, (d) by the time the [Fourteenth Amendment](#) was ratified, it was a crime in most states to assist a suicide, (e) in recent years, the states' assisted suicide bans have been re-examined and, generally, reaffirmed, (f) the Federal Assisted Suicide Funding Restriction Act of 1997 ([42 USCS 14401 et seq.](#)) prohibits the use of federal funds in support of physician-assisted suicide, and (g) despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decisionmaking, the nation's laws continue to prohibit assisting suicide, even for terminally ill, mentally competent adults; (3) the asserted right to assistance in committing suicide is not consistent with the United States Supreme Court's substantive due process line of cases; and (4) the state's assisted suicide ban is at least reasonably related to the promotion and protection of the state's important and legitimate interests in (a) preserving human life, (b)

preventing suicide and studying, identifying, and treating its causes, (c) protecting the integrity and ethics of the medical profession, (d) protecting vulnerable groups--including the poor, the elderly, and persons with disabilities--from abuse, neglect, and mistakes, and (e) preventing voluntary and perhaps even involuntary euthanasia. (Breyer, J., dissented in part from this holding.)

APPEAL §1339.5 > certiorari -- Court of Appeals' holding -- > Headnote:
[LEdHN\[2A\]](#) [2A][LEdHN\[2B\]](#) [2B]

On certiorari to review a Federal Court of Appeals' judgment, the holding of the Court of Appeals that is before the United States Supreme Court is whether a state statute prohibiting assisted suicide is unconstitutional as applied to a class of terminally ill, mentally competent patients, notwithstanding that the Court of Appeals' analysis and eventual holding that the statute was unconstitutional was not limited to a particular set of plaintiffs before the Court of Appeals, where (1) an action challenging the statute had been brought in Federal District Court by such patients and others, and (2) on appeal, the Court of Appeals emphasized that it was not deciding the facial validity of the statute.

CONSTITUTIONAL LAW §513 > due process -- analysis -- > Headnote:
[LEdHN\[3A\]](#) [3A][LEdHN\[3B\]](#) [3B]

The United States Supreme Court begins its analysis in all due process cases by examining the nation's history, legal traditions, and practices; such examination provides the crucial guideposts for responsible decisionmaking that direct and restrain the Supreme Court's exposition of the due process clause of the [Federal Constitution's Fourteenth Amendment](#).

CONSTITUTIONAL LAW §514 > due process -- liberty -- > Headnote:
[LEdHN\[4\]](#) [4]

The due process clause of the [Federal Constitution's Fourteenth Amendment](#) guarantees more than fair process, and the liberty it protects includes more than the absence of physical restraint; the due process clause provides heightened protection against government interference with certain fundamental rights and liberty interests.

CONSTITUTIONAL LAW §525 > due process -- new liberty interests -- > Headnote:
[LEdHN\[5\]](#) [5]

The United States Supreme Court, when asked to break new ground by extending constitutional protection to an asserted right or liberty interest under the due process clause of the [Federal Constitution's Fourteenth Amendment](#), must exercise the utmost care, lest the liberty protected by the due process clause be subtly transformed into the policy preferences of the members of the Supreme Court.

CONSTITUTIONAL LAW §525 > due process -- liberty -- state interest -- > Headnote:
[LEdHN\[6\]](#) [6]

The due process clause of the [Federal Constitution's Fourteenth Amendment](#) forbids the government to infringe fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.

CONSTITUTIONAL LAW §525 > due process --
personal autonomy -- > Headnote:

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

The fact that many of the rights and liberties protected by the due process clause of the [Federal Constitution's Fourteenth Amendment](#) sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.

CONSTITUTIONAL LAW §525 > due process --
liberty -- rational basis -- > Headnote:

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

With respect to an asserted right which is found not to be a fundamental liberty interested protected by the due process clause of the [Federal Constitution's Fourteenth Amendment](#), the due process clause requires that governmental interference with such right be rationally related to legitimate government interests.

CONSTITUTIONAL LAW §525 > due process --
liberty -- quality of life -- > Headnote:

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

Consistent with the liberty interests protected by the due process clause of the [Federal Constitution's Fourteenth Amendment](#), states may properly decline to make judgments about the quality of life that a particular individual may enjoy, even for those who are near death.

CONSTITUTIONAL LAW §854 > due process --

crime -- assisting suicide -- > Headnote:

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

A holding by the United States Supreme Court, to the effect that a state statute which provides that a person is guilty of the felony of promoting a suicide attempt when the person knowingly causes or aids another person to attempt suicide does not violate the due process clause of the [Federal Constitution's Fourteenth Amendment](#), does not absolutely foreclose a particularized due process challenge by an individual seeking to hasten death or by a doctor whose assistance is sought in hastening an individual's death, but such a claim would have to be quite different from a claim that mentally competent, terminally ill adults have a right, under the due process clause, to commit physician-assisted suicide.

Syllabus

It has always been a crime to assist a suicide in the State of Washington. The State's present law makes "promoting a suicide attempt" a felony, and provides: "A person is guilty of [that crime] when he knowingly causes or aids another person to attempt suicide." Respondents, four Washington physicians who occasionally treat terminally ill, suffering patients, declare that they would assist these patients in ending their lives if not for the State's assisted-suicide ban. They, along with three gravely ill plaintiffs who have since died and a nonprofit organization that counsels people considering physician-assisted suicide, filed this suit against petitioners, the State and its Attorney General, seeking [2] a declaration that the ban is, on its face, unconstitutional. They assert a liberty interest protected by the [Fourteenth Amendment's Due Process Clause](#) which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide. Relying primarily on [Planned Parenthood of Southeastern Pa. v. Casey](#), 505 U.S. 833, and [Cruzan v. Director, Mo. Dept. of Health](#), 497 U.S. 261, the Federal

District Court agreed, concluding that Washington's assisted-suicide ban is unconstitutional because it places an undue burden on the exercise of that constitutionally protected liberty interest. The en banc Ninth Circuit affirmed.

Held: Washington's prohibition against "causing" or "aiding" a suicide does not violate the Due Process Clause. Pp. 5-32.

(a) An examination of our Nation's history, legal traditions, and practices demonstrates that Anglo-American common law has punished or otherwise disapproved of assisting suicide for over 700 years; that rendering such assistance is still a crime in almost every State; that such prohibitions have never contained exceptions for those who were near death; that the prohibitions have in recent [3] years been reexamined and, for the most part, reaffirmed in a number of States; and that the President recently signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibits the use of federal funds in support of physician-assisted suicide. Pp. 5-15.

(b) In light of that history, this Court's decisions lead to the conclusion that respondents' asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Court's established method of substantive-due-process analysis has two primary features: First, the Court has regularly observed that the Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition. *E.g.*, [Moore v. East Cleveland](#), 431 U.S. 494, 503 (plurality opinion). Second, the Court has required a "careful description" of the asserted fundamental liberty interest. *E.g.*, [Reno v. Flores](#), 507 U.S. 292, 302. The Ninth Circuit's and respondents' various descriptions of the interest here at stake--*e.g.*, a right to "determine the time and manner of one's death," the "right to die," a "liberty [4] to choose how to die," a right to "control of one's final days," "the right to choose a humane, dignified death," and "the liberty to shape death"--run counter to that

second requirement. Since the Washington statute prohibits "aiding another person to attempt suicide," the question before the Court is more properly characterized as whether the "liberty" specially protected by the Clause includes a right to assist suicide which itself includes a right to assistance in doing so. This asserted right has no place in our Nation's traditions, given the country's consistent, almost universal, and continuing rejection of the right, even for terminally ill, mentally competent adults. To hold for respondents, the Court would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State. Respondents' contention that the asserted interest is consistent with this Court's substantive-due-process cases, if not with this Nation's history and practice, is unpersuasive. The constitutionally protected right to refuse lifesaving hydration and nutrition that was discussed in [Cruzan, supra, at 279](#), was not simply deduced from abstract [5] concepts of personal autonomy, but was instead grounded in the Nation's history and traditions, given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment. And although *Casey* recognized that many of the rights and liberties protected by the Due Process Clause sound in personal autonomy, [505 U.S. at 852](#), it does not follow that any and all important, intimate, and personal decisions are so protected, see [San Antonio School Dist. v. Rodriguez](#), 411 U.S. 1, 33-34. *Casey* did not suggest otherwise. Pp. 15-24.

(c) The constitutional requirement that Washington's assisted-suicide ban be rationally related to legitimate government interests, see *e.g.*, [Heller v. Doe](#), 509 U.S. 312, 319-320, is unquestionably met here. These interests include prohibiting intentional killing and preserving human life; preventing the serious public-health problem of suicide, especially among the young, the elderly, and those suffering from untreated pain or from depression or other mental disorders; protecting the medical profession's integrity and

ethics and maintaining physicians' role [6] as their patients' healers; protecting the poor, the elderly, disabled persons, the terminally ill, and persons in other vulnerable groups from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide towards voluntary and perhaps even involuntary euthanasia. The relative strengths of these various interests need not be weighed exactly, since they are unquestionably important and legitimate, and the law at issue is at least reasonably related to their promotion and protection. Pp. 24-31.

[79 F.3d 790](#), reversed and remanded.

Counsel: William L. Williams argued the cause for petitioners.

Walter Dellinger argued the cause for the United States, as amicus curiae, by special leave of court.

Kathryn L. Tucker argued the cause for respondents.

Judges: REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined in part. STEVENS, J., SOUTER, J., GINSBURG, J., and BREYER, J., filed opinions concurring in the judgment.

Opinion by: REHNQUIST

Opinion

[****779] [*705] [**2261] [***2261] CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[LEdHN\[1A\]](#) [1A]The question presented in this case is whether Washington's prohibition against "causing" or "aiding" a suicide [*706] offends the [Fourteenth Amendment to the United States Constitution](#). We hold that it does not.

It has [7] always been a crime to assist a suicide in the State of Washington. In 1854, Washington's first Territorial Legislature [*707] outlawed "assisting another in the commission of self-murder."¹ Today, Washington law provides: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." [HN1 Wash. Rev. Code 9A.36.060\(1\)](#) (1994). "Promoting a suicide attempt" is a felony, punishable by up to five years' imprisonment and up to a \$ 10,000 fine. [HN2](#) §§ 9A.36.060(2) and 9A.20.021(1)(c). At the same time, Washington's Natural Death Act, enacted in 1979, states that the "withholding or withdrawal of life-sustaining treatment" at a patient's direction "shall not, for any purpose, constitute a suicide." [HN3 Wash. Rev. Code § 70.122.070\(1\)](#).² [8]

Petitioners in this case are the State of Washington and its Attorney General. Respondents Harold Glucksberg, M. D., Abigail Halperin, M. D., Thomas A. Preston, M. D., and Peter Shalit, M. D., are physicians who practice in Washington. These doctors occasionally treat terminally ill, suffering patients, and declare that they would assist these patients [9] in ending their lives if not for Washington's assisted-suicide ban.³ In January

¹ Act of Apr. 28, 1854, § 17, 1854 Wash. Laws 78 ("Every person deliberately assisting another in the commission of self-murder, shall be deemed guilty of manslaughter"); see also Act of Dec. 2, 1869, § 17, 1869 Wash. Laws 201; Act of Nov. 10, 1873, § 19, 1873 Wash. Laws 184; Criminal Code, ch. 249, §§ 135-136, 1909 Wash. Laws, 11th sess., 929.

² Under Washington's Natural Death Act, "adult persons have the fundamental right to control the decisions relating to the rendering of their own health care, including the decision to have life-sustaining treatment withheld or withdrawn in instances of a terminal condition or permanent unconscious condition." [Wash. Rev. Code § 70.122.010](#) (1994). In Washington, "any adult person may execute a directive directing the withholding or withdrawal of life-sustaining treatment in a terminal condition or permanent unconscious condition," § 70.122.030, and a physician who, in accordance with such a directive, participates in the withholding or withdrawal of life-sustaining treatment is immune from civil, criminal, or professional liability. § 70.122.051.

³ Glucksberg Declaration, App. 35; Halperin Declaration, *id.*, at 49-50; Preston Declaration, *id.*, at 55-56; Shalit Declaration, *id.*, at 73-

1994, respondents, along with three gravely ill, pseudonymous plaintiffs who have since died and [*708] Compassion in Dying, a nonprofit organization that counsels people considering physician-assisted suicide, sued in the United States [****780] District Court, seeking a declaration that Wash. Rev. Code 9A.36.060(1) (1994) is, on its face, unconstitutional. Compassion in Dying v. Washington, 850 F. Supp. 1454, 1459 (WD Wash. 1994).⁴

[10] The plaintiffs asserted "the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill [**2262] [***2262] adult to commit physician-assisted suicide." Id., at 1459. Relying primarily on Planned Parenthood v. Casey, 505 U.S. 833 (1992), and Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990), the District Court agreed, 850 F. Supp., at 1459-1462, and concluded that Washington's assisted-suicide ban is unconstitutional because it "places an undue burden on the exercise of [that] constitutionally protected liberty interest." Id., at 1465.⁵ The District Court also decided that the Washington statute violated the Equal Protection Clause's requirement that "all persons similarly situated . . . be treated alike." Id., at 1466 (quoting Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985)).

[11] LEdHN[2A] [2A]A panel of the Court of Appeals for the Ninth Circuit reversed, emphasizing that "in the two hundred and five years of our existence no constitutional right to aid in killing [*709] oneself has ever been asserted and upheld by a court of final jurisdiction." Compassion in Dying v. Washington, 49 F.3d 586, 591 (1995). The Ninth Circuit reheard the case en banc, reversed the panel's decision, and affirmed the District Court. Compassion in Dying v. Washington, 79 F.3d 790, 798 (1996). Like the District Court, the en banc Court of Appeals emphasized our *Casey* and *Cruzan* decisions. 79 F.3d, at 813-816. The court also discussed what it described as "historical" and "current societal attitudes" toward suicide and assisted suicide, id., at 806-812, and concluded that "the Constitution encompasses a due process liberty interest in controlling the time and manner of one's death--that there is, in short, a constitutionally-recognized 'right to die.'" Id., at 816. After "weighing and then balancing" this interest against Washington's various interests, the court held that the State's assisted-suicide ban was unconstitutional "as applied to terminally ill competent [12] adults who wish to hasten their deaths with medication prescribed by their physicians." Id., at 836, 837.⁶ The court did not reach the District Court's equal-protection holding. Id., at 838.⁷ We granted

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⁴ John Doe, Jane Roe, and James Poe, plaintiffs in the District Court, were then in the terminal phases of serious and painful illnesses. They declared that they were mentally competent and desired assistance in ending their lives. Declaration of Jane Roe, id., at 23-25; Declaration of John Doe, id., at 27-28; Declaration of James Poe, id., at 30-31; Compassion in Dying, 850 F. Supp., at 1456-1457.

⁵ The District Court determined that *Casey*'s "undue burden" standard, 505 U.S. at 874 (joint opinion), not the standard from United States v. Salerno, 481 U.S. 739, 745 (1987) (requiring a showing that "no set of circumstances exists under which the [law] would be valid"), governed the plaintiffs' facial challenge to the assisted-suicide ban. 850 F. Supp., at 1462-1464.

⁶ Although, as JUSTICE STEVENS observes, *post*, at 2-3 (opinion concurring in judgment), "[the court's] analysis and eventual holding that the statute was unconstitutional was not limited to a particular set of plaintiffs before it," the court did note that "declaring a statute unconstitutional as applied to members of a group is atypical but not uncommon." 79 F.3d, at 798, n.9, and emphasized that it was "not deciding the facial validity of [the Washington statute]," id., at 797-798, and nn. 8-9. It is therefore the court's holding that Washington's physician-assisted suicide statute is unconstitutional as applied to the "class of terminally ill, mentally competent patients," *post*, at 14 (STEVENS, J., concurring in judgment), that is before us today.

⁷ The Court of Appeals did note, however, that "the equal protection argument relied on by [the District Court] is not insubstantial," 79 F.3d., at 838, n.139, and sharply criticized the opinion in a separate case then pending before the Ninth Circuit, Lee v. Oregon, 891 F. Supp. 1429 (Ore. 1995) (Oregon's Death With Dignity Act, which permits physician-assisted suicide, violates the Equal Protection Clause because it does not provide adequate safeguards against

certiorari, 519 U.S. __ [****781] (1996), and now reverse. [LEdHN\[2B\]](#) [2B]

[13] [*710] I

[LEdHN\[1B\]](#) [1B][LEdHN\[3A\]](#) [3A]We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices. See, e.g., [Casey](#), 505 U.S. at 849-850; [Cruzan](#), 497 U.S. at 269-279; [Moore v. East Cleveland](#), 431 U.S. 494, 503 (1977) (plurality opinion) (noting importance of "careful 'respect [**2263] [***2263] for the teachings of history'"). In almost every State--indeed, in almost every western democracy--it is a crime to assist a suicide.⁸ The States' assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life. [Cruzan](#), 497 U.S. at 280 ("The States--indeed, all civilized nations--demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority [*711] of States in this country have laws imposing criminal penalties on one who assists another to commit suicide"); see [Stanford v. Kentucky](#), 492 U.S. 361, 373 (1989) ("The primary and most reliable indication of [a

abuse), vacated, [Lee v. Oregon](#), 107 F.3d 1382 (CA9 1997) (concluding that plaintiffs lacked Article III standing). *Lee*, of course, is not before us, any more than it was before the Court of Appeals below, and we offer no opinion as to the validity of the *Lee* courts' reasoning. In [Vacco v. Quill](#), *post*, however, decided today, we hold that New York's assisted-suicide ban does not violate the [Equal Protection Clause](#).

⁸ See [Compassion in Dying v. Washington](#), 79 F.3d 790, 847, and nn. 10-13 (CA9 1996) (Beezer, J., dissenting) ("In total, forty-four states, the District of Columbia and two territories prohibit or condemn assisted suicide") (citing statutes and cases); [Rodriguez v. British Columbia \(Attorney General\)](#), 107 D. L. R. (4th) 342, 404 (Can. 1993) ("[[HN4](#) A] blanket prohibition on assisted suicide . . . is the norm among western democracies") (discussing assisted-suicide provisions in Austria, Spain, Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France). Since the Ninth Circuit's decision, Louisiana, Rhode Island, and Iowa have enacted statutory assisted-suicide bans. [La. Rev. Stat. Ann. § 14:32.12](#) (Supp. 1997); [R. I. Gen. Laws §§ 11-60-1, 11-60-3](#) (Supp. 1996); [Iowa Code Ann. §§ 707A.2, 707A.3](#) (Supp. 1997). For a detailed history of the States' statutes, see Marzen, O'Dowd, Crone & Balch, *Suicide: A Constitutional Right?*, 24 *Duquesne L. Rev.* 1, 148-242 (1985) (Appendix) (hereinafter Marzen).

national] consensus is . . . the pattern of enacted laws"). Indeed, opposition to and condemnation of suicide--and, therefore, of assisting suicide--are consistent [14] and enduring themes of our philosophical, legal, and cultural heritages. See generally, Marzen, O'Dowd, Crone & Balch, *Suicide: A Constitutional Right?*, 24 *Duquesne L. Rev.* 1, 17-56 (1985) (hereinafter Marzen); New York State Task Force on Life and [****782] the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* 77-82 (May 1994) (hereinafter New York Task Force).

[15] [LEdHN\[1C\]](#) [1C]More specifically, for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.⁹ [Cruzan](#), 497 U.S. at 294-295 (SCALIA, J., concurring). In the 13th century, Henry de Bracton, one of the first legal-treatise writers, observed that "just as a man may commit felony by slaying another so may he do so by slaying himself." 2 *Bracton on Laws and Customs of England* 423 (f. 150) (G. Woodbine ed., S. Thorne transl., 1968). The real and personal property of one who killed himself to avoid conviction and punishment for a crime were forfeit to the king; however, thought Bracton, "if a man slays himself in weariness of life or because he is unwilling to endure further bodily pain . . . [only] his movable goods [were] confiscated." *Id.*, at 423-424 (f. 150). Thus, "the principle that suicide of a sane person, for whatever reason, was a punishable felony was . . . introduced into [*712] English common law." ¹⁰ Centuries later, Sir William

⁹ The common law is thought to have emerged through the expansion of pre-Norman institutions sometime in the 12th century. J. Baker, *An Introduction to English Legal History* 11 (2d ed. 1979). England adopted the ecclesiastical prohibition on suicide five centuries earlier, in the year 673 at the Council of Hereford, and this prohibition was reaffirmed by King Edgar in 967. See G. Williams, *The Sanctity of Life and the Criminal Law* 257 (1957).

¹⁰ Marzen 59. Other late-medieval treatise writers followed and restated Bracton; one observed that "man-slaughter" may be "of oneself; as in case, when people hang themselves or hurt themselves, or otherwise kill themselves of their own felony" or "of others; as by beating, famine, or other punishment; in like cases, all are man-

[2264] [***2264]** Blackstone, whose *Commentaries on the Laws of England* not only provided a definitive summary of the common law but was also a primary legal authority for 18th and 19th century American **[16]** lawyers, referred to suicide as "self-murder" and "the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure" 4 W. Blackstone, *Commentaries* * 189. Blackstone emphasized that "the law has . . . ranked [suicide] among the highest crimes," *ibid*, although, anticipating later developments, he conceded that the harsh and shameful punishments imposed for suicide "border a little upon severity." *Id.*, at * 190.

[17] For the most part, the early American colonies adopted the common-law approach. For example, the legislators of the Providence Plantations, which would later become Rhode Island, declared, in 1647, that "self-murder is by all agreed to be the most unnatural, and it is by this present Assembly declared, to be **[****783]** that, wherein he that doth it, kills himself out **[*713]** of a premeditated hatred against his own life or other humor: . . . his goods and chattels are the king's custom, but not his debts nor lands; but in case he be an infant, a lunatic, mad or distracted man, he forfeits nothing." *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647-1719*, p. 19 (J. Cushing ed. 1977). Virginia also required ignominious burial for suicides, and

their estates were forfeit to the crown. A. Scott, *Criminal Law in Colonial Virginia* 108, and n.93, 198, and n.15 (1930).

Over time, however, the American colonies abolished these harsh common-law penalties. William Penn abandoned the criminal-forfeiture sanction in Pennsylvania in 1701, and the other colonies (and later, the other States) eventually followed this example. [*Cruzan*, 497 U.S. at 294](#) (SCALIA, J., concurring). **[18]** Zephaniah Swift, who would later become Chief Justice of Connecticut, wrote in 1796 that

"there can be no act more contemptible, than to attempt to punish an offender for a crime, by exercising a mean act of revenge upon lifeless clay, that is insensible of the punishment. There can be no greater cruelty, than the inflicting [of] a punishment, as the forfeiture of goods, which must fall solely on the innocent offspring of the offender. . . . [Suicide] is so abhorrent to the feelings of mankind, and that strong love of life which is implanted in the human heart, that it cannot be so frequently committed, as to become dangerous to society. There can of course be no necessity of any punishment." 2 Z. Swift, *A System of the Laws of the State of Connecticut* 304 (1796).

This statement makes it clear, however, that the movement away from the common law's harsh sanctions did not represent an acceptance of suicide; rather, as Chief Justice Swift observed, this change reflected the growing consensus that it was unfair to punish the suicide's family for his wrongdoing. [*Cruzan*, supra, at 294](#) (SCALIA, J., concurring). Nonetheless, **[*714]** although States moved away from Blackstone's **[19]** treatment of suicide, courts continued to condemn it as a grave public wrong. See, e.g., [*Bigelow v. Berkshire Life Ins. Co.*, 93 U.S. 284, 286 \(1876\)](#) (suicide **HN5** is "an act of criminal self-destruction"); [*Von Holden v. Chapman*, 87 App. Div. 2d 66, 70-71, 450 N. Y. S. 2d 623, 626-627 \(1982\)](#); [*Blackwood v. Jones*, 111 Fla. 528, 532, 149 So. 600, 601 \(1933\)](#) ("No sophistry is tolerated . . . which seeks to justify self-

slayers." A. Horne, *The Mirrour of Justices*, ch. 1, § 9, pp. 41-42 (W. Robinson ed. 1903). By the mid-16th century, the Court at Common Bench could observe that "[suicide] is an Offence against Nature, against God, and against the King. . . . To destroy one's self is contrary to Nature, and a Thing most horrible." *Hales v. Petit*, 1 Plowd. Com. 253, 261, 75 Eng. Rep. 387, 400 (1561-1562).

In 1644, Sir Edward Coke published his *Third Institute*, a lodestar for later common lawyers. See T. Plucknett, *A Concise History of the Common Law* 281-284 (5th ed. 1956). Coke regarded suicide as a category of murder, and agreed with Bracton that the goods and chattels--but not, for Coke, the lands--of a sane suicide were forfeit. 3 E. Coke, *Institutes* * 54. William Hawkins, in his 1716 *Treatise of the Pleas of the Crown*, followed Coke, observing that "our laws have always had . . . an abhorrence of this crime." 1 W. Hawkins, *Pleas of the Crown*, ch. 27, § 4, p. 164 (T. Leach ed. 1795).

destruction as commendable or even a matter of personal right").

That suicide remained a grievous, though nonfelonious, wrong is confirmed by the fact that colonial and early state legislatures and courts did not retreat from prohibiting assisting suicide. Swift, in his early 19th century treatise on the laws of Connecticut, stated that "if one counsels another to commit suicide, and the other by reason of the advice kills himself, the advisor is guilty of murder as principal." 2 Z. Swift, *A Digest of the Laws of the State of Connecticut* 270 (1823). This was the well established common-law view, see *In re Joseph G.*, 34 Cal. 3d 429, 434-435, 667 P. 2d 1176, [****2265**] [*****2265**] 1179 (1983); *Commonwealth v. Mink*, 123 Mass. 422, 428 (1877) ("Now if the murder [**20**] [******784**] of one's self is felony, the accessory is equally guilty as if he had aided and abetted in the murder") (quoting Chief Justice Parker's charge to the jury in *Commonwealth v. Bowen*, 13 Mass. 356 (1816)), as was the similar principle that the consent of a homicide victim is "wholly immaterial to the guilt of the person who caused [his death]," 3 J. Stephen, *A History of the Criminal Law of England* 16 (1883); see 1 F. Wharton, *Criminal Law* §§ 451-452 (9th ed. 1885); *Martin v. Commonwealth*, 184 Va. 1009, 1018-1019, 37 S. E. 2d 43, 47 (1946) ("The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable"). And the prohibitions against assisting suicide never contained exceptions for those who were near death. Rather, "the life of those to whom life had become a burden--of those who [were] hopelessly diseased or fatally wounded--nay, even the lives of criminals [***715**] condemned to death, [were] under the protection of law, equally as the lives of those who [were] in the full tide of life's enjoyment, and anxious to continue to live." *Blackburn v. State*, 23 Ohio St. 146, 163 (1872); see *Bowen, supra*, [**21**] at 360 (prisoner who persuaded another to commit suicide could be tried for murder, even though victim was scheduled shortly to be executed).

The earliest American statute explicitly to outlaw assisting suicide was enacted in New York in 1828, Act of Dec. 10, 1828, ch. 20, § 4, 1828 N. Y. Laws 19 (codified at 2 N. Y. Rev. Stat. pt. 4, ch. 1, tit. 2, art. 1, § 7, p. 661 (1829)), and many of the new States and Territories followed New York's example. Marzen 73-74. Between 1857 and 1865, a New York commission led by Dudley Field drafted a criminal code that prohibited "aiding" a suicide and, specifically, "furnishing another person with any deadly weapon or poisonous drug, knowing that such person intends to use such weapon or drug in taking his own life." *Id.*, at 76-77. By the time the *Fourteenth Amendment* was ratified, it was a crime in most States to assist a suicide. See *Cruzan, supra*, at 294-295 (SCALIA, J., concurring). The Field Penal Code was adopted in the Dakota Territory in 1877, in New York in 1881, and its language served as a model for several other western States' statutes in the late 19th and early 20th centuries. Marzen 76-77, 205-206, 212-213. California, [**22**] for example, codified its assisted-suicide prohibition in 1874, using language similar to the Field Code's.¹¹ In this century, the Model Penal Code also prohibited "aiding" suicide, prompting many States to enact or revise their assisted-suicide [***716**] bans.¹² The Code's drafters observed that "the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who [******785**] expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of

¹¹ In 1850, the California legislature adopted the English common law, under which assisting suicide was, of course, a crime. Act of Apr. 13, 1850, ch. 95, 1850 Cal. Stats. 219. The provision adopted in 1874 provided that "every person who deliberately aids or advises, or encourages another to commit suicide, is guilty of a felony." Act of Mar. 30, 1874, ch. 614, § 13, 400, 255 (codified at *Cal. Penal Code* § 400 (T. Hittel ed. 1876)).

¹² "A *HN6* person who purposely aids or solicits another to commit suicide is guilty of a felony in the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor." American Law Institute, Model Penal Code § 210.5(2) (Official Draft and Revised Comments 1980).

the suicide victim." American Law Institute, Model Penal Code § 210.5, Comment 5, p. 100 (Official Draft and Revised Comments 1980). [23]

Though deeply rooted, the States' assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed. Because of advances in medicine and technology, Americans today are increasingly likely to die in institutions, from chronic illnesses. President's Comm'n for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment* 16-18 (1983). Public concern and democratic action are therefore sharply focused on how best to protect dignity and independence at the end of life, with the result that there have been [**2266] [***2266] many significant changes in state laws and in the attitudes these laws reflect. Many States, for example, now permit "living wills," surrogate health-care decisionmaking, and the withdrawal or refusal of life-sustaining [24] medical treatment. See *Vacco v. Quill*, *post*, at 9-11; *79 F.3d, at 818-820*; *People v. Kevorkian*, *447 Mich. 436, 478-480, and nn. 53-56, 527 N. W. 2d 714, 731-732, and nn. 53-56* (1994). At the same time, however, voters and legislators continue for the most part to reaffirm their States' prohibitions on assisting suicide.

The Washington statute at issue in this case, *Wash. Rev. Code § 9A.36.060* (1994), was enacted in 1975 as part of a revision of that State's criminal code. Four years later, [*717] Washington passed its Natural Death Act, which specifically stated that the "withholding or withdrawal of life-sustaining treatment . . . shall not, for any purpose, constitute a suicide" and that "nothing in this chapter shall be construed to condone, authorize, or approve mercy killing" Natural Death Act, 1979 Wash. Laws, ch. 112, §§ 8(1), p. 11 (codified at *Wash. Rev. Code §§ 70.122.070(1), 70.122.100* (1994)). In 1991, Washington voters rejected a ballot initiative which, had it passed, would have permitted a form

of physician-assisted suicide.¹³ Washington then added a provision to the Natural Death Act expressly excluding physician-assisted suicide. 1992 Wash. [25] Laws, ch. 98, § 10; *Wash. Rev. Code § 70.122.100* (1994).

California voters rejected an assisted-suicide initiative similar to Washington's in 1993. On the other hand, in 1994, voters in Oregon enacted, also through ballot initiative, that State's "Death With Dignity Act," which legalized physician-assisted suicide for competent, terminally ill adults.¹⁴ Since the Oregon vote, many proposals to legalize assisted-suicide have been and continue [****786] to be introduced in the States' legislatures, [26] but none has been enacted.¹⁵ And [*718] just last year, Iowa and Rhode Island joined the overwhelming majority of States explicitly prohibiting assisted suicide. See *Iowa Code Ann. §§ 707A.2, 707A.3* (Supp. 1997); *R. I. Gen. Laws §§*

¹³ Initiative 119 would have amended Washington's Natural Death Act, *Wash. Rev. Code § 70.122.010 et seq.* (1994), to permit "aid-in-dying", defined as "aid in the form of a medical service provided in person by a physician that will end the life of a conscious and mentally competent qualified patient in a dignified, painless and humane manner, when requested voluntarily by the patient through a written directive in accordance with this chapter at the time the medical service is to be provided." App. H to Pet. for Cert. 3-4.

¹⁴ *Ore. Rev. Stat. §§ 127.800 et seq.* (1996); *Lee v. Oregon*, *891 F. Supp. 1429 (Ore. 1995)* (Oregon Act does not provide sufficient safeguards for terminally ill persons and therefore violates the *Equal Protection Clause*), vacated, *Lee v. Oregon*, *107 F.3d 1382 (CA9 1997)*.

¹⁵ See, e.g., Alaska H. B. 371 (1996); Ariz. S. B. 1007 (1996); Cal. A. B. 1080, A. B. 1310 (1995); Colo. H. B. 1185 (1996); Colo. H. B. 1308 (1995); Conn. H. B. 6298 (1995); Ill. H. B. 691, S. B. 948 (1997); Me. H. P. 663 (1997); Me. H. P. 552 (1995); Md. H. B. 474 (1996); Md. H. B. 933 (1995); Mass. H. B. 3173 (1995); Mich. H. B. 6205 (1996); Mich. S. B. 556 (1996); Mich. H. B. 4134 (1995); Miss. H. B. 1023 (1996); N. H. H. B. 339 (1995); N. M. S. B. 446 (1995); N. Y. S. B. 5024 (1995); N. Y. A. B. 6333 (1995); Neb. L. B. 406 (1997); Neb. L. B. 1259 (1996); R. I. S. 2985 (1996); Vt. H. B. 109 (1997); Vt. H. B. 335 (1995); Wash. S. B. 5596 (1995); Wis. A. B. 174, S. B. 90 (1995); Senate of Canada, *Of Life and Death*, Report of the Special Senate Committee on Euthanasia and Assisted Suicide

A--156 (June 1995) (describing unsuccessful proposals, between 1991-1994, to legalize assisted suicide).

[11-60-1](#), [11-60-3](#) (Supp. 1996). Also, on April 30, 1997, President Clinton signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibits the use of federal funds in support of physician-assisted suicide. Pub. L. 105-12, 111 Stat. 23 (codified at [42 U.S.C. § 14401 et seq.](#)).¹⁶ [27]

[28] [**2267] [***2267] [*719] Thus, the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues. For example, New York State's Task Force on Life and the Law--an ongoing, blue-ribbon commission composed of doctors, ethicists, lawyers, religious leaders, and interested laymen--was convened in 1984 and commissioned with "a broad mandate to recommend public policy on issues raised by medical advances." New York Task Force vii. Over the past decade, the Task Force has recommended laws relating to end-of-life decisions, surrogate pregnancy, and organ donation. [Id., at 118-119](#). After studying physician-assisted

suicide, however, the Task Force unanimously concluded that "legalizing assisted suicide and euthanasia would pose profound risks to many individuals who are ill and vulnerable. . . . The potential dangers of this dramatic change in public policy would outweigh any benefit that might be achieved." [Id., at 120](#).

[****787] Attitudes toward suicide itself have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the [29] importance of end-of-life decisionmaking, we have not retreated from this prohibition. Against this backdrop of history, tradition, and practice, we now turn to respondents' constitutional claim.

II

[LEdHN\[4\]](#) [4][HN7](#) The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. [Collins v. Harker Heights, 503 U.S. 115, 125 \(1992\)](#) (Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them'" (quoting [*720] [Daniels v. Williams, 474 U.S. 327, 331 \(1986\)](#))). The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. [Reno v. Flores, 507 U.S. 292, 301-302 \(1993\)](#); [Casey, 505 U.S. at 851](#). In a long line of cases, we have held that, [HN8](#) in addition to the specific freedoms protected by the [Bill of Rights](#), the "liberty" specially protected by the Due Process Clause includes the rights to marry, [Loving v. Virginia, 388 U.S. 1 \(1967\)](#); to have children, [Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 \(1942\)](#); to direct the education [30] and upbringing of one's children, [Meyer v. Nebraska, 262 U.S. 390 \(1923\)](#); [Pierce v. Society of Sisters, 268 U.S. 510 \(1925\)](#); to marital privacy, [Griswold v. Connecticut, 381 U.S. 479 \(1965\)](#); to use contraception, *ibid*; [Eisenstadt v.](#)

¹⁶Other countries are embroiled in similar debates: The Supreme Court of Canada recently rejected a claim that the Canadian Charter of Rights and Freedoms establishes a fundamental right to assisted suicide, *Rodriguez v. British Columbia (Attorney General)*, 107 D. L. R. (4th) 342 (1993); the British House of Lords Select Committee on Medical Ethics refused to recommend any change in Great Britain's assisted-suicide prohibition, House of Lords, Session 1993-94 Report of the Select Committee on Medical Ethics, 12 Issues in Law & Med. 193, 202 (1996) ("We identify no circumstances in which assisted suicide should be permitted"); New Zealand's Parliament rejected a proposed "Death With Dignity Bill" that would have legalized physician-assisted suicide in August 1995, Graeme, MPs Throw out Euthanasia Bill, The Dominion (Wellington), Aug. 17, 1995, p. 1; and the Northern Territory of Australia legalized assisted suicide and voluntary euthanasia in 1995. See Shenon, Australian Doctors Get Right to Assist Suicide, N.Y. Times, July 28, 1995, p. A8. As of February 1997, three persons had ended their lives with physician assistance in the Northern Territory. Mydans, Assisted Suicide: Australia Faces a Grim Reality, N. Y. Times, Febr. 2, 1997, p. A3. On March 24, 1997, however, the Australian Senate voted to overturn the Northern Territory's law. Thornhill, Australia Repeals Euthanasia Law, Washington Post, March 25, 1997, p. A14; see Euthanasia Laws Act 1997, No. 17, 1997 (Austl.). On the other hand, on May 20, 1997, Colombia's Constitutional Court legalized voluntary euthanasia for terminally ill people. Sentencia No. C-239/97 (Corte Constitucional, Mayo 20, 1997); see Colombia's Top Court Legalizes Euthanasia, Orlando Sentinel, May 22, 1997, p. A18.

Baird, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Casey*, *supra*. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S. at 278-279. **LEdHN[5]** [5] But we "have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins*, 503 U.S. at 125. By extending constitutional protection to an asserted right **[**2268]** **[***2268]** or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," *ibid*, lest the liberty protected by the Due Process Clause be subtly transformed into the policy **[31]** preferences of the members of this Court, *Moore*, 431 U.S. at 502 (plurality opinion).

LEdHN[3B] [3B] **LEdHN[6]** [6] Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, **[*721]** "deeply rooted in this Nation's history and tradition," *id.*, at 503 **[****788]** (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. *Flores*, *supra*, at 302; *Collins*, *supra*, at 125; *Cruzan*, *supra*, at 277-278. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," *Collins*, *supra*, at 125, that direct and restrain our exposition of the Due Process Clause. **[32]** As we stated recently in

Flores, **HN9** the *Fourteenth Amendment* "forbids the government to infringe . . . 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." 507 U.S. at 302.

JUSTICE SOUTER, relying on Justice Harlan's dissenting opinion in *Poe v. Ullman*, would largely abandon this restrained methodology, and instead ask "whether [Washington's] statute sets up one of those 'arbitrary impositions' or 'purposeless restraints' at odds with the *Due Process Clause of the Fourteenth Amendment*," *post*, at 1 (quoting *Poe*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)). ¹⁷ **[*722]** In our view, however, the development of this Court's substantive-due-process jurisprudence, described briefly above, *supra*, at 15, has been a process whereby the outlines of the "liberty" specially protected by the *Fourteenth Amendment*--never fully clarified, to be sure, and perhaps not capable of being fully clarified--have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein **[33]** in the subjective elements that are necessarily present in due-process judicial review. In addition, by establishing a threshold requirement--that a challenged state

¹⁷ In JUSTICE SOUTER'S opinion, Justice Harlan's *Poe* dissent supplies the "modern justification" for substantive-due-process review. *Post*, at 5, and n.2 (SOUTER, J., concurring in judgment). But although Justice Harlan's opinion has often been cited in due-process cases, we have never abandoned our fundamental-rights-based analytical method. Just four Terms ago, six of the Justices now sitting joined the Court's opinion in *Reno v. Flores*, 507 U.S. 292, 301-305 (1993); *Poe* was not even cited. And in *Cruzan*, neither the Court's nor the concurring opinions relied on *Poe*; rather, we concluded that the right to refuse unwanted medical treatment was so rooted in our history, tradition, and practice as to require special protection under the *Fourteenth Amendment*. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278-279 (1990); *id.*, at 287-288 (O'CONNOR, J., concurring). True, the Court relied on Justice Harlan's dissent in *Casey*, 505 U.S. at 848-850, but, as *Flores* demonstrates, we did not in so doing jettison our established approach. Indeed, to read such a radical move into the Court's opinion in *Casey* would seem to fly in the face of that opinion's emphasis on *stare decisis*. 505 U.S. at 854-869.

action implicate a fundamental right--before requiring more than a reasonable relation to a legitimate state interest [****789] to justify the action, it avoids the need for complex balancing of competing interests in every case.

[34] [LEdHN\[1D\]](#) [1D]Turning to the claim at issue here, the Court of Appeals stated that "properly analyzed, the first issue to be resolved is [**2269] [***2269] whether there is a liberty interest in determining the time and manner of one's death," [79 F.3d, at 801](#), or, in other words, "is there a right to die?," [id., at 799](#). Similarly, respondents assert a "liberty to choose how to die" and a right to "control of one's final days," Brief for Respondents 7, and describe the asserted liberty as "the right to choose a humane, dignified death," [id., at 15](#), and "the liberty to shape death," [id., at 18](#). As noted above, we have a tradition of carefully formulating the interest at stake in substantive-due-process cases. For example, although *Cruzan* is often described as a "right to die" case, see [79 F.3d, at 799](#); *post*, at 9 (STEVENS, J., concurring in judgment) (*Cruzan* recognized "the more specific interest in making decisions [*723] about how to confront an imminent death"), we were, in fact, more precise: we assumed that the Constitution granted competent persons a "constitutionally protected right to refuse lifesaving hydration and nutrition." [Cruzan, 497 U.S. at 279](#); [id., at 287](#) (O'CONNOR, J., [35] concurring) ("[A] liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions"). The Washington statute at issue in this case prohibits "aiding another person to attempt suicide," [Wash. Rev. Code § 9A.36.060\(1\)](#) (1994), and, thus, the question before us is whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.¹⁸

[36] We now inquire whether this asserted right has any place in our Nation's traditions. Here, as discussed above, *supra*, at 4-15, we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State. See [Jackman v. Rosenbaum Co., 260 U.S. 22, 31 \(1922\)](#) ("If [HN10](#) a thing has been practiced for two hundred years by common consent, it will need a strong case for the [Fourteenth Amendment](#) to affect it"); [Flores, 507 U.S. at 303](#) ("The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it").

Respondents contend, however, that the liberty interest they assert is consistent with this Court's substantive-due-process [*724] line of cases, if not with this Nation's history and practice. Pointing to *Casey* and [****790] *Cruzan*, respondents read our jurisprudence in this area as reflecting a general tradition of "self-sovereignty," Brief of Respondents 12, [37] and as teaching that the "liberty" protected by the Due Process Clause includes "basic and intimate exercises of personal autonomy," [id.](#), at 10; see [Casey, 505 U.S. at 847](#) ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter"). According to respondents, our liberty jurisprudence, and the broad, individualistic principles it reflects, protects the "liberty of competent, terminally ill adults to make end-of-life decisions free of undue government interference." Brief for Respondents 10. The question presented in this case, however, is whether the protections of the Due Process Clause include a right to commit suicide with another's assistance. With this "careful description" of respondents' claim in mind, we turn to *Casey* and *Cruzan*.

¹⁸ See, e.g., [Quill v. Vacco, 80 F.3d 716, 724 \(CA2 1996\)](#) ("right to assisted suicide finds no cognizable basis in the Constitution's language or design"); [Compassion in Dying v. Washington, 49 F.3d 586, 591 \(CA9 1995\)](#) (referring to alleged "right to suicide," "right to assistance in suicide," and "right to aid in killing oneself"); [People v.](#)

[Kevorkian, 447 Mich. 436, 476, n.47, 527 N. W. 2d 714, 730, n.47 \(1994\)](#) ("The question that we must decide is whether the Constitution encompasses a right to commit suicide and, if so, whether it includes a right to assistance").

In *Cruzan*, we considered whether Nancy Beth Cruzan, who had been severely injured in an automobile accident and was in a persistent vegetative state, "had a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment" at her parents' request. [Cruzan, \[**2270\] \[***2270\] 497 U.S. at 269](#). We began with the observation that "at common [38] law, even the touching of one person by another without consent and without legal justification was a battery." *Ibid.* We then discussed the related rule that "informed consent is generally required for medical treatment." *Ibid.* After reviewing a long line of relevant state cases, we concluded that "the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment." [Id., at 277](#). Next, we reviewed our own cases on the subject, and stated that "the principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior [*725] decisions." [Id., at 278](#). Therefore, "for purposes of [that] case, we assumed that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." [Id., at 279](#); see [id., at 287](#) (O'CONNOR, J., concurring). We concluded that, notwithstanding this right, the Constitution permitted Missouri to require clear and convincing evidence of an incompetent patient's wishes concerning the withdrawal of life-sustaining treatment. [39] [Id., at 280-281](#).

Respondents contend that in *Cruzan* we "acknowledged that competent, dying persons have the right to direct the removal of life-sustaining medical treatment and thus hasten death," Brief for Respondents 23, and that "the constitutional principle behind recognizing the patient's liberty to direct the withdrawal of artificial life support applies at least as strongly to the choice to hasten impending death by consuming lethal medication," *id.*, at 26. Similarly, the Court of Appeals concluded that "*Cruzan*, by recognizing a liberty interest that includes the refusal of artificial

provision of life-sustaining food and water, necessarily [****791] recognized a liberty interest in hastening one's own death." [79 F.3d, at 816](#).

The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal [40] and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct. See *Quill v. Vacco*, *post*, at 5-13. In *Cruzan* itself, we recognized that most States outlawed assisted suicide--and even more do today--and we certainly gave no intimation that the right to refuse unwanted medical treatment could be somehow [*726] transmuted into a right to assistance in committing suicide. [497 U.S. at 280](#).

Respondents also rely on *Casey*. There, the Court's opinion concluded that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." [Casey, 505 U.S. at 846](#). We held, first, that a woman has a right, before her fetus is viable, to an abortion "without undue interference from the State"; second, that States may restrict post-viability abortions, so long as exceptions are made to protect a woman's life and health; and third, that the State has legitimate interests throughout a pregnancy in protecting the health of the woman and the life of the unborn child. *Ibid.* In reaching this conclusion, the opinion discussed in some [41] detail this Court's substantive-due-process tradition of interpreting the Due Process Clause to protect certain fundamental rights and "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and noted that many of those rights and liberties "involve the most intimate and personal choices a person may make in a lifetime." [Id., at 851](#).

[LEdHN\[7\]](#) [7]The Court of Appeals, like the District Court, found *Casey* "highly instructive" and "almost prescriptive" for determining "what liberty interest may inhere in a terminally ill person's choice to commit suicide":

"Like the decision of whether or not to have an abortion, the decision how and when to die is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy.'" [79 F.3d, at 813-814](#).

Similarly, respondents emphasize the statement in *Casey* that:

"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they [\[42\] \[*727\]](#) formed under compulsion of the State." [Casey, 505 U.S. at 851](#).

Brief for Respondents 12. By choosing [\[****792\]](#) this language, the Court's opinion in *Casey* described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the [Fourteenth Amendment](#).¹⁹ The

¹⁹ See [Moore v. East Cleveland, 431 U.S. 494, 503 \(1977\)](#) ("The Constitution protects the sanctity of the family *precisely because* the institution of the family is deeply rooted in this Nation's history and tradition") (emphasis added); [Griswold v. Connecticut, 381 U.S. 479, 485-486 \(1965\)](#) (intrusions into the "sacred precincts of marital bedrooms" offend rights "older than the [Bill of Rights](#)"); *id.*, at 495-496 (Goldberg, J., concurring) (the law in question "disrupted the traditional relation of the family--a relation as old and as fundamental as our entire civilization"); [Loving v. Virginia, 388 U.S. 1, 12 \(1967\)](#) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness"); [Turner v. Safley, 482 U.S. 78, 95 \(1987\)](#) ("The decision to marry is a fundamental right"); [Roe v. Wade, 410 U.S. 113, 140 \(1973\)](#) (stating that at the Founding and throughout the 19th century, "a woman enjoyed a substantially broader right to terminate a

opinion moved from the recognition that liberty necessarily includes freedom of conscience and belief about ultimate considerations to the observation that "though the abortion decision may originate within the zone of conscience and belief, it is *more than a philosophic exercise*." [Casey, 505 U.S. at 852](#) (emphasis added). That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, [San Antonio \[*728\] Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-35 \(1973\)](#), and *Casey* did not suggest otherwise.

[\[43\] LEdHN\[1E\]](#) [1E][LEdHN\[8\]](#) [8]The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. [HN11](#) The Constitution also requires, however, that Washington's assisted-suicide ban be rationally related to legitimate government interests. See [Heller v. Doe, 509 U.S. 312, 319-320 \(1993\)](#); [Flores, 507 U.S. at 305](#). This requirement is unquestionably met here. As the court below recognized, [79 F.3d, at 816-817](#),²⁰ Washington's assisted-suicide ban implicates a number [\[**2272\] \[***2272\]](#) of [\[****793\]](#) state interests.²¹ See [49 F.3d, at 592-593](#); Brief for State of

pregnancy"); [Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 \(1942\)](#) ("Marriage and procreation are fundamental"); [Pierce v. Society of Sisters, 268 U.S. 510, 535 \(1925\)](#); [Meyer v. Nebraska, 262 U.S. 390, 399 \(1923\)](#) (liberty includes "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men").

²⁰ The court identified and discussed six state interests: (1) preserving life; (2) preventing suicide; (3) avoiding the involvement of third parties and use of arbitrary, unfair, or undue influence; (4) protecting family members and loved ones; (5) protecting the integrity of the medical profession; and (6) avoiding future movement toward euthanasia and other abuses. [79 F.3d, at 816-832](#).

²¹ Respondents also admit the existence of these interests, Brief for

California et al. as *Amici Curiae* 26-29; Brief for United States as *Amicus Curiae* 16-27. [44]

[LEdHN\[1F\]](#) [1F]First, Washington has an "unqualified interest in the preservation of human life." [Cruzan, 497 U.S. at 282](#). The State's prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest. See [id., at 280](#); Model Penal Code § 210.5, Comment 5, at 100 ("The [HN12](#) interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of [*729] another").²² This interest is symbolic and aspirational as well as practical:

[45]

"While suicide is no longer prohibited or penalized, the ban against assisted suicide and euthanasia shores up the notion of limits in human relationships. It reflects the gravity with which we view the decision to take one's own life or the life of another, and our reluctance to encourage or promote these decisions." New York Task Force 131-132.

[LEdHN\[9\]](#) [9]Respondents admit that "the State has a real interest in preserving the lives of those who can still contribute to society and enjoy life." Brief for Respondents 35, n.23. The Court of Appeals also recognized Washington's interest in protecting life, but held that the "weight" of this

Respondents 28-39, but contend that Washington could better promote and protect them through regulation, rather than prohibition, of physician-assisted suicide. Our inquiry, however, is limited to the question whether the State's prohibition is rationally related to legitimate state interests.

²² The States express this commitment by other means as well:

"Nearly [HN13](#) all states expressly disapprove of suicide and assisted suicide either in statutes dealing with durable powers of attorney in health-care situations, or in 'living will' statutes. In addition, all states provide for the involuntary commitment of persons who may harm themselves as the result of mental illness, and a number of states allow the use of nondeadly force to thwart suicide attempts." [People v. Kevorkian, 447 Mich., at 478-479, and nn. 53-56, 527 N. W. 2d, at 731-732, and nn. 53-56](#).

interest depends on the "medical condition and the wishes of the person whose life is at stake." [79 F.3d, at 817](#). Washington, however, has rejected this sliding-scale approach and, through its assisted-suicide ban, insists that all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law. See [United States v. Rutherford, 442 U.S. 544, 558 \(1979\)](#) ("... Congress could reasonably have determined to protect the terminally ill, no less than other patients, from the vast [46] range of self-styled panaceas that inventive minds can devise"). As we have previously affirmed, the States "may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy," [Cruzan, 497 U.S. at 282](#). [*730] This remains true, as *Cruzan* makes clear, even for those who are near death.

[LEdHN\[1G\]](#) [1G]Relatedly, all admit that [HN14](#) suicide is a serious public-health problem, especially among persons in otherwise vulnerable groups. See Washington State Dept. of Health, Annual Summary of Vital Statistics 1991, pp. 29-30 (Oct. 1992) (suicide is [****794] a leading cause of death in Washington of those between the ages of 14 and 54); New York Task Force 10, 23-33 (suicide rate in the general population is about one percent, and suicide is especially prevalent among the young and the elderly). The State has an interest in preventing suicide, and in studying, identifying, and treating its causes. See [79 F.3d, at 820; id., at 854](#) (Beezer, J., dissenting) ("The state recognizes suicide as a manifestation of medical and psychological anguish"); Marzen 107-146.

Those who attempt suicide--terminally ill or not--often suffer from depression or other mental disorders. See New [47] York Task Force 13-22, 126-128 (more than 95% of those who commit suicide had a major psychiatric illness at the time of death; among the terminally ill, uncontrolled pain is a "risk factor" because it contributes to depression); Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman [**2273] [***2273] Charles T. Canady to the

Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., 10-11 (Comm. Print 1996); cf. Back, Wallace, Starks, & Pearlman, Physician-Assisted Suicide and Euthanasia in Washington State, 275 JAMA 919, 924 (1996) ("Intolerable physical symptoms are not the reason most patients request physician-assisted suicide or euthanasia"). Research indicates, however, that many people who request physician-assisted suicide withdraw that request if their depression and pain are treated. H. Hendin, *Seduced by Death: Doctors, Patients and the Dutch Cure* 24-25 (1997) (suicidal, terminally ill patients "usually respond well to treatment for depressive illness and pain medication and are then grateful to be alive"); New York Task Force 177-178. [*731] The New York Task Force, however, expressed its concern that, because depression is difficult [48] to diagnose, physicians and medical professionals often fail to respond adequately to seriously ill patients' needs. *Id.*, at 175. Thus, legal physician-assisted suicide could make it more difficult for the State to protect depressed or mentally ill persons, or those who are suffering from untreated pain, from suicidal impulses.

The State also has an interest in protecting the integrity and ethics of the medical profession. In contrast to the Court of Appeals' conclusion that "the integrity of the medical profession would [not] be threatened in any way by [physician-assisted suicide]," 79 F.3d, at 827, the American Medical Association, like many other medical and physicians' groups, has concluded that "physician-assisted suicide is fundamentally incompatible with the physician's role as healer." American Medical Association, Code of Ethics § 2.211 (1994); see Council on Ethical and Judicial Affairs, *Decisions Near the End of Life*, 267 JAMA 2229, 2233 (1992) ("The societal risks of involving physicians in medical interventions to cause patients' deaths is too great"); New York Task Force 103-109 (discussing physicians' views). And physician-assisted suicide could, it is argued, [49] undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line

between healing and harming. Assisted Suicide in the United States, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., [****795] 355-356 (1996) (testimony of Dr. Leon R. Kass) ("The patient's trust in the doctor's wholehearted devotion to his best interests will be hard to sustain").

Next, the State has an interest in protecting vulnerable groups--including the poor, the elderly, and disabled persons--from abuse, neglect, and mistakes. The Court of Appeals dismissed the State's concern that disadvantaged persons might be pressured into physician-assisted suicide as [*732] "ludicrous on its face." 79 F.3d, at 825. We have recognized, however, the real risk of subtle coercion and undue influence in end-of-life situations. *Cruzan*, 497 U.S. at 281. Similarly, the New York Task Force warned that "legalizing physician-assisted suicide would pose profound risks to many individuals who are ill and vulnerable. . . . The risk of harm is greatest for the many individuals in our society whose autonomy and well-being are already compromised [50] by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized social group." New York Task Force 120; see *Compassion in Dying*, 49 F.3d, at 593 ("An insidious bias against the handicapped--again coupled with a cost-saving mentality--makes them especially in need of Washington's statutory protection"). If physician-assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end-of-life health-care costs.

The State's interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and "societal indifference." 49 F.3d, at 592. The State's assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person's

suicidal impulses should be interpreted and treated the same way as anyone else's. See New York Task Force 101-102; Physician-Assisted Suicide and Euthanasia **[**2274] [***2274]** in the Netherlands: A Report of Chairman Charles T. Canady, at 9, 20 **[51]** (discussing prejudice toward the disabled and the negative messages euthanasia and assisted suicide send to handicapped patients).

Finally, the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia. The Court of Appeals struck down **[*733]** Washington's assisted-suicide ban only "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors." [79 F.3d, at 838](#). Washington insists, however, that the impact of the court's decision will not and cannot be so limited. Brief for Petitioners 44-47. If suicide is protected as a matter of constitutional right, it is argued, "every man and woman in the United States must enjoy it." [Compassion in Dying, 49 F.3d, at 591](#); see [Kevorkian, 447 Mich., at 470, n.41, 527 N. W. 2d, at 727-728, n.41](#). The Court of Appeals' decision, and its expansive reasoning, provide ample support for the State's concerns. The court noted, for example, that the "decision of a duly appointed surrogate decision maker is for all legal purposes the decision of the patient himself," [79 F.3d, at 832, n.120](#); that "in some instances, **[52]** the **[****796]** patient may be unable to self-administer the drugs and . . . administration by the physician . . . may be the only way the patient may be able to receive them," [id., at 831](#); and that not only physicians, but also family members and loved ones, will inevitably participate in assisting suicide. [Id., at 838, n.140](#). Thus, it turns out that what is couched as a limited right to "physician-assisted suicide" is likely, in effect, a much broader license, which could prove extremely difficult to police and contain. ²³ Washington's ban on assisting suicide

prevents such erosion.

[53] [*734] This concern is further supported by evidence about the practice of euthanasia in the Netherlands. The Dutch government's own study revealed that in 1990, there were 2,300 cases of voluntary euthanasia (defined as "the deliberate termination of another's life at his request"), 400 cases of assisted suicide, and more than 1,000 cases of euthanasia without an explicit request. In addition to these latter 1,000 cases, the study found an additional 4,941 cases where physicians administered lethal morphine overdoses without the patients' explicit consent. Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady, at 12-13 (citing Dutch study). This study suggests that, despite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia. *Id.*, at 16-21; see generally C. Gomez, *Regulating Death: Euthanasia and the Case of the Netherlands* (1991); H. Hendin,

right would leave a court with no principled basis to avoid recognizing another, but because there is a plausible case that the right claimed would not be readily containable by reference to facts about the mind that are matters of difficult judgment, or by gatekeepers who are subject to temptation, noble or not." *Post*, at 36-37 (opinion concurring in judgment). We agree that the case for a slippery slope has been made out, but--bearing in mind Justice Cardozo's observation of "the tendency of a principle to expand itself to the limit of its logic," *The Nature of the Judicial Process* 51 (1932)--we also recognize the reasonableness of the widely expressed skepticism about the lack of a principled basis for confining the right. See Brief for United States as *Amicus Curiae* 26 ("Once a legislature abandons a categorical prohibition against physician assisted suicide, there is no obvious stopping point"); Brief for Not Dead Yet et al. as *Amici Curiae* 21-29; Brief for Bioethics Professors as *Amici Curiae* 23-26; Report of the Council on Ethical and Judicial Affairs, App. 133, 140 ("If assisted suicide is permitted, then there is a strong argument for allowing euthanasia"); New York Task Force 132; Kamisar, *The "Right to Die": On Drawing (and Erasing) Lines*, 35 *Duquesne L. Rev.* 481 (1996); Kamisar, *Against Assisted Suicide--Even in a Very Limited Form*, [72 U. Det. Mercy L. Rev.](#) 735 (1995).

²³ JUSTICE SOUTER concludes that "the case for the slippery slope is fairly made out here, not because recognizing one due process

[54] Seduced By Death: Doctors, Patients, and the Dutch Cure (1997). The New York Task Force, citing the Dutch experience, observed that "assisted suicide and euthanasia are closely linked," New York Task Force 145, and concluded that the "risk [**2275] [***2275] of . . . abuse is neither speculative nor distant," *id.*, at 134. Washington, like most [*735] other States, reasonably ensures against this risk by banning, rather than regulating, assisting suicide. See [United States v. 12 200-ft Reels of Super 8MM Film](#), 413 U.S. 123, 127 (1973) ("Each step, when taken, appears a reasonable step in relation to that [****797] which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance").

[LEdHN\[1H\]](#) [1H][LEdHN\[10A\]](#) [10A]We need not weigh exactly the relative strengths of these various interests. They are unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection. We therefore hold that [Wash. Rev. Code § 9A.36.060\(1\)](#) (1994) does not violate the [Fourteenth Amendment](#), either on its face or "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication [55] prescribed by their doctors." [79 F.3d, at 838](#).²⁴ [LEdHN\[10B\]](#) [10B]

²⁴ JUSTICE STEVENS states that "the Court does conceive of respondents' claim as a facial challenge--addressing not the application of the statute to a particular set of plaintiffs before it, but the constitutionality of the statute's categorical prohibition" *Post*, at 4 (opinion concurring in judgment). We emphasize that we today reject the Court of Appeals' specific holding that the statute is unconstitutional "as applied" to a particular class. See n.6, *supra*. JUSTICE STEVENS agrees with this holding, see *post*, at 14, but would not "foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge," *ibid*. Our opinion does not absolutely foreclose such a claim. However, given our holding that the [Due Process Clause of the Fourteenth Amendment](#) does not provide heightened protection to the asserted liberty interest in ending one's life with a physician's assistance, such a claim would have to be quite different from the ones advanced by respondents here.

[56] * * *

Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society. The decision of the en banc Court of Appeals is [*736] reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Concur by: O'CONNOR; STEVENS; SOUTER; GINSBURG; BREYER

Concur

JUSTICE O'CONNOR, concurring.*

Death will be different for each of us. For many, the last days will be spent in physical pain and perhaps the despair that accompanies physical deterioration and a loss of control of basic bodily and mental functions. Some will seek medication to alleviate that pain and other symptoms.

The Court frames the issue in this case as [57] whether the Due Process Clause of the Constitution protects a "right to commit suicide which itself includes a right to assistance in doing so," *ante*, at 18, and concludes that our Nation's history, legal traditions, and practices do not support the existence of such a right. I join the Court's opinions because I agree that there is no generalized right to "commit suicide." But respondents urge us to address the narrower question [****798] whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death. I see no need to reach that

* JUSTICE GINSBURG concurs in the Court's judgments substantially for the reasons stated in this opinion. JUSTICE BREYER joins this opinion except insofar as it joins the opinions of the Court.

question in the context of the facial challenges to the New York and Washington laws at issue here. See *ante*, at 18 ("The Washington statute at issue in this case prohibits 'aiding another person to attempt suicide,' . . . and, thus, the question before us is whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so"). The parties and *amici* agree that in these States a patient who is [*737] suffering from a terminal illness and who is experiencing great [58] pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death. See [Wash. Rev. Code § 70.122.010](#) (1994); Brief for Petitioners in No. 95-1858, p. 15, n.9; Brief for Respondents in No. 95-1858, p. 15. In this light, even assuming that we would recognize such an interest, I agree that the State's interests in protecting those who are not truly competent or facing imminent death, or those whose decisions to hasten death would not truly be voluntary, are sufficiently weighty to justify a prohibition against physician-assisted suicide. *Ante*, at 27-30; *post*, at 11 (STEVENS, J., concurring in judgments); *post*, at 33-39 (SOUTER, J., concurring in judgment).

Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure. As the Court recognizes, [59] States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues. *Ante*, at 11, 12-13; see *post*, at 36-39 (SOUTER, J., concurring in judgment). In such circumstances, "the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States . . . in the first instance." [Cruzan v. Director, Mo. Dept. of Health](#), 497 U.S. 261, 292 (1990) (O'CONNOR, J.,

concurring) (citing [New State Ice Co. v. Liebmann](#), 285 U.S. 262, 311 (1932)).

In sum, there is no need to address the question whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives. There is no dispute that [*738] dying patients in Washington and New York can obtain palliative care, even when doing so would hasten their deaths. The difficulty in defining terminal illness and the risk that a dying patient's request for assistance in ending his or her life might not be truly voluntary justifies the prohibitions on assisted suicide we uphold here.

[****799] JUSTICE STEVENS, concurring in [60] the judgments.

The Court ends its opinion with the important observation that our holding today is fully consistent with a continuation of the vigorous debate about the "morality, legality, and practicality of physician-assisted suicide" in a democratic society. *Ante*, at 32. I write separately to make it clear that there is also room for further debate about the limits that the Constitution places on the power of the States to punish the practice.

I

The morality, legality, and practicality of capital punishment have been the subject of debate for many years. In 1976, this Court upheld the constitutionality of the practice in cases coming to us from Georgia,¹ Florida², and Texas.³ In those cases we concluded that a State does have the power to place a lesser value on some lives than on others; there is no absolute requirement that a State treat all human life as having an equal right to preservation. Because the state legislatures had

¹ [Gregg v. Georgia](#), 428 U.S. 153 (1976)

² [Proffitt v. Florida](#), 428 U.S. 242 (1976).

³ [Jurek v. Texas](#), 428 U.S. 262 (1976).

sufficiently narrowed the category of lives that the State could terminate, and had enacted special procedures to ensure that the defendant belonged in that limited category, we concluded that the statutes were not unconstitutional on their [61] face. In later cases coming to us from each [*739] of those States, however, we found that some applications of the statutes were unconstitutional.⁴

Today, the Court decides that Washington's statute prohibiting assisted suicide is not invalid "on its face," that is to say, in all or most cases in which it might be applied.⁵ That holding, however, does not foreclose the possibility that some applications of the statute might well be invalid.

As originally filed, this case presented a challenge [62] to the Washington statute on its face and as it applied to three terminally ill, mentally competent patients and to four physicians who treat terminally ill patients. After the District Court issued its opinion holding that the statute placed an undue burden on the right to commit physician-assisted suicide, see [Compassion in Dying v. Washington](#), 850 F. Supp. 1454, 1462, 1465 (WD Wash. 1994), the three patients died. Although the Court of Appeals considered the constitutionality of the statute "as applied to the prescription of life-ending medication for use by terminally ill, competent adult patients who wish to hasten their deaths," [Compassion in Dying v. Washington](#), 79 F.3d 790, 798 (CA9 1996), the court did not have before it any individual plaintiff seeking to hasten her death or any doctor who [****800] was threatened with prosecution for assisting in the suicide of a particular patient; its analysis and eventual holding that the statute was unconstitutional was not limited to a particular set of plaintiffs before it.

The appropriate standard to be applied in cases

⁴ See, e.g., [Godfrey v. Georgia](#), 446 U.S. 420 (1980); [Enmund v. Florida](#), 458 U.S. 782 (1982); [Penry v. Lynaugh](#), 492 U.S. 302 (1989).

⁵ See *ante*, at 3, n.5.

making facial challenges to state statutes has been the subject of debate within this Court. See [Janklow \[63\] v. Planned Parenthood, Sioux Falls Clinic](#), 517 U.S. 1174; 116 S. Ct. 1582; 134 L. Ed. 2d 679 (1996). Upholding the validity of the federal Bail Reform Act of 1984, the Court stated in [United States v. Salerno](#), 481 U.S. 739 (1987), that a "facial challenge to a legislative Act is, of course, the most [*740] difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.*, at 745.⁶ I do not believe the Court has ever actually applied such a strict standard,⁷ even in *Salerno* itself, and the Court does not appear to apply *Salerno* here. Nevertheless, the Court does conceive of respondents' claim as a facial challenge--addressing not the application of the statute to a particular set of plaintiffs before it, but the constitutionality of the statute's categorical prohibition against "aiding another person to attempt suicide." *Ante*, at 18 (internal quotation marks omitted) (citing [Wash. Rev. Code § 9A.36.060\(1\)](#) (1994)). Accordingly, the Court requires the plaintiffs to show that the interest in liberty protected by the [Fourteenth Amendment](#) "includes a right to commit suicide

⁶ If the Court had actually applied the *Salerno* standard in this action, it would have taken only a few paragraphs to identify situations in which the Washington statute could be validly enforced. In *Salerno* itself, the Court would have needed only to look at whether the statute could be constitutionally applied to the arrestees before it; any further analysis would have been superfluous. See Dorf, *Facial Challenges to State and Federal Statutes*, 46 *Stan. L. Rev.* 235, 239-240 (1994) (arguing that if the *Salerno* standard were taken literally, a litigant could not succeed in her facial challenge unless she also succeeded in her as applied challenge).

⁷ In other cases and in other contexts, we have imposed a significantly lesser burden on the challenger. The most lenient standard that we have applied requires the challenger to establish that the invalid applications of a statute "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." [Broadrick v. Oklahoma](#), 413 U.S. 601, 615 (1973). As the Court's opinion demonstrates, Washington's statute prohibiting assisted suicide has a "plainly legitimate sweep." While that demonstration provides a sufficient justification for rejecting respondents' facial challenge, it does not mean that every application of the statute should or will be upheld.

which itself includes a right to assistance [64] in doing so." *Ante*, at 18.

[65] History and tradition provide ample support for refusing to recognize an open-ended constitutional right to commit suicide. Much more than the State's paternalistic interest [*741] in protecting the individual from the irrevocable consequences of an ill-advised decision motivated by temporary concerns is at stake. There is truth in John Donne's observation [****801] that "No man is an island." ⁸ The State has an interest in preserving and fostering the benefits that every human being may provide to the community--a community that thrives on the exchange of ideas, expressions of affection, shared memories and humorous incidents as well as on the material contributions that its members create and support. The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life. Thus, I fully agree with the Court that the "liberty" protected by the Due Process Clause does not include a categorical "right to commit suicide which itself includes a right to assistance in doing so." *Ante*, at 18.

[66] But just as our conclusion that capital punishment is not always unconstitutional did not preclude later decisions holding that it is sometimes impermissibly cruel, so is it equally clear that a decision upholding a general statutory prohibition of assisted suicide does not mean that every possible application of the statute would be valid. A

⁸ "Who casts not up his eye to the sun when it rises? but who takes off his eye from a comet when that breaks out? Who bends not his ear to any bell which upon any occasion rings? but who can remove it from that bell which is passing a piece of himself out of this world? No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were; any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee." J. Donne, *Meditation No. 17*, *Devotions Upon Emergent Occasions* 86, 87 (A. Raspa ed. 1987).

State, like Washington, that has authorized the death penalty and thereby has concluded that the sanctity of human life does not require that it always be preserved, must acknowledge that there are situations in which an interest in hastening [*742] death is legitimate. Indeed, not only is that interest sometimes legitimate, I am also convinced that there are times when it is entitled to constitutional protection.

II

In [*Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 \(1990\)](#), the Court assumed that the interest in liberty protected by the [*Fourteenth Amendment*](#) encompassed the right of a terminally ill patient to direct the withdrawal of life-sustaining treatment. As the Court correctly observes today, that assumption "was not simply deduced from abstract concepts of personal autonomy." *Ante*, at 21. Instead, it was supported by the [67] common-law tradition protecting the individual's general right to refuse unwanted medical treatment. *Ibid*. We have recognized, however, that this common-law right to refuse treatment is neither absolute nor always sufficiently weighty to overcome valid countervailing state interests. As Justice Brennan pointed out in his *Cruzan* dissent, we have upheld legislation imposing punishment on persons refusing to be vaccinated, [497 U.S. at 312, n.12](#), citing [*Jacobson v. Massachusetts*, 197 U.S. 11, 26-27 \(1905\)](#), and as JUSTICE SCALIA pointed out in his concurrence, the State ordinarily has the right to interfere with an attempt to commit suicide [****802] by, for example, forcibly placing a bandage on a self-inflicted wound to stop the flow of blood. [497 U.S. at 298](#). In most cases, the individual's constitutionally protected interest in his or her own physical autonomy, including the right to refuse unwanted medical treatment, will give way to the State's interest in preserving human life.

Cruzan, however, was not the normal case. Given the irreversible nature of her illness and the

progressive character of her suffering,⁹ Nancy Cruzan's interest in refusing medical care was [68] incidental to her more basic interest in controlling the manner and timing of her death. In finding that her [*743] best interests would be served by cutting off the nourishment that kept her alive, the trial court did more than simply vindicate Cruzan's interest in refusing medical treatment; the court, in essence, authorized affirmative conduct that would hasten her death. When this Court reviewed the case and upheld Missouri's requirement that there be clear and convincing evidence establishing Nancy Cruzan's intent to have life-sustaining nourishment withdrawn, it made two important assumptions: (1) that there was a "liberty interest" in refusing unwanted treatment protected by the Due Process Clause; and (2) that this liberty interest did not "end the inquiry" because it might be outweighed by relevant state interests. *Id.*, at 279. I agree with both of those assumptions, but I insist that the source of Nancy Cruzan's right to refuse treatment was not just a common-law rule. Rather, this right is an aspect of a far broader and more basic concept of freedom that is even older than the common law.¹⁰ [70] This freedom embraces, not merely a person's right to refuse a particular kind of [69] unwanted treatment, but also her interest in dignity, and in determining the character of the

memories that will survive long after her death.¹¹ In [*744] recognizing that the State's interests did not outweigh Nancy Cruzan's liberty interest in refusing medical treatment, *Cruzan* [****803] rested not simply on the common-law right to refuse medical treatment, but--at least implicitly--on the even more fundamental right to make this "deeply personal decision," [497 U.S. at 289](#) (O'CONNOR, J., concurring).

Thus, the common-law right to protection from battery, which included the right to refuse medical treatment in most circumstances, did not mark "the outer limits [71] of the substantive sphere of liberty" that supported the Cruzan family's decision to hasten Nancy's death. [Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 848 \(1992\)](#). Those limits have never been precisely defined. They are generally identified by the importance and character of the decision confronted by the individual, [Whalen v. Roe, 429 U.S. 589, 599-600, n.26 \(1977\)](#). Whatever the outer limits of the concept may be, it definitely includes protection for matters "central to personal dignity and autonomy." [Casey, 505 U.S. at 851](#). It includes,

"the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating 'basic values,' as being

⁹ See [497 U.S. at 332, n.2](#).

¹⁰ "Neither the [Bill of Rights](#) nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.

"I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations." [Meachum v. Fano, 427 U.S. 215, 230 \(1976\)](#) (STEVENS, J., dissenting).

¹¹ "Nancy Cruzan's interest in life, no less than that of any other person, includes an interest in how she will be thought of after her death by those whose opinions mattered to her. There can be no doubt that her life made her dear to her family and to others. How she dies will affect how that life is remembered." [Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 344 \(1990\)](#) (STEVENS, J., dissenting).

"Each of us has an interest in the kind of memories that will survive after death. To that end, individual decisions are often motivated by their impact on others. A member of the kind of family identified in the trial court's findings in this case would likely have not only a normal interest in minimizing the burden that her own illness imposes on others, but also an interest in having their memories of her filled predominantly with thoughts about her past vitality rather than her current condition." *Id.*, at 356.

'fundamental,' and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom--the [*745] abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable." *Fitzgerald v. Porter Memorial Hospital*, 523 F.2d 716, 719-720 [72] (CA7 1975) (footnotes omitted), cert. denied, 425 U.S. 916 (1976).

The *Cruzan* case demonstrated that some state intrusions on the right to decide how death will be encountered are also intolerable. The now-deceased plaintiffs in this action may in fact have had a liberty interest even stronger than Nancy Cruzan's because, not only were they terminally ill, they were suffering constant and severe pain. Avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly "at the heart of [the] liberty . . . to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S. at 851.

While I agree with the Court that *Cruzan* does not decide the issue presented by these cases, *Cruzan* did give recognition, not just to vague, unbridled notions of autonomy, but to the more specific interest in making decisions about how to confront an imminent death. Although there is no absolute right to physician-assisted suicide, *Cruzan* makes it clear that some individuals who no longer have the option of deciding whether to live or to die because they are already on the threshold [73] of death have a constitutionally protected interest that may outweigh the State's interest in preserving life at all costs. The liberty interest at stake in a case like this differs from, [****804] and is stronger than, both the common-law right to refuse medical treatment and the unbridled interest in deciding whether to live or die. It is an interest in deciding how, rather than whether, a critical threshold shall be crossed.

III

The state interests supporting a general rule banning the practice of physician-assisted suicide do not have the same [*746] force in all cases. First and foremost of these interests is the "unqualified interest in the preservation of human life," *ante*, at 24, (quoting *Cruzan*, 497 U.S. at 282,) which is equated with "the sanctity of life," *ante*, at 25, (quoting the American Law Institute, Model Penal Code § 210.5, Comment 5, p. 100 (Official Draft and Revised Comments 1980)). That interest not only justifies--it commands--maximum protection of every individual's interest in remaining alive, which in turn commands the same protection for decisions about whether to commence or to terminate life-support systems or to administer pain medication that [74] may hasten death. Properly viewed, however, this interest is not a collective interest that should always outweigh the interests of a person who because of pain, incapacity, or sedation finds her life intolerable, but rather, an aspect of individual freedom.

Many terminally ill people find their lives meaningful even if filled with pain or dependence on others. Some find value in living through suffering; some have an abiding desire to witness particular events in their families' lives; many believe it a sin to hasten death. Individuals of different religious faiths make different judgments and choices about whether to live on under such circumstances. There are those who will want to continue aggressive treatment; those who would prefer terminal sedation; and those who will seek withdrawal from life-support systems and death by gradual starvation and dehydration. Although as a general matter the State's interest in the contributions each person may make to society outweighs the person's interest in ending her life, this interest does not have the same force for a terminally ill patient faced not with the choice of whether to live, only of how to die. Allowing the individual, rather [75] than the State, to make judgments "about the 'quality' of life that a particular individual may enjoy." *ante*, at 25 (quoting *Cruzan*, 497 U.S. at 282), does not mean that the lives of terminally-ill, disabled people have

less value than the lives of those who are healthy, see *ante*, at 28. Rather, it gives [*747] proper recognition to the individual's interest in choosing a final chapter that accords with her life story, rather than one that demeans her values and poisons memories of her. See Brief for Bioethicists as *Amici Curiae* 11; see also R. Dworkin, *Life's Dominion* 213 (1993) ("Whether it is in someone's best interests that his life end in one way rather than another depends on so much else that is special about him--about the shape and character of his life and his own sense of his integrity and critical interests--that no uniform collective decision can possibly hope to serve everyone even decently").

Similarly, the State's legitimate [****805] interests in preventing suicide, protecting the vulnerable from coercion and abuse, and preventing euthanasia are less significant in this context. I agree that the State has a compelling interest in preventing persons from committing [76] suicide because of depression, or coercion by third parties. But the State's legitimate interest in preventing abuse does not apply to an individual who is not victimized by abuse, who is not suffering from depression, and who makes a rational and voluntary decision to seek assistance in dying. Although, as the New York Task Force report discusses, diagnosing depression and other mental illness is not always easy, mental health workers and other professionals expert in working with dying patients can help patients cope with depression and pain, and help patients assess their options. See Brief for Washington State Psychological Association et al. as *Amici Curiae* 8-10.

Relatedly, the State and *amici* express the concern that patients whose physical pain is inadequately treated will be more likely to request assisted suicide. Encouraging the development and ensuring the availability of adequate pain treatment is of utmost importance; palliative care, however, cannot alleviate all pain and suffering. See Orentlicher, *Legalization of Physician Assisted Suicide: A Very Modest Revolution*, 38 Boston College L. Rev. (Galley, p. 8) (1997) ("Greater use of palliative care

would reduce [77] the demand for [*748] assisted suicide, but it will not eliminate [it]"); see also Brief for Coalition of Hospice Professionals as *Amici Curiae* 8 (citing studies showing that "as death becomes more imminent, pain and suffering become progressively more difficult to treat"). An individual adequately informed of the care alternatives thus might make a rational choice for assisted suicide. For such an individual, the State's interest in preventing potential abuse and mistake is only minimally implicated.

The final major interest asserted by the State is its interest in preserving the traditional integrity of the medical profession. The fear is that a rule permitting physicians to assist in suicide is inconsistent with the perception that they serve their patients solely as healers. But for some patients, it would be a physician's refusal to dispense medication to ease their suffering and make their death tolerable and dignified that would be inconsistent with the healing role. See Block & Billings, *Patient Request to Hasten Death*, 154 Archives Internal Med. 2039, 2045 (1994) (A doctor's refusal to hasten death "may be experienced by the [dying] patient as an abandonment, a rejection, [78] or an expression of inappropriate paternalistic authority"). For doctors who have long-standing relationships with their patients, who have given their patients advice on alternative treatments, who are attentive to their patient's individualized needs, and who are knowledgeable about pain symptom management and palliative care options, see Quill, *Death and Dignity, A Case of Individualized Decision Making*, 324 New England J. of Med. 691-694 (1991), heeding a patient's desire to assist in her suicide would not serve to harm the physician-patient relationship. Furthermore, because physicians are already involved in making decisions that hasten the death of terminally ill patients--through termination of [****806] life support, withholding of medical treatment, and terminal sedation--there is in fact significant tension between the traditional view of [*749] the physician's role and the actual practice in a growing

number of cases.¹²

[79] As the New York State Task Force on Life and the Law recognized, a State's prohibition of assisted suicide is justified by the fact that the "ideal" case in which "patients would be screened for depression and offered treatment, effective pain medication would be available, and all patients would have a supportive committed family and doctor" is not the usual case. New York State Task Force on Life and the Law, *When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context* 120 (May 1994). Although, as the Court concludes today, these *potential* harms are sufficient to support the State's general public policy against assisted suicide, they will not always outweigh the individual liberty [*750] interest of a particular patient. Unlike the Court of Appeals, I would not say as a categorical matter that these state interests are invalid as to the entire class of terminally ill, mentally competent patients. I do not, however, foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor

whose assistance was sought, could prevail in a more particularized challenge. Future cases will determine whether such a challenge may succeed.

IV

In New [80] York, a doctor must respect a competent person's decision to refuse or to discontinue medical treatment even though death will thereby ensue, but the same doctor would be guilty of a felony if she provided her patient assistance in committing suicide.¹³ Today we hold that the [Equal Protection Clause](#) is not violated by the resulting disparate treatment of two classes of terminally ill people who may have the same interest in hastening death. I agree that the distinction between permitting death to ensue from an underlying fatal disease and causing it to occur by the administration of medication or other means provides a constitutionally sufficient basis for [****807] the State's classification.¹⁴ Unlike the Court, however, see *Vacco, ante*, at 6-7, I am not persuaded that in all cases there will in fact be a significant difference between the intent of the physicians, the patients or the families in the two situations.

[81] There may be little distinction between the intent of a terminally-ill patient who decides to remove her life-support and one who seeks the assistance of a doctor in ending her life; in both situations, the patient is seeking to hasten a certain, impending death. The doctor's intent might also be the same in prescribing lethal medication as it is in terminating [*751] life support. A doctor who fails to administer medical treatment to one who is dying from a disease could be doing so with an intent to harm or kill that patient. Conversely, a doctor who prescribes lethal medication does not necessarily intend the patient's death--rather that doctor may seek simply to ease the patient's suffering and to

¹²I note that there is evidence that a significant number of physicians support the practice of hastening death in particular situations. A survey published in the *New England Journal of Medicine*, found that 56% of responding doctors in Michigan preferred legalizing assisted suicide to an explicit ban. Bachman et al., *Attitudes of Michigan Physicians and the Public Toward Legalizing Physician-Assisted Suicide and Voluntary Euthanasia*, 334 *New England J. Med.* 303-309 (1996). In a survey of Oregon doctors, 60% of the responding doctors supported legalizing assisted suicide for terminally ill patients. See Lee et al., *Legalizing Assisted Suicide--Views of Physicians in Oregon*, 335 *New England J. Med.* 310-315 (1996). Another study showed that 12% of physicians polled in Washington State reported that they had been asked by their terminally ill patients for prescriptions to hasten death, and that, in the year prior to the study, 24% of those physicians had complied with such requests. See Back, Wallace, Starks, & Perlman, *Physician-Assisted Suicide and Euthanasia in Washington State*, 275 *JAMA* 919-925 (1996); see also Doukas, Waterhouse, Gorenflo, & Seld, *Attitudes and Behaviors on Physician-Assisted Death: A Study of Michigan Oncologists*, 13 *J. Clinical Oncology* 1055 (1995) (reporting that 18% of responding Michigan oncologists reported active participation in assisted suicide); Slome, Moulton, Huffine, Gorter, & Abrams, *Physicians' Attitudes Toward Assisted Suicide in AIDS*, 5 *J. Acquired Immune Deficiency Syndromes* 712 (1992) (reporting that 24% of responding physicians who treat AIDS patients would likely grant a patient's request for assistance in hastening death).

¹³See *Vacco v. Quill, ante*, at 1, nn. 1 and 2.

¹⁴The American Medical Association recognized this distinction when it supported Nancy Cruzan and continues to recognize this distinction in its support of the States in these cases.

comply with her wishes. The illusory character of any differences in intent or causation is confirmed by the fact that the American Medical Association unequivocally endorses the practice of terminal sedation--the administration of sufficient dosages of pain-killing medication to terminally ill patients to protect them from excruciating pain even when it is clear that the time of death will be advanced. The purpose of terminal sedation is to ease the suffering of the patient and comply with [82] her wishes, and the actual cause of death is the administration of heavy doses of lethal sedatives. This same intent and causation may exist when a doctor complies with a patient's request for lethal medication to hasten her death.¹⁵

Thus, although the differences the majority notes in causation and intent between terminating life-support and assisting in suicide support the Court's rejection of the respondents' facial [83] challenge, these distinctions may be inapplicable to particular terminally ill patients and their doctors. Our holding today in *Vacco v. Quill* that the [Equal Protection Clause](#) is not violated by New York's classification, just like our holding in *Washington v. Glucksberg* that the Washington statute is not invalid on its face, does not foreclose the possibility that some applications of the New [*752] York statute may impose an intolerable intrusion on the patient's freedom.

There remains room for vigorous debate about the outcome of particular cases that are not necessarily resolved by the opinions announced today. How such cases may be decided will depend on their specific facts. In my judgment, however, it is clear that the so-called "unqualified interest in the

preservation of human life," [Cruzan, 497 U.S. at 282](#), *Glucksberg, ante*, at 24, [****808] is not itself sufficient to outweigh the interest in liberty that may justify the only possible means of preserving a dying patient's dignity and alleviating her intolerable suffering.

JUSTICE SOUTER, concurring in the judgment.

Three terminally ill individuals and four physicians who sometimes treat terminally ill patients [84] brought this challenge to the Washington statute making it a crime "knowingly . . . [to] aid another person to attempt suicide," [Wash. Rev. Code § 9A.36.060](#) (1994), claiming on behalf of both patients and physicians that it would violate substantive due process to enforce the statute against a doctor who acceded to a dying patient's request for a drug to be taken by the patient to commit suicide. The question is whether the statute sets up one of those "arbitrary impositions" or "purposeless restraints" at odds with the [Due Process Clause of the Fourteenth Amendment](#). [Poe v. Ullman, 367 U.S. 497, 543 \(1961\)](#) (Harlan, J., dissenting). I conclude that the statute's application to the doctors has not been shown to be unconstitutional, but I write separately to give my reasons for analyzing the substantive due process claims as I do, and for rejecting this one.

I

Although the terminally ill original parties have died during the pendency of this case, the four physicians who remain [*753] as respondents here¹ continue to request declaratory and injunctive relief for their own benefit in discharging their obligations to other dying patients who request their help.² See, e.g., [85] [Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 \(1911\)](#) (question was capable of repetition yet

¹⁵ If a doctor prescribes lethal drugs to be self-administered by the patient, it not at all clear that the physician's intent is that the patient "be made dead," *ante*, at 7 (internal quotation marks omitted). Many patients prescribed lethal medications never actually take them; they merely acquire some sense of control in the process of dying that the availability of those medications provides. See Back, *supra* n.12, at 922; see also Quill, 324 New England J. Med., at 693 (describing how some patients fear death less when they feel they have the option of physician-assisted suicide).

¹ A nonprofit corporation known as Compassion in Dying was also a plaintiff and appellee below but is not a party in this Court.

² As I will indicate in some detail below, I see the challenge to the statute not as facial but as-applied, and I understand it to be in narrower terms than those accepted by the Court.

[**2276] [***2276] evading review). The case reaches us on an order granting summary judgment, and we must take as true the undisputed allegations that each of the patients was mentally competent and terminally ill, and that each made a knowing and voluntary choice to ask a doctor to prescribe "medications . . . to be self-administered for the purpose of hastening . . . death." Complaint P2.3. The State does not dispute that each faced a passage to death more agonizing both mentally and physically, and more protracted over time, than death by suicide with a physician's help, or that each would have chosen such a suicide for the sake of personal dignity, apart even from relief from pain. Each doctor in this case claims to encounter patients like the original plaintiffs who have died, that is, mentally competent, terminally ill, and seeking medical help in "the voluntary self-termination of life." *Id.*, at P 2.5-2.8. While there may be no unanimity on the physician's professional obligation in such circumstances, I accept here respondents' representation that providing such patients with prescriptions [86] for drugs that go beyond pain relief to hasten death would, in these circumstances, be consistent with standards of medical [****809] practice. Hence, I take it to be true, as respondents say, that the Washington statute prevents the exercise of a physician's "best professional judgment to prescribe medications to [such] patients in dosages that would enable them to act to hasten their own deaths." *Id.*, at P 2.6; see also App. 35-37, 49-51, 55-57, 73-75.

[*754] In their brief to this Court, the doctors claim not that they ought to have a right generally to hasten patients' imminent deaths, but only to help patients who have made "personal decisions regarding their own bodies, medical care, and, fundamentally, [87] the future course of their lives," Brief for Respondents 12, and who have concluded responsibly and with substantial justification that the brief and anguished remainders of their lives have lost virtually all value to them. Respondents fully embrace the notion that the State must be free to impose reasonable regulations on

such physician assistance to ensure that the patients they assist are indeed among the competent and terminally ill and that each has made a free and informed choice in seeking to obtain and use a fatal drug. Complaint P3.2; App. 28-41.

In response, the State argues that the interest asserted by the doctors is beyond constitutional recognition because it has no deep roots in our history and traditions. Brief for Petitioners 21-25. But even aside from that, without disputing that the patients here were competent and terminally ill, the State insists that recognizing the legitimacy of doctors' assistance of their patients as contemplated here would entail a number of adverse consequences that the Washington Legislature was entitled to forestall. The nub of this part of the State's argument is not that such patients are constitutionally undeserving of relief on their [88] own account, but that any attempt to confine a right of physician assistance to the circumstances presented by these doctors is likely to fail. *Id.*, at 34-35, 44-47.

First, the State argues that the right could not be confined to the terminally ill. Even assuming a fixed definition of that term, the State observes that it is not always possible to say with certainty how long a person may live. *Id.*, at 34. It asserts that "there is no principled basis on which [the right] can be limited to the prescription of medication for terminally ill patients to administer to themselves" when the right's justifying principle is as broad as "merciful termination [*755] of suffering." *Id.*, at 45 (citing Y. Kamisar, Are Laws Against Assisted Suicide Unconstitutional?, Hastings Center Report 32, 36-37 (May-June 1993)). Second, the State argues that the right could not be confined to the mentally competent, observing that a person's competence cannot always be assessed with certainty, Brief for Petitioners 34, and suggesting further that no principled distinction is possible between a competent patient acting independently and a patient acting through a duly appointed and competent surrogate, [89] *id.*, at 46. Next, according to the State, such a right might entail a

right to or at least merge in practice into "other forms of life-ending assistance," such as euthanasia. *Id.*, at 46-47. Finally, the State believes that a right to physician assistance could not easily be distinguished from a right to assistance [**2277] [***2277] from others, such as friends, family, and other health-care workers. *Id.*, at 47. The State thus argues that recognition of the substantive [****810] due process right at issue here would jeopardize the lives of others outside the class defined by the doctors' claim, creating risks of irresponsible suicides and euthanasia, whose dangers are concededly within the State's authority to address.

II

When the physicians claim that the Washington law deprives them of a right falling within the scope of liberty that the [Fourteenth Amendment](#) guarantees against denial without due process of law,³ they are not claiming some sort of procedural defect in the process through which the statute has been enacted or is administered. Their claim, rather, is that the State has no substantively adequate justification for barring the assistance sought by the patient and sought to be offered [90] by the physician. Thus, we are dealing with a claim to one of those rights sometimes described as rights [*756] of substantive due process and sometimes as unenumerated rights, in view of the breadth and indeterminacy of the "due process" serving as the claim's textual basis. The doctors accordingly arouse the skepticism of those who find the Due Process Clause an unduly vague or oxymoronic warrant for judicial review of substantive state law, just as they also invoke two centuries of American constitutional practice in recognizing unenumerated, substantive limits on governmental action. Although this practice has neither rested on any single textual basis nor expressed a consistent theory (or, before *Poe v. Ullman*, a much

articulated one), a brief overview of its history is instructive on two counts. The persistence of substantive due process in our cases points to the legitimacy of the modern justification for such judicial review found in Justice Harlan's dissent in *Poe*,⁴ on which I will dwell further on, while the acknowledged failures of some of these cases point with caution to the difficulty raised by the present claim. [91]

Before the ratification of the [Fourteenth Amendment](#), substantive constitutional review resting on a theory of unenumerated rights occurred largely in the state courts applying state constitutions [92] that commonly contained either due process clauses like that of the [Fifth Amendment](#) (and later the Fourteenth) or the textual antecedents of such clauses, repeating [*757] Magna Carta's guarantee of "the law of the land."⁵ On the [****811] basis of such clauses, or of general principles untethered to specific constitutional language, state courts evaluated the constitutionality of a wide range of statutes.

Thus, a Connecticut court approved a statute legitimating a class of previous illegitimate marriages, as falling within the terms of the "social compact," while making clear its power to review constitutionality in those terms. [Goshen v.](#)

⁴The status of the Harlan dissent in [Poe v. Ullman](#), 367 U.S. 497 (1961), is shown by the Court's adoption of its result in [Griswold v. Connecticut](#), 381 U.S. 479 (1965), and by the Court's acknowledgment of its status and adoption of its reasoning in [Planned Parenthood of Southeastern Pa. v. Casey](#), 505 U.S. 833, 848-849 (1992). See also [Youngberg v. Romeo](#), 457 U.S. 307, 320 (1982) (citing Justice Harlan's *Poe* dissent as authority for the requirement that this Court balance "the liberty of the individual" and "the demands of an organized society"); [Roberts v. United States Jaycees](#), 468 U.S. 609, 619 (1984); [Moore v. East Cleveland](#), 431 U.S. 494, 500-506, and n.12 (1977) (plurality opinion) (opinion for four Justices treating Justice Harlan's *Poe* dissent as a central explication of the methodology of judicial review under the Due Process Clause).

⁵Coke indicates that prohibitions against deprivations without "due process of law" originated in an English statute that "rendred" Magna Carta's "law of the land" in such terms. See 2 E. Coke, Institutes 50 (1797); see also E. Corwin, Liberty Against Government 90-91 (1948).

³The doctors also rely on the [Equal Protection Clause](#), but that source of law does essentially nothing in a case like this that the Due Process Clause cannot do on its own.

[Stonington, 4 Conn. 209, 225-226 \(1822\)](#). In the same period, a specialized court of equity, created under [93] a Tennessee statute solely to hear cases brought by the state bank against its debtors, found its own authorization unconstitutional as "partial" legislation violating the state constitution's [**2278] [***2278] "law of the land" clause. [Bank of the State v. Cooper, 2 Yerg. 599, 602-608 \(Tenn. 1831\)](#) (Green, J.); [id., at 613-615](#) (Peck, J.); [id., at 618-623](#) (Kennedy, J.). And the middle of the 19th century brought the famous *Wynehamer* case, invalidating a statute purporting to render possession of liquor immediately illegal except when kept for narrow, specified purposes, the state court finding the statute inconsistent with the state's due process clause. [Wynehamer v. People, 13 N. Y. 378, 486-487 \(1856\)](#). The statute was deemed an excessive threat to the "fundamental rights of the citizen" to property. [Id., at 398](#) (Comstock, J.). See generally, E. Corwin, *Liberty Against Government* 58-115 (1948) (discussing substantive due process in the state courts before the Civil War); T. Cooley, *Constitutional Limitations* * 85-*129, *351-*397.

Even in this early period, however, this Court anticipated the developments that would presage both the Civil War and the ratification [94] of the [Fourteenth Amendment](#), by making it clear on several occasions that it too had no doubt of the [*758] judiciary's power to strike down legislation that conflicted with important but unenumerated principles of American government. In most such instances, after declaring its power to invalidate what it might find inconsistent with rights of liberty and property, the Court nevertheless went on to uphold the legislative acts under review. See, e.g., [Wilkinson v. Leland, 2 Pet. 627, 656-661 \(1829\)](#); [Calder v. Bull, 3 Dall. 386, 386-395 \(1798\)](#) (opinion of Chase, J.); see also [Corfield v. Coryell, 6 F. Cas. 546, 550-552 \(No. 3,230\) \(1823\)](#). But in [Fletcher v. Peck, 6 Cranch 87 \(1810\)](#), the Court went further. It struck down an act of the Georgia legislature that purported to rescind a sale of public land *ab initio* and reclaim title for the State, and so deprive subsequent, good-faith purchasers of property conveyed by the original grantees. The

Court rested the invalidation on alternative sources of authority: the specific prohibitions against bills of attainder, *ex post facto* laws, laws impairing contracts in Article I, § 10 of the Constitution; and "general [95] principles which are common to our free institutions," by which Chief Justice Marshall meant that a simple deprivation of property by the State could not be an authentically "legislative" act. [Fletcher, 6 Cranch, at 135-139](#).

Fletcher was not, though, the most telling early example of such review. For its most salient instance in this Court before the adoption of the [Fourteenth Amendment](#) was, of course, the case that the Amendment would in due course overturn, *Dred Scott v. Sandford*, 19 How. 393 [****812] (1857). Unlike *Fletcher*, *Dred Scott* was textually based on a due process clause (in the [Fifth Amendment](#), applicable to the national government), and it was in reliance on that clause's protection of property that the Court invalidated the Missouri Compromise. 19 How., at 449-452. This substantive protection of an owner's property in a slave taken to the territories was traced to the absence of any enumerated power to affect that property granted to the Congress by Article I of the Constitution, *id.*, at 451-452, the implication [*759] being that the government had no legitimate interest that could support the earlier congressional compromise. The ensuing judgment of history [96] needs no recounting here.

After the ratification of the [Fourteenth Amendment](#), with its guarantee of due process protection against the States, interpretation of the words "liberty" and "property" as used in due process clauses became a sustained enterprise, with the Court generally describing the due process criterion in converse terms of reasonableness or arbitrariness. That standard is fairly traceable to Justice Bradley's dissent in the [Slaughter-House Cases, 16 Wall. 36 \(1873\)](#), in which he said that a person's right to choose a calling was an element of liberty (as the calling, once chosen, was an aspect of property) and declared that the liberty and property protected by due process are not truly recognized if such

rights may be "arbitrarily assailed," *id.*, at 116.⁶ After **[**2279] [***2279]** that, opinions comparable to those that preceded *Dred Scott* expressed willingness to review legislative action for consistency with the Due Process Clause even as they upheld the laws in question. See, e.g., *Bartemeyer v. Iowa*, 18 Wall. 129, 133-135 (1874); *Munn v. Illinois*, 94 U.S. 113, 123-135 (1877); *Railroad Comm'n Cases*, 116 U.S. 307, 331 (1886); *Mugler v. [**760] Kansas*, **[97]** 123 U.S. 623, 659-670 (1887). See generally Corwin, *Liberty Against Government*, at 121-136 (surveying the Court's early *Fourteenth Amendment* cases and finding little dissent from the general principle that the Due Process Clause authorized judicial review of substantive statutes).

[98] The theory became serious, however, beginning with *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), where the Court invalidated a Louisiana statute for excessive interference with *Fourteenth Amendment* liberty to contract, *id.*, at 588-593, and offered a substantive interpretation of "liberty," that in the aftermath of the so-called *Lochner* Era **[****813]** has been scaled back in some respects, but expanded in others, and never repudiated in principle. The Court said that *Fourteenth Amendment* liberty includes "the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and

work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." *Id.*, at 589. "We do not intend to hold that in no such case can the State exercise its police power," the Court added, but "when and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises." *Id.* **[99]** at 590.

Although this principle was unobjectionable, what followed for a season was, in the realm of economic legislation, the echo of *Dred Scott*. *Allgeyer* was succeeded within a decade by *Lochner v. New York*, 198 U.S. 45 (1905), and the era to which that case gave its name, famous now for striking down as arbitrary various sorts of economic regulations that post-New Deal courts have uniformly thought constitutionally sound. Compare, e.g., *id.*, at 62 (finding New York's maximum-hours law for bakers "unreasonable and entirely arbitrary") and *Adkins v. Children's Hospital of D. C.*, 261 U.S. 525, **[*761]** 559 (1923) (holding a minimum wage law "so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States") with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (overruling *Adkins* and approving a minimum-wage law on the principle that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process"). As the parentheticals here suggest, while the cases in the *Lochner* line routinely invoked a correct standard **[100]** of constitutional arbitrariness review, they harbored the spirit of *Dred Scott* in their absolutist implementation of the standard they espoused.

Even before the deviant economic due process cases had been repudiated, however, the more durable precursors of modern substantive due process were reaffirming this Court's obligation to

⁶The *Slaughter-House Cases* are important, of course, for their holding that the Privileges or Immunities Clause was no source of any but a specific handful of substantive rights. *Slaughter-House Cases*, 16 Wall., at 74-80. To a degree, then, that decision may have led the Court to look to the Due Process Clause as a source of substantive rights. In *Twining v. New Jersey*, 211 U.S. 78, 95-97 (1908), for example, the Court of the *Lochner* Era acknowledged the strength of the case against *Slaughter-House's* interpretation of the Privileges or Immunities Clause but reaffirmed that interpretation without questioning its own frequent reliance on the Due Process Clause as authorization for substantive judicial review. See also J. Ely, *Democracy and Distrust* 14-30 (1980) (arguing that the Privileges or Immunities Clause and not the Due Process Clause is the proper warrant for courts' substantive oversight of state legislation). But the courts' use of due process clauses for that purpose antedated the 1873 decision, as we have seen, and would in time be supported in the *Poe* dissent, as we shall see.

conduct arbitrariness review, beginning with [Meyer v. Nebraska](#), 262 U.S. 390 [****2280**] [*****2280**] (1923). Without referring to any specific guarantee of the [Bill of Rights](#), the Court invoked precedents from the *Slaughter-House Cases* through *Adkins* to declare that the [Fourteenth Amendment](#) protected "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.*, at 399. The Court then held that the same [Fourteenth Amendment](#) liberty included a teacher's right to teach and the rights of parents to direct their children's education without unreasonable [**101**] interference by the States, *id.*, at 400, [******814**] with the result that Nebraska's prohibition on the teaching of foreign languages in the lower grades was, "arbitrary and without reasonable relation to any end within the competency of the State," *id.*, at 403. See also [Pierce v. Society of Sisters](#), 268 U.S. 510, 534-536 (1925) [***762**] (finding that a statute that all but outlawed private schools lacked any "reasonable relation to some purpose within the competency of the State"); [Palko v. Connecticut](#), 302 U.S. 319, 327-238 (1937) ("even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts"; "Is that [injury] to which the statute has subjected [the appellant] a hardship so acute and shocking that our polity will not endure it? Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?") (citation and internal quotation marks omitted).

After *Meyer* and *Pierce*, two further opinions took the major steps that lead to the modern law. The first was not even in a due process case but one about equal protection, [**102**] [Skinner v. Oklahoma ex rel. Williamson](#), 316 U.S. 535 (1942), where the Court emphasized the "fundamental" nature of

individual choice about procreation and so foreshadowed not only the later prominence of procreation as a subject of liberty protection, but the corresponding standard of "strict scrutiny," in this Court's [Fourteenth Amendment](#) law. See *id.*, at 541. *Skinner*, that is, added decisions regarding procreation to the list of liberties recognized in *Meyer* and *Pierce* and loosely suggested, as a gloss on their standard of arbitrariness, a judicial obligation to scrutinize any impingement on such an important interest with heightened care. In so doing, it suggested a point that Justice Harlan would develop, that the kind and degree of justification that a sensitive judge would demand of a State would depend on the importance of the interest being asserted by the individual. [Poe](#), 367 U.S. at 543.

The second major opinion leading to the modern doctrine was Justice Harlan's *Poe* dissent just cited, the conclusion of which was adopted in [Griswold v. Connecticut](#), 381 U.S. 478 (1965), and the authority of which was acknowledged in [Planned Parenthood \[103\] of Southeastern Pa. v. Casey](#), 505 U.S. 833 (1992). See also n.4, *supra*. The dissent is important [***763**] for three things that point to our responsibilities today. The first is Justice Harlan's respect for the tradition of substantive due process review itself, and his acknowledgement of the Judiciary's obligation to carry it on. For two centuries American courts, and for much of that time this Court, have thought it necessary to provide some degree of review over the substantive content of legislation under constitutional standards of textual breadth. The obligation was understood before *Dred Scott* and has continued after the repudiation of *Lochner*'s progeny, most notably on the subjects of segregation in public education, [Bolling v. Sharpe](#), 347 U.S. 497, 500 (1954), interracial marriage, [Loving v. Virginia](#), 388 U.S. 1, 12 [******815**] (1967), marital privacy and contraception, [Carey v. Population Services Int'l](#), 431 U.S. 678, 684-691 (1977), [Griswold v. Connecticut](#), *supra*, at 481-486, abortion, [Planned Parenthood of Southeastern \[**2281\] \[***2281\] Pa. v. Casey](#), 505 U.S. 833,

[849, 869-879 \(1992\)](#) (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.), [Roe \[104\] v. Wade, 410 U.S. 113, 152-166 \(1973\)](#), personal control of medical treatment, [Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 287-289 \(1990\)](#) (O'CONNOR, J., concurring); [id., at 302](#) (Brennan, J., dissenting); [id., at 331](#) (STEVENS, J., dissenting); see also [id., at 278](#) (majority opinion), and physical confinement, [Foucha v. Louisiana, 504 U.S. 71, 80-83 \(1992\)](#). This enduring tradition of American constitutional practice is, in Justice Harlan's view, nothing more than what is required by the judicial authority and obligation to construe constitutional text and review legislation for conformity to that text. See [Marbury v. Madison, 1 Cranch 137 \(1803\)](#). Like many judges who preceded him and many who followed, he found it impossible to construe the text of due process without recognizing substantive, and not merely procedural, limitations. "Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application [*764] to individuals, nevertheless destroy [105] the enjoyment of all three." [Poe, 367 U.S. at 541](#).⁷ The text of the Due Process Clause thus imposes nothing less than an obligation to give substantive content to the words "liberty" and "due process of law."

[106] Following the first point of the *Poe* dissent,

⁷Judge Johnson of the New York Court of Appeals had made the point more obliquely a century earlier when he wrote that, "the form of this declaration of right, 'no person shall be deprived of life, liberty or property, without due process of law,' necessarily imports that the legislature cannot make the mere existence of the rights secured the occasion of depriving a person of any of them, even by the forms which belong to 'due process of law.' For if it does not necessarily import this, then the legislative power is absolute." And, "To provide for a trial to ascertain whether a man is in the enjoyment of [any] of these rights, and then, as a consequence of finding that he is in the enjoyment of it, to deprive him of it, is doing indirectly just what is forbidden to be done directly, and reduces the constitutional provision to a nullity." [Wynehamer v. People, 13 N. Y. 378, 420 \(1856\)](#).

on the necessity to engage in the sort of examination we conduct today, the dissent's second and third implicitly address those cases, already noted, that are now condemned with virtual unanimity as disastrous mistakes of substantive due process review. The second of the dissent's lessons is a reminder that the business of such review is not the identification of extratextual absolutes but scrutiny of a legislative resolution (perhaps unconscious) of clashing principles, each quite possibly worthy in and of itself, but each to be weighed within the history of our values as a people. It is a comparison of the relative strengths of opposing claims that informs the judicial task, not a deduction from some first premise. Thus informed, judicial review still has no warrant [****816] to substitute one reasonable resolution of the contending positions for another, but authority to supplant the balance already struck between the contenders only when it falls outside the realm of the reasonable. Part III, below, deals with this second point, and also with the dissent's third, which takes the form of an [*765] object lesson in the explicit attention to detail [107] that is no less essential to the intellectual discipline of substantive due process review than an understanding of the basic need to account for the two sides in the controversy and to respect legislation within the zone of reasonableness.

III

My understanding of unenumerated rights in the wake of the *Poe* dissent and subsequent cases avoids the absolutist failing of many older cases without embracing the opposite pole of equating reasonableness with past practice described at a very specific level. See [Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847-849 \(1992\)](#). That understanding begins with a concept of "ordered liberty," [Poe, 367 U.S. \[**2282\] \[***2282\] at 549](#) (Harlan, J.); see also [Griswold, 381 U.S. at 500](#), comprising a continuum of rights to be free from "arbitrary impositions and purposeless restraints," [Poe, 367 U.S. at 543](#) (Harlan, J., dissenting).

"Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, [108] has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could [*766] serve as a substitute, in this area, for judgment and restraint." *Id.*, at 542.

See also *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion of Powell, J.) ("Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society'" (quoting *Griswold*, 381 U.S. at 501 (Harlan, J., concurring))).

After the *Poe* dissent, as before [109] it, this enforceable concept of liberty would bar statutory impositions even at relatively trivial levels when governmental restraints are undeniably irrational as unsupported by any imaginable rationale. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) [****817] (economic legislation "not . . . unconstitutional unless . . . facts . . . preclude the assumption that it rests upon some rational basis"); see also *Poe*, 367 U.S. at 545, 548 (Harlan, J., dissenting) (referring to usual "presumption of constitutionality" and ordinary test "going merely to the plausibility of [a statute's]

underlying rationale"). Such instances are suitably rare. The claims of arbitrariness that mark almost all instances of unenumerated substantive rights are those resting on "certain interests requiring particularly careful scrutiny of the state needs asserted to justify their abridgment. Cf. *Skinner v. Oklahoma [ex rel. Williamson]*, 316 U.S. 535 (1942)]; *Bolling v. Sharpe*, [347 U.S. 497 (1954)]," *id.*, at 543; that is, interests in liberty sufficiently important to be judged "fundamental," *id.*, at 548; see also *id.*, at 541 (citing *Corfield* [110] v. *Coryell*, 4 Wash. C. C. 371, 380 (CC ED Pa. 1825)). In the face of an interest this powerful a State may not rest on threshold rationality or a presumption of constitutionality, but may prevail only on the ground of an interest sufficiently compelling to place within the realm of the reasonable a refusal to recognize the individual right asserted. *Poe*, *supra*, at 548 (Harlan, J., dissenting) (an "enactment involving . . . a most fundamental aspect [*767] of 'liberty' . . . [is] subject to 'strict scrutiny'" (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. at 541));⁸ *Reno v. [**2283] [***2283] Flores*, 507 U.S. 292, 301-302 (1993) (reaffirming that due process "forbids the government to infringe certain 'fundamental' liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest").⁹ [111]

⁸ We have made it plain, of course, that not every law that incidentally makes it somewhat harder to exercise a fundamental liberty must be justified by a compelling counterinterest. See *Casey*, 505 U.S. at 872-876 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.); *Carey v. Population Services Int'l*, 431 U.S. 678, 685-686 (1977) ("An individual's [constitutionally protected] liberty to make choices regarding contraception does not . . . automatically invalidate every state regulation in this area. The business of manufacturing and selling contraceptives may be regulated in ways that do not [even] infringe protected individual choices"). But a state law that creates a "substantial obstacle," *Casey*, *supra*, at 877, for the exercise of a fundamental liberty interest requires a commensurably substantial justification in order to place the legislation within the realm of the reasonable.

⁹ Justice Harlan thus recognized just what the Court today assumes, that by insisting on a threshold requirement that the interest (or, as the Court puts it, the right) be fundamental before anything more than rational basis justification is required, the Court ensures that not

This approach calls for a court to assess the relative "weights" or dignities of the contending interests, and to this extent the judicial method is familiar to the common law. Common law method is subject, however, to two important constraints in the hands of a court engaged in substantive due process review. First, such a court is bound to confine the values that it recognizes to those truly deserving constitutional [****818] stature, either to those expressed in constitutional text, or those exemplified by "the traditions from which [the Nation] developed," or revealed by contrast with "the traditions from which it broke." [Poe, 367 U.S. at 542](#) (Harlan, J., dissenting). "We may not draw on our merely personal and [112] private notions and disregard the limits . . . derived from [*768] considerations that are fused in the whole nature of our judicial process . . . [.] considerations deeply rooted in reason and in the compelling traditions of the legal profession." [Id., at 544-545](#) (quoting [Rochin v. California, 342 U.S. 165, 170-171 \(1952\)](#)); see also [Palko v. Connecticut, 302 U.S. at 325](#) (looking to "'principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'" (quoting [Snyder v. Massachusetts, 291 U.S. 97, 105 \(1934\)](#))).

The second constraint, again, simply reflects the fact that constitutional review, not judicial lawmaking, is a court's business here. The weighing or valuing of contending interests in this sphere is only the first step, forming the basis for determining whether the statute in question falls inside or outside the zone of what is reasonable in the way it resolves the conflict between the interests of state and individual. See, e.g., [Poe, supra, at 553](#) (Harlan, J., dissenting); [Youngberg v. Romeo, 457 U.S. 307, 320-321 \(1982\)](#). It is no justification for judicial intervention merely to identify [113] a reasonable resolution of contending values that differs from the terms of the legislation under review. It is only when the legislation's justifying principle, critically valued, is

so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way. Only if this standard points against the statute can the individual claimant be said to have a constitutional right. See [Cruzan v. Director, Mo. Dept. of Health, 497 U.S. at 279](#) ("Determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether [the individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests'" (quoting [Youngberg v. Romeo, supra, at 321](#))).¹⁰

[114] [*769] [**2284] [***2284] The *Poe* dissent thus reminds us of [****819] the nature of review for reasonableness or arbitrariness and the limitations entailed by it. But the opinion cautions against the repetition of past error in another way as well, more by its example than by any particular statement of constitutional method: it reminds us that the process of substantive review by reasoned judgment, [Poe, 367 U.S. at 542-544](#), is one of close criticism going to the details of the opposing interests and to their relationships with the historically recognized principles that lend them weight or value.

Although the *Poe* dissent disclaims the possibility of any general formula for due process analysis

every case will require the "complex balancing" that heightened scrutiny entails. See *ante*, at 17-18.

¹⁰ Our cases have used various terms to refer to fundamental liberty interests, see, e.g., [Poe, 367 U.S. at 545](#) (Harlan, J., dissenting) ("basic liberty") (quoting [Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 \(1942\)](#)); [Poe, supra, at 543](#) (Harlan, J., dissenting) ("certain interests" must bring "particularly careful scrutiny"); [Casey, 505 U.S. at 851](#) ("protected liberty"); [Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 278 \(1990\)](#) ("constitutionally protected liberty interest"); [Youngberg v. Romeo, 457 U.S. at 315](#) ("liberty interests"), and at times we have also called such an interest a "right" even before balancing it against the government's interest, see, e.g., [Roe v. Wade, 410 U.S. 113, 153-154 \(1973\)](#); [Carey v. Population Services Int'l, supra, at 686, 688](#), and n.5; [Poe, 367 U.S. at 541](#) ("rights 'which are . . . fundamental'" (quoting [Corfield v. Coryell, 4 Wash. C.C. 371, 380 \(CC ED Pa. 1825\)](#))). Precision in terminology, however, favors reserving the label "right" for instances in which the individual's liberty interest actually trumps the government's countervailing interests; only then does the individual have anything legally enforceable as against the state's attempt at regulation.

(beyond the basic analytic structure just described), see [id.](#), at 542, 544, Justice Harlan of course assumed that adjudication under the Due Process Clauses is like any other instance of judgment dependent on common-law method, being more or less persuasive according to the usual canons of critical discourse. See also [Casey](#), 505 U.S. at 849 ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity [115] which by tradition courts always have exercised: reasoned judgment"). When identifying and assessing the competing interests of liberty and authority, for example, [*770] the breadth of expression that a litigant or a judge selects in stating the competing principles will have much to do with the outcome and may be dispositive. As in any process of rational argumentation, we recognize that when a generally accepted principle is challenged, the broader the attack the less likely it is to succeed. The principle's defenders will, indeed, often try to characterize any challenge as just such a broadside, perhaps by couching the defense as if a broadside attack had occurred. So the Court in *Dred Scott* treated prohibition of slavery in the Territories as nothing less than a general assault on the concept of property. See *Dred Scott v. Sandford*, 19 How., at 449-452.

Just as results in substantive due process cases are tied to the selections of statements of the competing interests, the acceptability of the results is a function of the good reasons for the selections made. It is here that the value of common-law method becomes apparent, for the usual thinking of the common law is suspicious [116] of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples. The "tradition is a living thing," [Poe](#), 367 U.S. at 542 (Harlan, J., dissenting), albeit one that moves by moderate steps carefully taken. "The decision of an

apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take its place in relation to what went before and further [cut] a channel for what is to come." [Id.](#), at 544 (Harlan, J., dissenting) (internal quotation marks omitted). Exact [****820] analysis and characterization of any due process claim is critical to the method and to the result.

So, in *Poe*, Justice Harlan viewed it as essential to the plaintiffs' claimed right to use contraceptives that they sought to do so within the privacy of the marital bedroom. This detail in fact served two crucial and complementary [*771] functions, and provides a lesson for today. It rescued the individuals' claim from a breadth that would [117] have threatened all state regulation of contraception or intimate relations; extramarital intimacy, no matter how privately practiced, was outside the scope of the right Justice Harlan would have recognized in that case. See [id.](#), at 552-553. It was, moreover, this same restriction that allowed the interest to be valued as an aspect of a broader liberty to be free from all unreasonable intrusions into the privacy of the home and the family life within it, a liberty exemplified in constitutional provisions such as the [Third](#) and [Fourth Amendments](#), in prior decisions of the Court involving unreasonable [**2285] [***2285] intrusions into the home and family life, and in the then-prevailing status of marriage as the sole lawful locus of intimate relations. [Id.](#), at 548, 551.¹¹ The

¹¹ Thus, as the *Poe* dissent illustrates, the task of determining whether the concrete right claimed by an individual in a particular case falls within the ambit of a more generalized protected liberty requires explicit analysis when what the individual wants to do could arguably be characterized as belonging to different strands of our legal tradition requiring different degrees of constitutional scrutiny. See also Tribe & Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057, 1091 (1990) (abortion might conceivably be assimilated either to the tradition regarding women's reproductive freedom in general, which places a substantial burden of justification on the State, or to the tradition regarding protection of fetuses, as embodied in laws criminalizing feticide by someone other than the mother, which generally requires only rationality on the part of the State). Selecting among such competing characterizations

individuals' interest was therefore at its peak in *Poe*, because it was supported by a principle that distinguished of its own force between areas in which government traditionally had regulated (sexual relations outside of marriage) and those in which it had not (private marital intimacies), and thus was broad enough to cover the claim at hand without being so broad as to be shot-through by exceptions.

[118] [*772] On the other side of the balance, the State's interest in *Poe* was not fairly characterized simply as preserving sexual morality, or doing so by regulating contraceptive devices. Just as some of the earlier cases went astray by speaking without nuance of individual interests in property or autonomy to contract for labor, so the State's asserted interest in *Poe* was not immune to distinctions turning (at least potentially) on the precise purpose being pursued and the collateral consequences of the means chosen, see *id.*, at 547-548. It was assumed that the State might legitimately enforce limits on the use of contraceptives through laws regulating divorce and annulment, or even through its tax policy, *ibid.*, but not necessarily be justified in criminalizing the same practice in the marital bedroom, which would entail the consequence of authorizing state enquiry into the intimate relations of a married couple who chose to [****821] close their door, *id.*, at 548-549. See also *Casey*, 505 U.S. at 869 (strength of State's interest in potential life varies depending on precise context and character of regulation pursuing that interest).

The same insistence on exactitude [119] lies behind questions, in current terminology, about the proper level of generality at which to analyze claims and counter-claims, and the demand for fitness and proper tailoring of a restrictive statute is just another way of testing the legitimacy of the generality at which the government sets up its

demands reasoned judgment about which broader principle, as exemplified in the concrete privileges and prohibitions embodied in our legal tradition, best fits the particular claim asserted in a particular case.

justification.¹² We may [*773] therefore classify Justice Harlan's example of proper analysis in any of these ways: as applying concepts of normal critical reasoning, as pointing to the need to attend to the levels of generality at which countervailing interests are stated, or as examining the concrete application of principles for fitness with their own ostensible justifications. But whatever the categories in which we place the dissent's example, it stands in marked contrast to earlier cases whose reasoning was marked by comparatively less discrimination, and it points to the importance of evaluating the claims of the parties now before us with comparable detail. For [**2286] [***2286] here we are faced with an individual claim not to a right on the part of just anyone to help anyone else commit suicide under any circumstances, but to the right of a narrow class to help others also in a narrow class under [120] a set of limited circumstances. And the claimants are met with the State's assertion, among others, that rights of such narrow scope cannot be recognized without jeopardy to individuals whom the State may concededly protect through its regulations.

[121] IV

A

Respondents claim that a patient facing imminent death, who anticipates physical suffering and indignity, and is capable of responsible and voluntary choice, should have a right to a physician's assistance in providing counsel and

¹²The dual dimensions of the strength and the fitness of the government's interest are succinctly captured in the so-called "compelling interest test," under which regulations that substantially burden a constitutionally protected (or "fundamental") liberty may be sustained only if "narrowly tailored to serve a compelling state interest," *Reno v. Flores*, 507 U.S. 292, 302 (1993); see also, e.g., *Roe v. Wade*, 410 U.S. at 155; *Carey v. Population Services Int'l*, 431 U.S. at 686. How compelling the interest and how narrow the tailoring must be will depend, of course, not only on the substantiality of the individual's own liberty interest, but also on the extent of the burden placed upon it, see *Casey*, 505 U.S. at 871-874 (opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.); *Carey*, *supra*, at 686.

drugs to be administered by the patient to end life promptly. Complaint P3.1. They accordingly claim that a physician must have the corresponding right to provide such aid, contrary to the provisions of [Wash. Rev. Code § 9A.36.060](#) (1994). I do not understand the argument to rest on any assumption that rights either to suicide or to assistance in committing it are historically based as such. Respondents, rather, acknowledge the prohibition of each historically, but rely on the fact that to a substantial extent the State has repudiated that history. The result of this, respondents say, is to open [*774] the door to claims of such a patient to be accorded [****822] one of the options open to those with different, traditionally cognizable claims to autonomy in deciding how their bodies and minds should be treated. They seek the option to obtain the services of a physician to give them the benefit of advice and medical help, which is said to enjoy a tradition so strong [122] and so devoid of specifically countervailing state concern that denial of a physician's help in these circumstances is arbitrary when physicians are generally free to advise and aid those who exercise other rights to bodily autonomy.

1

The dominant western legal codes long condemned suicide and treated either its attempt or successful accomplishment as a crime, the one subjecting the individual to penalties, the other penalizing his survivors by designating the suicide's property as forfeited to the government. See 4 W. Blackstone, Commentaries * 188-*189 (commenting that English law considered suicide to be "ranked . . . among the highest crimes" and deemed persuading another to commit suicide to be murder); see generally Marzen, O'Dowd, Crone, & Balch, Suicide: A Constitutional Right?, 24 Duquense L. Rev. 1, 56-63 (1985). While suicide itself has generally not been considered a punishable crime in the United States, largely because the common-law punishment of forfeiture was rejected as improperly penalizing an innocent family, see [id.](#), at 98-99, most States have consistently punished the act of

assisting a suicide as either a common-law or statutory crime and some continue [123] to view suicide as an unpunishable crime. See generally [id.](#), at 67-100, 148-242.¹³ Criminal prohibitions

¹³ Washington and New York are among the minority of States to have criminalized attempted suicide, though neither State still does so. See Brief for Members of the New York and Washington State Legislatures as *Amicus Curiae* 15, n.8 (listing state statutes). The common law governed New York as a colony and the New York Constitution of 1777 recognized the common law, N. Y. Const. of 1777, Art. XXXV, and the state legislature recognized common-law crimes by statute in 1788. See Act of Feb. 21, 1788, ch. 37, § 2, 1788 N.Y. Laws 664 (codified at 2 N. Y. Laws 242) (Jones & Varick 1789). In 1828, New York changed the common law offense of assisting suicide from murder to manslaughter in the first degree. See 2 N. Y. Rev. Stat. pt. 4, ch. 1, tit. 2, art. 1, § 7, p. 661 (1829). In 1881, New York adopted a new penal code making attempted suicide a crime punishable by two years in prison, a fine, or both, and retaining the criminal prohibition against assisting suicide as manslaughter in the first degree. Act of July 26, 1881, ch. 676, §§ 172-178, 1881 N. Y. Laws (3 Penal Code), pp. 42-43 (codified at 4 N. Y. Consolidated Laws, Penal Law §§ 2300 to 2306, pp. 2809-2810 (1909)). In 1919, New York repealed the statutory provision making attempted suicide a crime. See Act of May 5, 1919, ch. 414, § 1, 1919 N.Y. Laws 1193. The 1937 New York Report of the Law Revision Commission found that the history of the ban on assisting suicide was "traceable into the ancient common law when a suicide or *felo de se* was guilty of crime punishable by forfeiture of his goods and chattels." State of New York, Report of the Law Revision Commission for 1937, p. 830. The Report stated that since New York had removed "all stigma [of suicide] as a crime" and that "since liability as an accessory could no longer hinge upon the crime of a principal, it was necessary to define it as a substantive offense." [Id.](#), at 831. In 1965, New York revised its penal law, providing that a "person is guilty of manslaughter in the second degree when . . . he intentionally causes or aids another person to commit suicide." Penal Law, ch. 1030, 1965 N.Y. Laws at 2387 (codified at [N. Y. Penal Law § 125.15\(3\)](#) (McKinney 1975)).

Washington's first territorial legislature designated assisting another "in the commission of self-murder" to be manslaughter, see Act of Apr. 28, 1854, § 17, 1854 Wash. Laws 78, and re-enacted the provision in 1869 and 1873, see Act of Dec. 2, 1869, § 17, 1869 Wash. Laws 201; Act of Nov. 10, 1873, § 19, 1873 Wash. Laws 184 (codified at Wash. Code § 794 (1881)). In 1909, the state legislature enacted a law based on the 1881 New York law and a similar one enacted in Minnesota, see Marzen, O'Dowd, Crone, & Balch, 24 Duquesne L. Rev., at 206, making attempted suicide a crime punishable by two years in prison or a fine, and retaining the criminal prohibition against assisting suicide, designating it manslaughter. See Criminal Code, ch. 249, §§ 133-137, 1909 Wash. Laws, 11th Sess. 890, 929 (codified at Remington & Ballinger's Wash. Code §§ 2385-2389 (1910)). In 1975, the Washington Legislature repealed these provisions, see Wash. Crim. code, 1975,

[*775] on such assistance [****2287**] [*****2287**] remain widespread, as exemplified [******823**] in the Washington statute in question here.¹⁴ [**124**]

[**125**] The principal significance of this history in the State of Washington, according to respondents, lies in its repudiation [***776**] of the old tradition to the extent of eliminating the criminal suicide prohibitions. Respondents do not argue that the State's decision goes further, to imply that the State has repudiated any legitimate claim to discourage suicide or to limit its encouragement. The reasons for the decriminalization, after all, may have had more to do with difficulties of law enforcement than with a shift in the value ascribed to [***777**]

ch. 260, § 9A.92.010 (213-217) 1975 Wash. Laws 817, 858, 866, and enacted the ban on assisting suicide at issue in this case, see Wash. Crim. code, 1975, ch. 260, § 9A.36.060 1975 Wash. Laws 817, 836, codified at Rev. Wash. Code §§ 9A.36.060 (1977). The decriminalization of attempted suicide reflected the view that a person compelled to attempt it should not be punished if the attempt proved unsuccessful. See *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1464, n.9 (WD Wash. 1994) (citing Legislative Council Judiciary Committee, Report on the Revised Washington Criminal Code 153 (Dec. 3, 1970).

¹⁴Numerous States have enacted statutes prohibiting assisting a suicide. See, e.g., *Alaska Stat. Ann. § 11.41.120(a)(2)* (1996); *Ariz. Rev. Stat. Ann. § 13-1103(A)(3)* (West Supp. 1996-1997); *Ark. Code Ann. § 5-10-104(a)(2)* (1993); *Cal. Penal Code Ann. § 401* (West 1988); *Colo. Rev. Stat. § 18-3-104(1)(b)* (Supp. 1996); *Conn. Gen. Stat. § 53a-56(a)(2)* (1997); *Del. Code Ann. Tit. 11, § 645* (1995); *Fla. Stat. § 782.08* (1991); *Ga. Code Ann. § 16-5-5(b)* (1996); *Haw. Rev. Stat. § 707-702(1)(b)* (1993); Ill. Comp. Stat., ch. 720, § 5/12-31 (1993); Ind. Stat. Ann. §§ 35-42-1-2 to 35-42-1-2.5 (1994 and Supp. 1996); *Iowa Code Ann. § 707A.2* (West Supp. 1997); *Kan. Stat. Ann. § 21-3406* (1995); *Ky. Rev. Stat. Ann. § 216.302* (Michie 1994); *La. Rev. Stat. Ann. § 14:32.12* (West Supp. 1997); *Me. Rev. Stat. Ann., Tit. 17-A, § 204* (1983); *Mich. Comp. Laws Ann. § 752.1027* (West Supp. 1997-1998); *Minn. Stat. § 609.215* (1996); *Miss. Code Ann. § 97-3-49* (1994); Mo. Stat. § 565.023.1(2) (1994); *Mont. Code Ann. § 45-5-105* (1995); *Neb. Rev. Stat. § 28-307* (1995); *N. H. Rev. Stat. Ann. § 630:4* (1996); *N. J. Stat. Ann. § 2C:11-6* (West 1995); *N. M. Stat. Ann. § 30-2-4* (1996); *N. Y. Penal Law § 120.30* (McKinney 1987); *N. D. Cent. Code § 12.1-16-04* (Supp. 1995); Okla. Stat. Tit. 21, §§ 813-815 (1983); *Ore. Rev. Stat. § 163.125(1)(b)* (1991); Pa. Cons. Stat. Ann., Tit. 18 Purdon § 2505 (1983); *R. I. Gen. Laws §§ 11-60-1 through 11-60-5* (Supp. 1996); *S. D. Codified Laws § 22-16-37* (1988); *Tenn. Code Ann. § 39-13-216* (Supp. 1996); *Tex. Penal Code Ann. § 22.08* (1994); *Wash. Rev. Code § 9A.36.060* (1994); *Wis. Stat. § 940.12* (1993-1994). See also P. R. Law Ann., Tit. 33, § 4009 (1984).

life in various circumstances or in the perceived legitimacy of taking one's own. See, e.g., Kamisar, Physician-Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia, in *Euthanasia Examined* 225, 229 (J. Keown ed. 1995); CeloCruz, Aid-in-Dying: Should We Decriminalize Physician-Assisted Suicide and Physician-Committed Euthanasia?, *18 Am. J. L. & Med.* 369, 375 (1992); Marzen, O'Dowd, Crone, & Balch 24 *Duquesne L. Rev. supra*, at 98-99. Thus it may indeed make sense for the State to take its hands off suicide as such, while continuing to prohibit the sort of assistance that would make its commission easier. See, e.g., American Law Institute, [**126**] Model Penal Code § 210.5, Comment 5 (1980). Decriminalization does not, then, imply the existence of a constitutional liberty interest in suicide as such; it simply opens the door to the assertion of a cognizable liberty interest in bodily integrity and associated medical care that would otherwise [******824**] have been inapposite so long as suicide, as well as assisting a suicide, was a criminal offense.

[****2288**] [*****2288**] This liberty interest in bodily integrity was phrased in a general way by then-Judge Cardozo when he said, "every human being of adult years and sound mind has a right to determine what shall be done with his own body" in relation to his medical needs. *Schloendorff v. Society of New York Hospital*, 211 N. Y. 125, 129, 105 N.E. 92, 93 (1914). The familiar examples of this right derive from the common law of battery and include the right to be free from medical invasions into the body, *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. at 269-279, as well as a right generally to resist enforced medication, see *Washington v. Harper*, 494 U.S. 210, 221-222, 229 (1990). Thus "it is settled now . . . that the Constitution places limits on a State's right to interfere with a [**127**] person's most basic decisions about . . . bodily integrity." *Casey*, 505 U.S. at 849 (citations omitted); see also *Cruzan*, 497 U.S. at 278; *id.*, at 288 (O'CONNOR, J., concurring); *Washington v. Harper, supra*, at 221-222; *Winston v. Lee*, 470 U.S. 753, 761-762 (1985); *Rochin v.*

[California](#), 342 U.S. at 172. [*778] Constitutional recognition of the right to bodily integrity underlies the assumed right, good against the State, to require physicians to terminate artificial life support, [Cruzan, supra](#), at 279 ("we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition"), and the affirmative right to obtain medical intervention to cause abortion, see [Casey, supra](#), at 857, 896; cf. [Roe v. Wade](#), 410 U.S. at 153.

It is, indeed, in the abortion cases that the most telling recognitions of the importance of bodily integrity and the concomitant tradition of medical assistance have occurred. In *Roe v. Wade*, the plaintiff contended that the Texas statute making it criminal for any person to "procure an abortion," [id.](#), at 117, for [128] a pregnant woman was unconstitutional insofar as it prevented her from "terminating her pregnancy by an abortion 'performed by a competent, licensed physician, under safe, clinical conditions,'" [id.](#), at 120, and in striking down the statute we stressed the importance of the relationship between patient and physician, see [id.](#), at 153, 156.

The analogies between the abortion cases and this one are several. Even though the State has a legitimate interest in discouraging abortion, see [Casey](#), 505 U.S. at 871 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.) [Roe](#), 410 U.S. at 162, the Court recognized a woman's right to a physician's counsel and care. Like the decision to commit suicide, the decision to abort potential life can be made irresponsibly and under the influence of others, and yet the Court has held in the abortion cases that physicians are fit assistants. Without physician assistance in abortion, the [****825] woman's right would have too often amounted to nothing more than a right to self-mutilation, and without a physician to assist in the suicide of the dying, the patient's right will often be confined to crude methods of causing death, most shocking and painful [129] to the decedent's survivors.

[*779] There is, finally, one more reason for claiming that a physician's assistance here would fall within the accepted tradition of medical care in our society, and the abortion cases are only the most obvious illustration of the further point. While the Court has held that the performance of abortion procedures can be restricted to physicians, the Court's opinion in *Roe* recognized the doctors' role in yet another way. For, in the course of holding that the decision to perform an abortion called for a physician's assistance, the Court recognized that the good physician is not just a mechanic of the human body whose services have no bearing on a person's moral choices, but one who does more than treat symptoms, one who ministers to the patient. See [id.](#), at 153; see also [Griswold v. Connecticut](#), 381 U.S. at 482 ("This law . . . operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation"); see generally R. [**2289] [***2289] Cabot, *Ether Day Address*, *Boston Medical and Surgical J.* 287, 288 (1920). This idea of the physician as serving the whole person is a source of the high value traditionally placed [130] on the medical relationship. Its value is surely as apparent here as in the abortion cases, for just as the decision about abortion is not directed to correcting some pathology, so the decision in which a dying patient seeks help is not so limited. The patients here sought not only an end to pain (which they might have had, although perhaps at the price of stupor) but an end to their short remaining lives with a dignity that they believed would be denied them by powerful pain medication, as well as by their consciousness of dependency and helplessness as they approached death. In that period when the end is imminent, they said, the decision to end life is closest to decisions that are generally accepted as proper instances of exercising autonomy over one's own body, instances recognized under the Constitution and the State's own law, instances in which the help of physicians is accepted as falling within the traditional norm.

[*780] Respondents argue that the State has in fact already recognized enough evolving examples of

this tradition of patient care to demonstrate the strength of their claim. Washington, like other States, authorizes physicians to withdraw life-sustaining medical [131] treatment and artificially delivered food and water from patients who request it, even though such actions will hasten death. See Wash. Rev. Code §§ 70.122.110, 70.122.051 (1994); see generally Notes to Uniform Rights of the Terminally Ill Act, 9B U. L. A. 168-169 (Supp. 1997) (listing state statutes). The State permits physicians to alleviate anxiety and discomfort when withdrawing artificial life-supporting devices by administering medication that will hasten death even further. And it generally permits physicians to administer medication to patients in terminal conditions when the primary intent is to alleviate pain, even when the medication is so powerful as to hasten [****826] death and the patient chooses to receive it with that understanding. See Wash. Rev. Code § 70.122.010 (1994); see generally P. Rousseau, Terminal Sedation in the Care of Dying Patients, 156 Archives of Internal Medicine 1785 (1996); Truog, Berde, Mitchell, & Grier, Barbiturates in the Care of the Terminally Ill, 327 New Eng. J. Med. 1678 (1992).¹⁵

[132] [*781] 2

The argument supporting respondents' position thus progresses through three steps of increasing

forcefulness. First, it emphasizes the decriminalization of suicide. Reliance on this fact is sanctioned under the standard that looks not only to the tradition retained, but to society's occasional choices to reject traditions of the legal past. See Poe v. Ullman, 367 U.S. at 542 (Harlan, J., dissenting). While the common law prohibited both suicide and aiding a suicide, with the prohibition on aiding largely justified by the primary prohibition on self-inflicted death itself, see, e.g., American Law Institute, Model Penal Code § 210.5, Comment 1, pp. 92-93, and n.7 (1980), the State's rejection of the traditional treatment of the one leaves the criminality of the other open to questioning that previously would not have been appropriate. The second step in the argument is to emphasize that the State's own act of decriminalization gives a freedom of choice much like the individual's option in recognized instances of bodily autonomy. One of these, abortion, is a legal right to [**2290] [***2290] choose in spite of the interest a State may legitimately invoke in discouraging the practice, [133] just as suicide is now subject to choice, despite a state interest in discouraging it. The third step is to emphasize that respondents claim a right to assistance not on the basis of some broad principle that would be subject to exceptions if that continuing interest of the State's in discouraging suicide were to be recognized at all. Respondents base their claim on the traditional right to medical care and counsel, subject to the limiting conditions of informed, responsible choice when death is imminent, conditions that support a strong analogy to rights of care in other situations in which medical counsel and assistance have been available as a matter of course. There can be no stronger claim to a physician's assistance than at the time when death is imminent, a moral judgment implied by the State's own recognition of the legitimacy of medical procedures necessarily hastening the moment of impending death.

[****827] [*782] In my judgment, the importance of the individual interest here, as within that class of "certain interests" demanding careful

¹⁵ Other States have enacted similar provisions, some categorically authorizing such pain treatment, see, e.g., Ind. Code Ann. § 35-42-1-2.5(a)(1) (Supp. 1996) (ban on assisted suicide does not apply to licensed health care provider who administers or dispenses medications or procedures to relieve pain or discomfort, even if such medications or procedures hasten death, unless provider intends to cause death); Iowa Code Ann. § 707A.3.1 (West Supp. 1997) (same); Ky. Rev. Stat. Ann. § 216.304 (Michie 1997) (same); Minn. Stat. Ann. § 609.215(3) (West Supp. 1997) (same); Ohio Rev. Code Ann. §§ 2133.11(A)(6), 2133.12(E)(1) (1994); R. I. Gen. Laws § 11-60-4 (Supp. 1996) (same); S. D. Codified Laws § 22-16-37.1 (Supp. 1997); see Mich. Comp. Laws Ann. § 752.1027(3) (West Supp. 1997); Tenn. Code Ann. § 39-13-216(b)(2) (1996); others permit patients to sign health-care directives in which they authorize pain treatment even if it hastens death. See, e.g., Me. Rev. Stat. Ann., Tit. 18-A, §§ 5-804, 5-809 (1996); N. M. Stat. Ann. §§ 24-7A-4, 24-7A-9 (Supp. 1995); S. C. Code Ann. § 62-5-504 (Supp. 1996); Va. Code Ann. §§ 54.1-2984, 4.1-2988 (1994).

scrutiny of the State's contrary claim, see [Poe, supra, at 543](#), cannot be gainsaid. Whether that interest might in some circumstances, or at some time, [134] be seen as "fundamental" to the degree entitled to prevail is not, however, a conclusion that I need draw here, for I am satisfied that the State's interests described in the following section are sufficiently serious to defeat the present claim that its law is arbitrary or purposeless.

B

The State has put forward several interests to justify the Washington law as applied to physicians treating terminally ill patients, even those competent to make responsible choices: protecting life generally, Brief for Petitioners 33, discouraging suicide even if knowing and voluntary, [id., at 37-38](#), and protecting terminally ill patients from involuntary suicide and euthanasia, both voluntary and nonvoluntary, [id., at 34-35](#).

It is not necessary to discuss the exact strengths of the first two claims of justification in the present circumstances, for the third is dispositive for me. That third justification is different from the first two, for it addresses specific features of respondents' claim, and it opposes that claim not with a moral judgment contrary to respondents', but with a recognized state interest in the protection of nonresponsible individuals and those who do not stand in [135] relation either to death or to their physicians as do the patients whom respondents describe. The State claims interests in protecting patients from mistakenly and involuntarily deciding to end their lives, and in guarding against both voluntary and involuntary euthanasia. Leaving aside any difficulties in coming to a clear concept of imminent death, mistaken decisions may result from inadequate palliative care or a terminal prognosis that turns out to be error; coercion and abuse may stem from the large medical bills that family members cannot bear [*783] or unreimbursed hospitals decline to shoulder. Voluntary and involuntary euthanasia may result once doctors are authorized to prescribe lethal

medication in the first instance, for they might find it pointless to distinguish between patients who administer their own fatal drugs and those who wish not to, and their compassion for those who suffer may obscure the distinction between those who ask for death and those who may be unable to request it. The argument is that a progression would occur, obscuring the line between the ill and the dying, and between the responsible and the unduly influenced, until ultimately doctors and perhaps others [136] would abuse a limited freedom to aid suicides by yielding to the impulse to end another's suffering under conditions going beyond the narrow limits the respondents propose. The State thus argues, essentially, that respondents' claim is not as narrow as it sounds, simply because no recognition of the interest they assert could be limited to vindicating those interests and affecting no others. The State says that the claim, in practical effect, would entail consequences that the State could, without doubt, legitimately act to prevent.

The mere assertion that the terminally sick might be pressured into [****828] suicide decisions by close friends and family members would [**2291] [***2291] not alone be very telling. Of course that is possible, not only because the costs of care might be more than family members could bear but simply because they might naturally wish to see an end of suffering for someone they love. But one of the points of restricting any right of assistance to physicians, would be to condition the right on an exercise of judgment by someone qualified to assess the patient's responsible capacity and detect the influence of those outside the medical relationship.

The State, however, goes further, [137] to argue that dependence on the vigilance of physicians will not be enough. First, the lines proposed here (particularly the requirement of a knowing and voluntary decision by the patient) would be more difficult to draw than the lines that have limited [*784] other recently recognized due process rights. Limiting a state from prosecuting use of artificial contraceptives by married couples posed

no practical threat to the State's capacity to regulate contraceptives in other ways that were assumed at the time of *Poe* to be legitimate; the trimester measurements of *Roe* and the viability determination of *Casey* were easy to make with a real degree of certainty. But the knowing and responsible mind is harder to assess.¹⁶ Second, this difficulty could become the greater by combining with another fact within the realm of plausibility, that physicians simply would not be assiduous to preserve the line. They have compassion, and those who would be willing to assist in suicide at all might be the most susceptible to the wishes of a patient, whether the patient were technically quite responsible or not. Physicians, and their hospitals, have their own financial incentives, too, in this new [138] age of managed care. Whether acting from compassion or under [*785] some other influence, a physician who would provide a drug for a patient to administer might well go the further step of administering the drug himself; so, the barrier between assisted suicide and euthanasia could become porous, and the line between voluntary and involuntary euthanasia as well.¹⁷

¹⁶ While it is also more difficult to assess in cases involving limitations on life incidental to pain medication and the disconnection of artificial life support, there are reasons to justify a lesser concern with the punctilio of responsibility in these instances. The purpose of requesting and giving the medication is presumably not to cause death but to relieve the pain so that the State's interest in preserving life is not unequivocally implicated by the practice; and the importance of pain relief is so clear that there is less likelihood that relieving pain would run counter to what a responsible patient would choose, even with the consequences for life expectancy. As for ending artificial life support, the State again may see its interest in preserving life as weaker here than in the general case just because artificial life support preserves life when nature would not; and, because such life support is a frequently offensive bodily intrusion, there is a lesser reason to fear that a decision to remove it would not be the choice of one fully responsible. Where, however, a physician writes a prescription to equip a patient to end life, the prescription is written to serve an affirmative intent to die (even though the physician need not and probably does not characteristically have an intent that the patient die but only that the patient be equipped to make the decision). The patient's responsibility and competence are therefore crucial when the physician is presented with the request.

¹⁷ Again, the same can be said about life support and shortening life to kill pain, but the calculus may be viewed as different in these instances, as noted just above.

The case for the slippery slope is fairly made out here, not because recognizing one due process right would leave a court with no principled [****829] basis to avoid recognizing another, but because there is a plausible case that the right claimed would not be readily containable by reference to facts about the mind that are matters of difficult judgment, or by gatekeepers who are subject to temptation, noble or not. [139]

Respondents propose an answer to all this, the answer of state regulation with teeth. Legislation proposed in several States, for example, would authorize physician-assisted suicide but require two qualified physicians to confirm the patient's diagnosis, prognosis, and competence; and would mandate that the patient make repeated requests witnessed by at least two others over a specified time span; and would impose reporting requirements and criminal penalties for various acts of coercion. See App. to Brief for State Legislators as *Amici Curiae* 1a-2a.

But at least at this moment there are reasons for caution in predicting the effectiveness [***2292] [***2292] of the teeth proposed. Respondents' proposals, as it turns out, sound much like the guidelines now in place in the Netherlands, the only place where experience with physician-assisted suicide and euthanasia has yielded empirical evidence about how such regulations might affect actual practice. [140] Dutch physicians must engage in consultation before proceeding, and must decide whether the patient's decision is voluntary, well considered, and stable, whether the request to die is enduring and made more than once, and whether the patient's future will involve [*786] unacceptable suffering. See C. Gomez, *Regulating Death* 40-43 (1991). There is, however, a substantial dispute today about what the Dutch experience shows. Some commentators marshal evidence that the Dutch guidelines have in practice failed to protect patients from involuntary euthanasia and have been violated with impunity. See, e.g., H. Hendin, *Seduced By Death* 75-84 (1997) (noting many cases in which decisions

intended to end the life of a fully competent patient were made without a request from the patient and without consulting the patient); Keown, *Euthanasia in the Netherlands: Sliding Down the Slippery Slope?*, in *Euthanasia Examined* 261, 289 (J. Keown ed. 1995) (guidelines have "proved signally ineffectual; non-voluntary euthanasia is now widely practised and increasingly condoned in the Netherlands"); Gomez, *supra*, at 104-113. This evidence is contested. See, e.g., R. Epstein, *Mortal Peril* 322 (1997) ("Dutch [141] physicians are not euthanasia enthusiasts and they are slow to practice it in individual cases"); R. Posner, *Aging and Old Age* 242, and n.23 (1995) (noting fear of "doctors' rushing patients to their death" in the Netherlands "has not been substantiated and does not appear realistic"); Van der Wal, Van Eijk, Leenen, & Spreeuwenberg, *Euthanasia and Assisted Suicide*, 2, *Do Dutch Family Doctors Act Prudently?*, 9 *Family Practice* 135 (1992) (finding no serious abuse in Dutch practice). The day may come when we can say with some assurance which side is right, but for now it is the substantiality of the factual disagreement, and the alternatives for resolving it, that matter. They are, for me, dispositive of the due process claim at this time.

I take it that the basic concept of judicial review with its possible displacement of legislative judgment bars any finding that a legislature has acted arbitrarily when the following [****830] conditions are met: there is a serious factual controversy over the feasibility of recognizing the claimed right without at the same time making it impossible for the State to engage in an undoubtedly legitimate exercise of power; facts [*787] necessary to resolve the controversy [142] are not readily ascertainable through the judicial process; but they are more readily subject to discovery through legislative factfinding and experimentation. It is assumed in this case, and must be, that a State's interest in protecting those unable to make responsible decisions and those who make no decisions at all entitles the State to bar aid to any but a knowing and responsible person intending suicide, and to prohibit

euthanasia. How, and how far, a State should act in that interest are judgments for the State, but the legitimacy of its action to deny a physician the option to aid any but the knowing and responsible is beyond question.

The capacity of the State to protect the others if respondents were to prevail is, however, subject to some genuine question, underscored by the responsible disagreement over the basic facts of the Dutch experience. This factual controversy is not open to a judicial resolution with any substantial degree of assurance at this time. It is not, of course, that any controversy about the factual predicate of a due process claim disqualifies a court from resolving it. Courts can recognize captiousness, and most factual issues can be settled in [143] a trial court. At this point, however, the factual issue at the heart of this case does not appear to be one of those. The principal enquiry at the moment is into the Dutch experience, and I question whether an independent front-line investigation into the facts of a foreign country's legal administration can be soundly undertaken through American courtroom litigation. While an extensive literature on any subject can raise the hopes for judicial understanding, the literature on this subject is only nascent. Since there is little experience directly bearing on the issue, the most that can [**2293] [***2293] be said is that whichever way the Court might rule today, events could overtake its assumptions, as experimentation in some jurisdictions confirmed or discredited the concerns about progression from assisted suicide to euthanasia.

[*788] Legislatures, on the other hand, have superior opportunities to obtain the facts necessary for a judgment about the present controversy. Not only do they have more flexible mechanisms for factfinding than the Judiciary, but their mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions. There is, indeed, good [144] reason to suppose that in the absence of a judgment for respondents here, just such experimentation will be

attempted in some of the States. See, e.g., [Ore. Rev. Stat. Ann. §§ 127.800 et seq.](#) (Supp. 1996); App. to Brief for State Legislators as *Amici Curiae* 1a (listing proposed statutes).

I do not decide here what the significance might be of legislative foot-dragging in ascertaining the facts going to the State's argument that the right in question could not be confined as claimed. Sometimes a court may be bound to act regardless of the institutional preferability of the political branches as forums for addressing constitutional claims. See, e.g., [Bolling v. Sharpe, 347 U.S. 497 \(1954\)](#). Now, [****831] it is enough to say that our examination of legislative reasonableness should consider the fact that the Legislature of the State of Washington is no more obviously at fault than this Court is in being uncertain about what would happen if respondents prevailed today. We therefore have a clear question about which institution, a legislature or a court, is relatively more competent to deal with an emerging issue as to which facts currently unknown could be dispositive. The [145] answer has to be, for the reasons already stated, that the legislative process is to be preferred. There is a closely related further reason as well.

One must bear in mind that the nature of the right claimed, if recognized as one constitutionally required, would differ in no essential way from other constitutional rights guaranteed by enumeration or derived from some more definite textual source than "due process." An unenumerated right should not therefore be recognized, with the effect [*789] of displacing the legislative ordering of things, without the assurance that its recognition would prove as durable as the recognition of those other rights differently derived. To recognize a right of lesser promise would simply create a constitutional regime too uncertain to bring with it the expectation of finality that is one of this Court's central obligations in making constitutional decisions. See [Casey, 505 U.S. at 864-869](#).

Legislatures, however, are not so constrained. The experimentation that should be out of the question in constitutional adjudication displacing legislative judgments is entirely proper, as well as highly desirable, when the legislative power addresses an emerging [146] issue like assisted suicide. The Court should accordingly stay its hand to allow reasonable legislative consideration. While I do not decide for all time that respondents' claim should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time.

JUSTICE GINSBURG, concurring in the judgments.

I concur in the Court's judgments in these cases substantially for the reasons stated by JUSTICE O'CONNOR in her concurring opinion.

JUSTICE BREYER, concurring in the judgments.

I believe that JUSTICE O'CONNOR's views, which I share, have greater legal significance than the Court's opinion suggests. I join her separate opinion, except insofar as it joins the majority. And I concur in the judgments. I shall briefly explain how I differ from the Court.

I agree with the Court in *Vacco v. Quill, ante*, that the articulated state interests justify the distinction [*790] drawn between physician assisted suicide and withdrawal of life-support. I also agree with the Court that the critical question in both of the cases before us is whether "the 'liberty' specially protected by the [****832] Due Process Clause includes a right" of the sort [147] that the respondents assert. *Washington v. Glucksberg, ante*, at 19. I do not agree, however, with the Court's formulation of that claimed "liberty" interest. The Court describes it as a "right to commit suicide with another's assistance." *Ante*, at 20. But I would not reject the respondents' claim without considering a different formulation, for which our legal tradition may provide greater support. That formulation would use words roughly like a "right to die with dignity." But irrespective of

the exact words used, at its core would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering--combined.

As JUSTICE SOUTER points out, *ante* at 13-16 (SOUTER, J., concurring in the judgment), Justice Harlan's dissenting opinion in [Poe v. Ullman](#), 367 U.S. 497 (1961), offers some support for such a claim. In that opinion, Justice Harlan referred to the "liberty" that the [Fourteenth Amendment](#) protects as including "a freedom from all substantial arbitrary impositions and purposeless restraints" and also as recognizing that "certain interests require particularly careful scrutiny [148] of the state needs asserted to justify their abridgment." *Id.*, at 543. The "certain interests" to which Justice Harlan referred may well be similar (perhaps identical) to the rights, liberties, or interests that the Court today, as in the past, regards as "fundamental." *Ante*, at 15; see also [Planned Parenthood of Southeastern Pa. v. Casey](#), 505 U.S. 833 (1992); [Eisenstadt v. Baird](#), 405 U.S. 438 (1972); [Griswold v. Connecticut](#), 381 U.S. 479 (1965); [Rochin v. California](#), 342 U.S. 165 (1952); [Skinner v. Oklahoma ex rel. Williamson](#), 316 U.S. 535 (1942). [*791]

Justice Harlan concluded that marital privacy was such a "special interest." He found in the Constitution a right of "privacy of the home"--with the home, the bedroom, and "intimate details of the marital relation" at its heart--by examining the protection that the law had earlier provided for related, but not identical, interests described by such words as "privacy," "home," and "family." 367 U.S. at 548, 552; cf. [Casey](#), *supra*, at 851. The respondents here essentially ask us to do the same. They argue that one can find a "right to die with dignity" by examining the protection the [149] law has provided for related, but not identical, interests relating to personal dignity, medical treatment, and freedom from state-inflicted pain. See [Ingraham v. Wright](#), 430 U.S. 651 (1977); [Cruzan v. Director, Mo. Dept. of Health](#), 497 U.S. 261 (1990); [Casey](#),

[supra](#).

I do not believe, however, that this Court need or now should decide whether or not such a right is "fundamental." That is because, in my view, the avoidance of severe physical pain (connected with death) would have to comprise an essential part of any successful claim and because, as JUSTICE O'CONNOR points out, the laws before us do not force a [****833] dying person to undergo that kind of pain. *Ante*, at 2 (O'CONNOR, J., concurring). Rather, the laws of New York and of Washington do not prohibit doctors from providing patients with drugs sufficient to control pain despite the risk that those drugs themselves will kill. Cf. New York State Task Force on Life and the Law, *When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context* 163, n.29 (May 1994). And under these circumstances the laws of New York and Washington would overcome any remaining significant interests and would be [150] justified, regardless.

Medical technology, we are repeatedly told, makes the administration of pain-relieving drugs sufficient, except for a very few individuals for whom the ineffectiveness of pain control medicines can mean, not pain, but the need for sedation [*792] which can end in a coma. Brief for National Hospice Organization 8; Brief for the American Medical Association (AMA) et al. as *Amici Curiae* 6; see also Byock, *Consciously Walking the Fine Line: Thoughts on a Hospice Response to Assisted Suicide and Euthanasia*, 9 J. Palliative Care 25, 26 (1993); New York State Task Force, at 44, and n.37. We are also told that there are many instances in which patients do not receive the palliative care that, in principle, is available, *id.*, at 43-47; Brief for AMA as *Amici Curiae* 6; Brief for Choice in Dying, Inc., as *Amici Curiae* 20, but that is so for institutional reasons or inadequacies or obstacles, which would seem possible to overcome, and which do not include a prohibitive set of laws. *Ante*, at 2 (O'CONNOR, J., concurring); see also 2 House of Lords, Session 1993-1994 Report of Select Committee on Medical Ethics 113 (1994)

(indicating that the number of [151] palliative care centers in the United Kingdom, where physician assisted suicide is illegal, significantly exceeds that in the Netherlands, where such practices are legal).

This legal circumstance means that the state laws before us do not infringe directly upon the (assumed) central interest (what I have called the core of the interest in dying with dignity) as, by way of contrast, the state anticontraceptive laws at issue in *Poe* did interfere with the central interest there at stake--by bringing the State's police powers to bear upon the marital bedroom.

Were the legal circumstances different--for example, were state law to prevent the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life--then the law's impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue. And as JUSTICE O'CONNOR suggests, the Court might have to revisit its conclusions in these cases.

References

[152]

[22A Am Jur 2d, Death 570-588](#); [40 Am Jur 2d, Homicide 111](#), 585; [61 Am Jur 2d, Physicians, Surgeons, and Other Healers 393](#)

USCS, [Constitution, Amendment 14](#)

Annotated [Revised Code of Washington 9A.36.060](#)

L Ed Digest, Constitutional Law 854

L Ed Index, Aiding and Abetting; Due Process; Medical Care or Treatment; Physicians and Surgeons; Suicide

ALR Index, Aiding and Abetting; Due Process; Medical Care and Treatment; Physicians and Surgeons; States; Suicide

Annotation References:

Supreme Court's views as to concept of "liberty" under [due process clauses of Fifth](#) and [Fourteenth Amendments](#). [47 L Ed 2d 975](#).

Criminal liability for death of another as result of accused's attempt to kill self or assist another's suicide. [40 ALR4th 702](#).

Druggist's civil liability for suicide consummated with drugs furnished by him. [58 ALR3d 828](#).

Homicide: Criminal liability for death resulting from unlawfully furnishing intoxicating liquor or drugs to another. [153] [32 ALR3d 589](#).

Civil liability for death by suicide. [11 ALR2d 751](#).

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Weddington Productions, Inc. v. Flick

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

January 7, 1998, Decided

No. B099986.

Reporter

60 Cal. App. 4th 793 *; 71 Cal. Rptr. 2d 265 **; 1998 Cal. App. LEXIS 9 ***; 98 Cal. Daily Op. Service 218; 98 Daily Journal DAR 223

WEDDINGTON PRODUCTIONS, INC., Plaintiff
and Respondent, v. STEPHEN FLICK et al.,
Defendants and Appellants.

Notice: [*1]** Opinion certified for partial publication. *

Subsequent History: Review Denied April 22, 1998, Reported at: [1998 Cal. LEXIS 2499](#).

Prior History: APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC140705, Alan G. Buckner and Robert H. O'Brien, Judges.

Disposition: The judgment entered pursuant to [section 664.6](#) is reversed, including the award of attorney's fees to Weddington. The denial of the Flick Parties' motion to enter the terms of the Deal Point Memorandum as a judgment pursuant to [section 664.6](#) is affirmed. The preliminary injunction and the motion denying modification of the injunction are affirmed. In view of developments, the preliminary injunction is modified as stated in (unpublished) part III, *ante*. Appellants to recover costs on appeal. The matter is remanded for further proceedings not inconsistent with this opinion.

Case Summary

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part III.

Procedural Posture

Appellants challenged a judgment of the Superior Court of Los Angeles County (California) which, in a dispute over control of a sound library, denied appellants' motion to enter the terms of a one-page memorandum between the parties as a judgment and granted respondent's motion to enforce the private judge's "order enforcing settlement agreement" against appellants.

Overview

When appellant sound editor, a co-founder of respondent, left to form his own sound editing company, he took a copy of the sound library. After respondent brought an action against appellants, the parties stipulated to voluntary mediation. The mediation yielded a one-page memorandum covering many material terms but provided that the parties would "formalize" additional terms later. The mediation went awry because the parties were unable to agree on the powers remaining in the private judge or on the terms by which appellants would license the sound library from respondent. Appellants left the process, and the private judge entered an "order enforcing settlement agreement" against appellants. On appeal, the court affirmed the trial court's denial of appellants' motion to enter the terms of the one-page memorandum as a judgment and reversed and remanded the granting of respondent's motion to enforce the private judge's order. The court found that no meeting of the minds occurred on the material terms of a contract and that there was no writing signed by the

parties. As a result, there was no settlement agreement to enforce, pursuant to [Cal. Civ. Proc. Code § 664.6](#) or otherwise.

Outcome

The court affirmed the trial court's denial of appellants' motion to enter the terms of the one-page memorandum as a judgment and reversed and remanded the granting of respondent's motion to enforce the private judge's order. The court found that no meeting of the minds occurred on the material terms of a contract and that there was no settlement agreement to enforce.

LexisNexis® Headnotes

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Business & Corporate Compliance > Alternative Dispute Resolution > Judicial Review

Business & Corporate Compliance > Alternative Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

Civil Procedure > Settlements > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

Civil Procedure > ... > Settlement Agreements > Enforcement > General Overview

Civil Procedure > Judgments > Entry of Judgments > General Overview

Contracts Law > Contract Formation > General Overview

Contracts Law > Contract Formation > Execution & Delivery

Business & Corporate Compliance > Contracts > Contract Formation > Execution & Delivery

Business & Corporate

Compliance > Contracts > Contract Formation > Meeting of Minds

Contracts Law > Contract Formation > Acceptance > Meeting of Minds

Contracts Law > Types of Contracts > Settlement Agreements

Business & Corporate Compliance > Contracts > Types of Contracts > Settlement Agreements

HN1 Neither a mediator nor a judge may select and impose settlement terms on the authority of [Cal. Civ. Proc. Code § 664.6](#). [Section 664.6](#) creates only a summary procedure for specifically enforcing certain types of settlement agreements by converting them into judgments. It provides that the court, upon motion, may enter judgment pursuant to the terms of the settlement. Before judgment can be entered, two key prerequisites must be satisfied. First, there must be contract formation. The litigants must first agree to the material terms of a settlement contract before a judgment can be entered pursuant to the terms of the settlement. If no meeting of the minds has occurred on the material terms of a contract, basic contract law provides that no contract formation has occurred. If no contract formation has occurred, there is no settlement agreement to enforce pursuant to [§ 664.6](#) or otherwise. Second, there must be a writing signed by the parties that contains the material terms.

Civil Procedure > Settlements > Settlement Agreements > General Overview

Civil Procedure > ... > Settlement Agreements > Enforcement > General Overview

Contracts Law > Remedies > Specific Performance

HN2 The law of contracts precludes specific enforcement of a contract when it cannot be determined exactly what terms the parties agreed upon.

Civil Procedure > Judicial
Officers > Judges > General Overview

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Judicial Review

Business & Corporate Compliance > Alternative
Dispute Resolution > Judicial Review

Business & Corporate Compliance > Alternative
Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Validity of ADR Methods

Civil Procedure > Settlements > Settlement
Agreements > General Overview

Civil Procedure > ... > Settlement
Agreements > Enforcement > General Overview

Civil Procedure > Judgments > Enforcement &
Execution > General Overview

Contracts Law > Remedies > Specific Performance

Contracts Law > Types of Contracts > Settlement
Agreements

Business & Corporate
Compliance > Contracts > Types of
Contracts > Settlement Agreements

Real Property Law > Encumbrances > Limited Use
Rights > Licenses

HN3 [Cal. Civ. Proc. Code § 664.6](#) provides a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit. Although a judge hearing a [§ 664.6](#) motion may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment, nothing in [§ 664.6](#) authorizes a judge to create the material terms of a settlement, as opposed to deciding what terms the parties themselves have previously agreed upon.

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Judicial Review

Business & Corporate Compliance > Alternative
Dispute Resolution > Judicial Review

Civil Procedure > Settlements > Settlement

Agreements > General Overview

Civil Procedure > ... > Settlement
Agreements > Enforcement > General Overview

Contracts Law > Contract Formation > Execution &
Delivery

Business & Corporate
Compliance > Contracts > Contract
Formation > Execution & Delivery

Contracts Law > Types of Contracts > Settlement
Agreements

Business & Corporate
Compliance > Contracts > Types of
Contracts > Settlement Agreements

HN4 In order to be enforceable pursuant to the summary procedures of [Cal. Civ. Proc. Code § 664.6](#), a settlement agreement must either be entered into orally before a court, or must be in writing and signed by the parties.

Civil Procedure > Settlements > Settlement
Agreements > General Overview

Contracts Law > Contract
Formation > Acceptance > General Overview

Business & Corporate Compliance > ... > Contract
Formation > Acceptance > General Overview

Contracts Law > Types of Contracts > Settlement
Agreements

Business & Corporate
Compliance > Contracts > Types of
Contracts > Settlement Agreements

HN5 A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts. An essential element of any contract is consent. The consent must be mutual. Consent is not mutual, unless the parties all agree upon the same thing in the same sense. The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe. The parties' outward manifestations must show that the

parties all agreed upon the same thing in the same sense. If there is no evidence establishing a manifestation of assent to the same thing by both parties, then there is no mutual consent to contract and no contract formation.

Contracts Law > Breach > General Overview

Contracts Law > Contract
Formation > Acceptance > General Overview

Business & Corporate Compliance > ... > Contract
Formation > Acceptance > General Overview

Business & Corporate Compliance > ... > Contract
Formation > Offers > Definite Terms

Contracts Law > Contract
Formation > Offers > Definite Terms

HN6 In order for acceptance of a proposal to result in the formation of a contract, the proposal must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain. A proposal cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain. The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. If, by contrast, a supposed "contract" does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract.

Civil Procedure > Settlements > Settlement
Agreements > General Overview

Civil Procedure > ... > Settlement
Agreements > Enforcement > General Overview

Contracts Law > Contract
Formation > Acceptance > General Overview

Business & Corporate Compliance > ... > Contract
Formation > Acceptance > General Overview

HN7 If an essential element is reserved for the

future agreement of both parties, as a general rule the promise can give rise to no legal obligation until such future agreement. Since either party in such a case may, by the very terms of the promise, refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise.

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Judicial Review

Business & Corporate Compliance > Alternative
Dispute Resolution > Judicial Review

Civil Procedure > Settlements > Settlement
Agreements > General Overview

Civil Procedure > ... > Settlement
Agreements > Enforcement > General Overview

Contracts Law > Contract Formation > General
Overview

Business & Corporate
Compliance > Contracts > Contract
Formation > Meeting of Minds

Contracts Law > Contract
Formation > Acceptance > Meeting of Minds

Contracts Law > Types of Contracts > Settlement
Agreements

Business & Corporate
Compliance > Contracts > Types of
Contracts > Settlement Agreements

HN8 A settlement agreement which incorporates other documents can be enforced pursuant to [Cal. Civ. Proc. Code § 664.6](#), but only if there was a meeting of the minds regarding the terms of the incorporated documents.

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Judicial Review

Business & Corporate Compliance > Alternative
Dispute Resolution > Judicial Review

Civil Procedure > Settlements > Settlement

Agreements > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN9 Factual determinations made by a trial court on a [Cal. Civ. Proc. Code § 664.6](#) motion to enforce a settlement must be affirmed if the trial court's factual findings are supported by substantial evidence. Other rulings are reviewed de novo for errors of law.

Contracts Law > Remedies > Specific Performance

HN10 An agreement cannot be specifically enforced unless the terms are sufficiently certain to make the precise act which is to be done clearly ascertainable. It must not only contain all the material terms but also express each in a reasonably definite manner.

Contracts Law > Contract Interpretation > General Overview

Criminal Law & Procedure > Sentencing > Supervised Release

HN11 Although custom is admissible for the purpose of interpreting the contract or agreement of the parties, or for furnishing details not expressly covered thereby, it is not admissible to establish a contract.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court entered an order enforcing a purported settlement agreement imposed by a mediator in alternative dispute resolution (ADR) proceedings ([Code Civ. Proc., § 664.6](#)). The

dispute was between defendant, a motion picture sound editing corporation, and plaintiff, the owner of a sound effects library, and involved defendant's use of the library following defendant's departure from the corporation that plaintiff and defendant had formed to conduct a sound editing business. (Superior Court of Los Angeles County, No. BC140705, Alan G. Buckner and Robert H. O'Brien, Judges.)

The Court of Appeal reversed the judgment and remanded for further proceedings, and in the unpublished part of the opinion disposed of issues concerning a preliminary injunction. The court held that the trial court erred to the extent that the judgment was based simply on the proposition that the trial court should accept what the mediator had done, since defendant had never agreed to the "settlement" and had continuously objected during the ADR proceedings that the mediator could not impose an agreement without the consent of both parties. The mediator gained no authority from [Code Civ. Proc., § 664.6](#), to select and impose the terms of a settlement agreement, since [§ 664.6](#) creates only a summary procedure for specifically enforcing certain types of settlement agreements by converting them into judgments. Before judgment can be entered, two key prerequisites must be satisfied, both of which were missing. First, there must be contract formation. Second, there must be a "writing signed by the parties" that contains the material terms. Moreover, a motion to enforce a settlement must be made to a court, not to the mediator, as was initially done. Thus, [§ 664.6](#) provided no authority for enforcing the alleged settlement. (Opinion by Zebrowski, J., with Boren, P. J., and Nott, J., concurring.)

Headnotes

CA(1a) (1a) CA(1b) (1b)

**Compromise, Settlement, and Release § 11—
Settlement—Enforcement—Settlement Imposed
by Mediator in Alternative Dispute Resolution**

Proceedings.

--The trial court erred in entering an order enforcing a purported settlement agreement imposed by a mediator in alternative dispute resolution (ADR) proceedings ([Code Civ. Proc., § 664.6](#)), to the extent that the judgment was based simply on the proposition that the trial court should accept what the mediator had done, where one of the parties never agreed to the "settlement" and had continuously objected during the ADR proceedings that the mediator could not impose an agreement without the consent of both parties. The mediator gained no authority from [§ 664.6](#) to select and impose the terms of a settlement agreement, since [§ 664.6](#) creates only a summary procedure for specifically enforcing certain types of settlement agreements by converting them into judgments. Before judgment can be entered, two key prerequisites must be satisfied, both of which were missing. First, there must be contract formation. Second, there must be a "writing signed by the parties" that contains the material terms. There was no writing signed by the parties containing the material terms, which the mediator placed into his order and which later appeared in the judgment. Moreover, a motion to enforce a settlement must be made to a court, not to the mediator, as was initially done. Thus, [§ 664.6](#) provided no authority for enforcing the alleged settlement.

[See 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 93 et seq.]

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

Compromise, Settlement, and Release § 11— Settlement—Enforcement—Summary Procedure.

--[Code Civ. Proc., § 664.6](#), was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit. In order to be enforceable pursuant to the summary procedures, a settlement agreement must either be entered into orally before a court or must be in writing and signed by the parties. The reason

for the requirement that the agreement be signed by the parties is that settlement is such a serious step that it requires knowledge and express consent.

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

Compromise, Settlement, and Release § 9— Settlement—Construction.

--A settlement agreement is a contract, and the legal principles that apply to contracts generally apply to settlement contracts.

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

Contracts § 4—Consent—Sufficiency.

--An essential element of any contract is consent, which must be mutual. Consent is not mutual, unless the parties all agree upon the same thing in the same sense. The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe. If there is no evidence establishing a manifestation of assent to the "same thing" by both parties, then there is no mutual consent to contract and no contract formation.

[CA\(5\)](#) (5)

Contracts § 18—Certainty.

--In order for acceptance of a proposal to result in the formation of a contract, the proposal must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain. A proposal cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain. The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. If, by contrast, a supposed "contract" does not provide a

basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract. If an essential element is reserved for the future agreement of both parties, as a general rule the promise can give rise to no legal obligation until such future agreement. Since either party in such a case may, by the very terms of the promise, refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise.

CA(6) (6)

Compromise, Settlement, and Release § 9— Settlement—Construction—Incorporation.

--A settlement agreement that incorporates other documents can be enforced pursuant to [Code Civ. Proc., § 664.6](#) (judgment pursuant to terms of settlement), but only if there was a meeting of the minds regarding the terms of the incorporated documents. For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he or she must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties.

CA(7) (7)

Compromise, Settlement, and Release § 11— Settlement—Enforcement—Review.

--Factual determinations made by a trial court on a [Code Civ. Proc., § 664.6](#), motion to enforce a settlement must be affirmed if the trial court's factual findings are supported by substantial evidence. Other rulings are reviewed de novo for errors of law.

Counsel: Doniger & Fetter, Thomas Doniger and Henry D. Fetter for Defendants and Appellants.

Levy, Small & Lallas, Tom Lallas and Theodore A. Cohen for Plaintiff and Respondent.

Judges: Opinion by Zebrowski, [***2] J., with Boren, P. J., and Nott, J., concurring.

Opinion by: ZEBROWSKI

Opinion

[*796] [**267] ZEBROWSKI, J.

The primary issue on this appeal involves an entertainment industry ADR (alternative dispute resolution) procedure gone seriously awry. The ADR procedure took place in two phases. After a preliminary injunction and related contempt proceeding, the parties stipulated to a voluntary mediation. The mediation yielded a one-page memorandum covering many material terms, but also providing that the parties would "formalize" additional material terms later. Anticipating possible dispute over these additional terms, the parties also agreed to "reserve jurisdiction" in the mediator "to resolve any dispute" over the "documentation" of their settlement and to "administer any process, including fact-finding, for a full implementation of the settlement."

When the parties attempted to "formalize" the additional terms, numerous disputes became apparent. Respondents then filed a "Motion to Specifically Enforce Settlement" pursuant to [Code of Civil Procedure section 664.6](#) ([section 664.6](#)). This "motion" was filed not with the court, but rather with the mediator (hereafter private judge). The second [***3] ADR phase then followed pursuant to the clause quoted above. The exact nature of this second phase was disputed. Appellants regarded it as a continuation of mediation. Respondent and the private judge regarded it as a binding dispute resolution process authorized by [section 664.6](#). No one contended that the further ADR proceedings were a form of arbitration, and no one has made that contention on

appeal.

The second ADR phase took place in several lengthy sessions. Most of these sessions were recorded by a court reporter, and transcripts are in the record. The transcripts clearly show lack of agreement on many material terms. Appellants--who regarded the process as a continuation of voluntary mediation--then declined to participate further. Respondent and the private judge, relying upon [section 664.6](#) as authority, then continued the process in appellants' absence. The private judge then signed a 33-page "Order Enforcing Settlement Agreement, etc. and Awarding Attorneys' [*797] Fees." This "order" purported to impose upon appellants numerous material settlement terms to which appellants had never agreed.

Respondent then moved in the superior court to enforce the "order" as a [***4] settlement agreement, again relying on [section 664.6](#). The superior court granted the motion. By this method, a one-page memorandum which appellants signed after the initial mediation session became a thirty-five page judgment [**268] containing numerous material terms to which appellant had never agreed.

[CA\(1a\)](#) (1a) [Section 664.6](#) authorizes none of this. [HNI](#) Neither a mediator nor a judge may select and impose settlement terms on the authority of [section 664.6](#). [Section 664.6](#) creates only a summary procedure for specifically enforcing certain types of settlement agreements by converting them into judgments. It provides that "the court, upon motion, may enter judgment pursuant to the terms of the settlement." ([§ 664.6](#), end of first sentence.) Before judgment can be entered, two key prerequisites must be satisfied, both of which were missing in this case. First, there must be contract formation. The litigants must first agree to the material terms of a settlement contract before a judgment can be entered "pursuant to the terms of the settlement." If no meeting of the minds has occurred on the material terms of a contract, basic contract law provides that no contract formation has occurred. If no contract [***5] formation has occurred, there is

no settlement agreement to enforce pursuant to [section 664.6](#) or otherwise. Second, there must be a "writing signed by the parties" that contains the material terms. Here there was no writing signed by the parties containing the material terms, which the private judge placed into his order and which later appeared in the judgment. [Section 664.6](#) therefore provided no basis for the judgment entered. Moreover, a [section 664.6](#) motion must be made to "the court." ([§ 664.6](#), first sentence.) The "motion" made by respondent before the private judge did not constitute a "motion" to "the court" within the meaning of [section 664.6](#), and hence adds nothing to the [section 664.6](#) analysis.

Appellants appeal from this judgment. In the published portion of this opinion, we reverse it. Appellants also appeal from the issuance of the preliminary injunction, and from the denial of a motion seeking to modify it. In the unpublished portion of this opinion, we affirm the issuance of the preliminary injunction and the denial of the motion to modify, but order an interim modification ourselves in view of the passage of time and possible changed circumstances, and remand with [***6] instructions for further proceedings.

[*798] I. FACTUAL AND PROCEDURAL BACKGROUND.

a. *The parties; the business breakup.*

Appellants are Stephen Flick, a corporation formed by Mr. Flick named Creative Cafe, and an employee of Creative Cafe (collectively the Flick Parties). Mr. Flick has long been in the business of editing sound effects for motion pictures, television, and related media. He has won Academy Awards for his sound effect editing on the movies *Speed* (20th Century Fox 1994) and *Robocop* (Orion Pictures Corp. 1987), and has been nominated for Academy Awards on three other occasions. In 1987, Mr. Flick joined with colleagues Mark Mangini and Richard Anderson to form respondent Weddington Productions, Inc., as a vehicle for conducting the business of sound

effect editing. Each owned one-third of the stock of Weddington.

In 1994, disputes arose, and in July of 1995, Mr. Flick left Weddington and formed Creative Cafe.

b. The business of sound editing and Weddington's sound library.

The business of sound editing is performed by using a "library" of recorded sounds, such as guns firing, doors slamming, helicopters hovering, etc. These sounds are then mixed [***7] or modified as appropriate for a given production. Weddington had such a library. This library was jointly assembled by Messrs. Flick, Mangini and Anderson, as well as by employees of Weddington. While working as part of Weddington, Mr. Flick used this library. When Mr. Flick left Weddington and formed Creative Cafe, he took a copy of the library with him and continued to use it.

c. The preliminary injunction proceedings.

In December of 1995, Weddington obtained an injunction prohibiting the Flick Parties from using the library. In May of 1996, the superior court issued an order to show cause why the Flick Parties should not be held in contempt for violating the injunction by using the library to create sound effects for the movie *Twister* (Universal Pictures 1996). In June of [**269] 1996, evidence was presented at a contempt trial. Following the taking of evidence, but before the filing of closing briefs, the Flick Parties and Weddington agreed to mediate. The contempt proceeding was then abated pending the outcome of mediation.¹

[***8] [*799] *d. The mediation and the Deal*

Point Memorandum.

The mediation took place in August of 1996. At the end of a 12-hour session, both sides signed a 1-page document commonly referred to as the "Deal Point Memorandum." The Deal Point Memorandum began by reciting: "This Settlement Memorandum notes the significant 'deal points' with respect to all litigation now pending" between Weddington and the Flick Parties. It continued that "[a]ll parties agree to settle and dismiss on the following terms: . . ." The document then specified sums that Weddington would pay to the Flick Parties, a schedule for such payments, and the agreed allocation of these sums and other sums previously paid. The document also provided that the Flick Parties would transfer to Weddington title to certain real property and also specified other terms.

The Deal Point Memorandum also contained a "Licensing Agreement" clause and an ADR clause, both discussed next below. The Deal Point Memorandum ended by stating: "There are no other significant terms."

e. The Licensing Agreement clause and the ADR clause.

(1) The Licensing Agreement clause.

The Licensing Agreement clause provided: "[t]he [***9] parties will formalize a Licensing Agreement recognizing the Weddington Library to remain the property of . . . Weddington, but with a fully paid up license to Flick for use in sound editing services by Flick or by his corporation, or any corporation owned together with family, to use, or to devise to family members as the library existed on July 31, 1995." Neither the term "Licensing Agreement" nor "fully paid up license" was further defined. The only other terms in the Deal Point Memorandum relating to the sound library were that the parties would "cooperate to number and index" the library, that Mr. Flick would "return all masters," that Weddington would give Mr. Flick access "to replace any copy predating 7/31/95," and that "[a]ll parties will respect 3rd

¹ Because the parties did not resolve their conflict quickly enough to satisfy the superior court judge hearing the contempt proceeding, that judge later recalendared the proceedings and found the Flick Parties in contempt and fined them. The contempt finding and fine are not appealable and hence are not part of this appeal. ([Code Civ. Proc., § 1222](#); see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 105, pp. 168-169; but see 8 Witkin, Cal. Procedure, *supra*, Extraordinary Writs, § 33, pp. 811-812.)

party restrictions (e.g., Disney)." Nothing further was said about the library and no other details of the proposed Licensing Agreement were stated in the Deal Point Memorandum.

(2) *The materiality of the Licensing Agreement.*

The record clearly shows that the Licensing Agreement was centrally material to both sides. The Flick Parties relied upon access to the sound [*800] library to earn their livelihood as sound [***10] effects editors. As Mr. Flick stated in his declaration, "I am a sound effects editor. That is my only means of employment and to preclude me from acting as a sound effects editor and using the Sound Effects Library as my tool of trade . . . would preclude me from making a living." As Weddington itself stated in its application for the preliminary injunction, "[i]f Flick did not have access to the Library, Flick could not perform services for, or meet the needs, of the Production Companies." The terms of the Licensing Agreement were therefore obviously material to the Flick Parties. Those terms, whatever they might be, would control the Flick Parties' future careers.

The Licensing Agreement was also material to Weddington, as was conceded at oral argument. In seeking the injunction, Weddington contended: "The sound effects library . . . is Weddington's most valuable asset." According to Weddington, "rights of access to and use of the sound effects library owned by Weddington" was one of four issues [**270] "that needed to be resolved" in connection with Mr. Flick's withdrawal from Weddington. According to Weddington, a sound library "is an indispensable tool to anyone in the sound editing [***11] business One cannot conduct a sound editing business . . . without a high quality and well catalogued sound library." Weddington sought and obtained injunctive relief by alleging that Weddington would suffer irreparable injury if the Flick Parties were permitted uncontrolled use of the sound library.

The proposed Licensing Agreement was therefore of central material importance to both sides.

Agreement on the material terms of the Licensing Agreement was hence essential to contract formation, as will be further developed in the legal discussion below. As subsequent events were to prove, there had been no meeting of the minds on the meaning of the terms "Licensing Agreement" or "fully paid up license" as of the time the Deal Point Memorandum was signed.

(3) *The ADR clause.*

The Deal Point Memorandum also contained an ADR clause providing: "All parties agree this settlement is enforceable under [C CP 664.6](#), and reserve jurisdiction in [the private judge] to resolve any dispute that may occur in the documentation of a full Settlement Agreement or the Licensing Agreement, and in the implementation of the settlement. [The private judge] may administer any process, including [***12] fact-finding if necessary, for a full implementation of the settlement."

The reference to enforceability pursuant to [section 664.6](#) suggests that the parties subjectively thought they had formed a settlement contract. Nevertheless, subsequent events illustrate quite vividly that they had never agreed [**801] on the same terms for a Licensing Agreement. As discussed below, [HN2](#) the law of contracts precludes specific enforcement of a contract when it cannot be determined exactly what terms the parties agreed upon. Beyond this, the reference to [section 664.6](#) has little significance since any settlement agreement memorialized in a signed writing is enforceable pursuant to [section 664.6](#), whether the agreement expressly so states or not.

The meaning of the balance of the clause is debatable. The Flick Parties contend that it "reserved" only the "jurisdiction" THE PRIVATE JUDGE ALREADY HAD: to conduct a mediation. Weddington contends that the references to [section 664.6](#) empowered the private judge to select licensing agreement terms and to impose those terms on the parties. It has not been disputed that

parties theoretically could confer wide-ranging arbitration authority on an arbitrator, [***13] even to the extent of allowing an arbitrator to write a licensing agreement for them. However, Weddington has never argued that the clause calls for some sort of arbitration process, and neither the private judge nor the superior court judge treated the clause as an arbitration clause. Moreover, no motion to compel arbitration or to confirm an arbitration award was ever filed. Any possible claim that the ADR clause is an arbitration agreement has therefore been waived, and the validity of the judgment must stand or fall on [section 664.6](#).²

[***14] f. *The post-Deal Point Memorandum ADR proceedings.*

(1) *Numerous disagreements surface over material terms.*

Following the signing of the Deal Point Memorandum, the parties commenced efforts to "formalize a Licensing Agreement" and to prepare a "full Settlement Agreement" as provided in the Deal Point Memorandum. Letters and drafts were exchanged and red-lined, [**271] and discussions took place. Disagreements soon became obvious regarding numerous material terms of the proposed licensing agreement. For example, disputes involved material issues such as how the library should be defined and exactly what it encompassed; the scope of the uses permitted to the Flick Parties; the scope of the Flick Parties' permitted access to

the master tapes; whether different Flick [*802] entities, such as both Mr. Flick and the corporation Creative Cafe, could simultaneously utilize the library for different projects and possibly in different locations; the copyright implications of the Licensing Agreement; what duties the Flick Parties would have, if any, to protect Weddington's interests, such as possibly to provide insurance; whether the Flick Parties had the duty to indemnify Weddington [***15] and, if so, under what circumstances; whether the Licensing Agreement could be terminated by Weddington and, if so, on what basis and by what procedure; whether the Licensing Agreement would contain an arbitration clause, or whether the parties would retain their right to trial by jury in case of a dispute; whether, if arbitration was specified, the arbitrator would be authorized to engage his or her own experts, etc.

Although the record suggests continuing dispute over subjects other than the Licensing Agreement, the ADR proceedings which followed the Deal Point Memorandum focused on the Licensing Agreement. We also focus on the Licensing Agreement here, since examination of the Licensing Agreement issue alone is enough to show quite clearly that the parties neither reached, nor objectively manifested, a meeting of the minds on the material terms of a settlement.

(2) *The post-Deal Point Memorandum ADR proceedings commence.*

When the Flick Parties and Weddington could not agree on the terms of a Licensing Agreement, Weddington filed a "Motion to Specifically Enforce Settlement" with the private judge, styling it a motion pursuant to [section 664.6](#). The parties and the private [***16] judge then engaged in a series of lengthy meetings which will here be termed collectively the "post-Deal Point Memorandum ADR proceedings." The Flick Parties were apparently apprehensive about the nature and effect of these proceedings and consequently arranged for them (except for the first one) to be recorded by a court reporter. We thus have transcripts of four

² Even if the ADR clause were interpreted as an arbitration clause, it would not appear to be self-executing inasmuch as the clause does not expressly authorize ex parte arbitration proceedings nor does it incorporate any body of established arbitral rules, let alone any that provide for ex parte proceedings. (See, e.g., 6 Witkin, Cal. Procedure, *supra*, Proceedings Without Trial, § 495, p. 924 [discussing the type of arbitration agreement that is effective without court order]; Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 1997) PP 5:291 & 5:414.1 et seq., pp. 5-93, 5-128 to 5-175.) Since the ADR clause was not of the self-executing variety, and since no motion to compel arbitration was ever made, there is no legitimate issue of arbitration which could be raised by Weddington on appeal.

such sessions (including the last one which took place in the Flick Parties' absence).

(3) *Disputes emerge regarding the nature of the post-Deal Point Memorandum ADR proceedings.*

The precise nature of the post-Deal Point Memorandum ADR proceedings was in dispute from the outset. Early in these proceedings, the private judge stated that the goal was to produce a document that would "go around the table for signature" and suggested that participation was voluntary, thus implying a continuing mediation. Weddington, however, insisted from the outset that the proceedings were "an enforcement motion pursuant to 664.6" [*803] and "a hearing under 664.6 to enforce the settlement deal point memorandum." Soon the private judge began agreeing with Weddington's characterization of the proceedings as a process authorized [***17] by [section 664.6](#) to select and to impose a binding resolution, whether agreed to or not. The private judge thus ceased to act as a mediator, and embarked upon a role similar to that of judge or arbitrator, overruling objections by the Flick Parties and making rulings about what terms the Licensing Agreement would contain.

The Flick Parties consistently contended that the proceedings were only a continuation of mediation, and insisted that their participation was not a concession that the private judge had any power to select and impose Licensing Agreement terms. The Flick Parties repeatedly stated their contention that the ADR clause, by which the parties agreed to "reserve jurisdiction" in the private judge, "reserved" only that "jurisdiction" which had previously been bestowed upon the private judge to conduct a mediation. For example, counsel for the Flick Parties stated ". . . as I understand the reservation of jurisdiction, that is a reservation of that jurisdiction that you possessed at the outset of these proceedings, to wit, mediation," [**272] and "Your Honor, I want to say because I'm participating in these discussions does not mean that on behalf of the Flicks I'm agreeing to [***18]

this. Ultimately we're going to reserve our right to agree or not agree to the agreement. I'm trying to make it as positive an agreement as possible for the Flicks in the hope that they will believe they can live with it and sign it."

(4) *Impasse is averted; agreement is reached to continue discussions.*

After the private judge unequivocally stated his view that [section 664.6](#) and the ADR clause of the Deal Point Memorandum authorized him to select the terms of a Licensing Agreement and to impose those terms upon the Flick Parties, the Flick Parties stated that they would proceed with a mediation and nothing more. The proceedings then teetered on the brink of termination during extended discussion about the nature of the proceedings. At the urging of the private judge, all parties eventually agreed that the Flick Parties could continue to participate without waiving their contention that only a voluntary mediation, and not a procedure by which the private judge could select and impose a resolution, was in progress.

(5) *No agreement on licensing terms is ever reached.*

The transcripts, together with related documents filed by the parties with the private judge and later [***19] with the superior court, show that many different Licensing Agreement terms were proposed and discussed. Two facts emerge quite clearly. First, at the time of the Deal Point Memorandum, no meeting [*804] of the minds had yet occurred between the Flick Parties and Weddington regarding the material terms of a Licensing Agreement. Second, no such meeting of the minds occurred during the post-Deal Point Memorandum ADR proceedings. The record is voluminous, but a few examples will illustrate these points.

The private judge noted near the outset of the post-Deal Point Memorandum ADR proceedings that none of the settlement terms could reasonably be implemented "when we can't even come to a basic

understanding of the document format that's going to serve as the basis for the license agreement." Weddington then cited "practice in the community" as authority for the license terms it proposed, and presented examples of licenses from treatises and elsewhere illustrating various possible clauses. After counsel for the Flick Parties objected to the private judge's approval of a particular indemnity provision, the private judge told him that he had "the burden of going forward if you think [***20] that there are texts or cases that would demonstrate that an indemnification provision is not a feature--an appropriate feature or a usual feature I should say in custom and practice in licensing agreements." At one point the private judge suggested that no settlement could be implemented when "there is still significant dispute about the library." The subject of termination terms also generated significant controversy. Responding to protestations from counsel for the Flick Parties that no agreement had been reached during negotiation of the Deal Point Memorandum on a termination clause for the licensing agreement, the private judge stated "You said that a termination provision was not negotiated in the [Deal Point Memorandum] and I'm agreeing that we did not spend my time discussing a termination provision because many provisions are implied or would become a matter of further meet-and-confer and discussion between counsel." Numerous other material issues were also hotly contested, for example concerning whether the Licensing Agreement would contain an arbitration clause, issues of indemnity and scope of use, etc.

(6) *The private judge applies a "consistent with" or "not inconsistent [***21] with" test.*

The private judge regularly stated his belief that he was authorized to choose Licensing Agreement terms which, in his opinion, were either "consistent with" or "not inconsistent with" the Deal Point Memorandum. The private judge thus often inquired whether certain terms were "customary" or "true to the settlement discussions." On one occasion the private judge acknowledged

unfamiliarity with what types of terms were "customary" on a particular point, and entertained [***273] argument on the point and asked for reference to "a text" on the subject. In discussing a proposed provision regarding [***805] how many days should be allowed for cure of a breach, the private judge asked: "Can you help me with some practical experience because this is clearly a matter for negotiation Can you offer some practical experience that suggests that 60 is a more appropriate period or 30 or any other time period?" Ultimately, the private judge decided that "15 business days" was an appropriate period, and that is the number that ultimately appeared in the private judge's "order" and which now appears in the resulting superior court judgment, notwithstanding that the Flick Parties never [***22] agreed to it. On another occasion the private judge stated that he saw no "prejudice" in a provision proposed by Weddington, "so I will not require it to be removed."

Assuming that a private judge were given the authority, as theoretically might be done in an arbitration agreement, to select and impose the terms of a licensing agreement, a private judge who proceeded as the private judge did here can be considered to have proceeded in a reasonable and skillful manner. However, the issue we consider is whether the decisions of the private judge here can be enforced pursuant to [section 664.6](#). Counsel for the Flick Parties continually objected, stating at one point: "it was not my clients' understanding that some agreement would be hammered out based upon a view of what would be consistent with what the . . . deal point memorandum said."

The private judge eventually refined the "consistent or not inconsistent" test by inquiring whether a proposed Licensing Agreement term did or did not create a "substantive right." For example, the private judge stated "Again, my focus is going to be to determine whether the document [the Licensing Agreement] is consistent with the settlement. . [***23] . . One way of measuring that is whether it creates any substantive rights that are not implied

in the agreement" After the private judge declared what termination provision the Licensing Agreement would contain, stating that the provision "does not in my opinion create a substantive right," COUNSEL FOR THE FLICK PARTIES OBJECTED: "Shouldn't the test be whether that appears in the deal point memorandum and not whether it creates a substantive right . . . ?" THE PRIVATE JUDGE REPLIED: "No. That's the whole reason we're going through this process is because the deal point memorandum was not designed to include every provision of the licensing agreement." Counsel for the Flick Parties then responded: "I must say for the record that my clients never envisioned this process. I don't believe they agreed to anything more than what they agreed to in that deal point memorandum and this process of making up an agreement that's 10 to 20 times as long as that deal point memorandum is one that I just can't find any basis for."

The transcripts thus show clearly that both Weddington and the private judge fully understood that they were not involved in an effort to identify [*806] [***24] Licensing Agreement terms to which the Flick Parties had already agreed, but instead were searching for Licensing Agreement terms which the private judge would accept as "consistent" with the Deal Point Memorandum, whether or not the Flick Parties agreed to those terms.

(7) *The post-Deal Point Memorandum ADR proceedings collapse; Weddington and the private judge proceed alone.*

Disputes continually boiled to the surface regarding the nature of the proceedings and the authority of the private judge, leading the private judge to state at one point: "It will still be my effort because I think it's my responsibility and partly because the parties charged me with that responsibility and partly because that's the way it's supposed to work under 664.6 that I should forge ahead to work out a licensing agreement and the matters that still need to be resolved. . . . I'll move ahead to flush [sic] out

the document we will call the licensing agreement." By the time of the third post-Deal Point Memorandum ADR session, the volume of proposed licensing agreement terms and related correspondence that had passed among the parties and the private judge had become quite large. [***25] Commenting on this, the private judge noted "The post-settlement paper has [**274] now reached the same volume as the pre-settlement paper in this particular matter. . . . But moving forward I think our task is to work forward in the licensing agreement" The private judge then suggested the creation of an agenda of "the items that need discussion," noting that he had received "samples" of proposed provisions from both sides. Referring to the continuing protestations from the Flick Parties, the private judge stated, " . . . I made reference to the fact that [the Flick Parties] might choose not to sign, [but] that doesn't mean that there won't be an enforceable settlement. They can withhold their signature but that may have no effect on whether or not there's an enforceable settlement."

When the Flick Parties concluded that further discussions were not likely to produce an acceptable licensing agreement, they declined to participate further. By letter dated three days before the final scheduled ADR session, the Flick Parties explained that they "no longer believe that participation in the mediation is likely to lead to a mutually-acceptable license agreement with respect to the [***26] 'library.' "

When the Flick Parties did not appear for the final ADR session, Weddington and the private judge continued discussions in their absence. Weddington and the private judge finalized a 14-page "Settlement Agreement and Mutual General Release of Known and Unknown Claims" and a 14-page (including exhibits) "License Agreement." These documents were appended [*807] to the private judge's "Order Enforcing Settlement Agreement, etc. and Awarding Attorneys' Fees." In signing this "order," THE PRIVATE JUDGE STATED: "I have now approved the licensing

agreement" Upon being told that the Licensing Agreement document just "approved" contained an arbitration clause that was different from the arbitration clause in the settlement agreement document, and hearing a suggestion from Weddington that the provision in the settlement agreement be replaced with the provision from the Licensing Agreement, the private judge stated: "I approve that change."

Weddington then questioned whether the payments to the Flick Parties specified in the Deal Point Memorandum would really have to be made according to the agreed schedule. Weddington argued that the Flick Parties should not be [***27] entitled to the payments as scheduled because they had refused to agree to the Licensing Agreement terms "approved" by the private judge. The private judge responded: "You authorized me to make fact findings in connection with the resolution of this settlement and the documentation of it and I'm now prepared to make a fact finding that Mr. Flick is not acting in good faith in connection with the settlement and that in the absence of good faith I could not see that he could expect" payment according to the schedule in the Deal Point Memorandum. Expanding on this comment, the private judge stated "let me simply say that with the finding of lack of good faith on the part of Mr. Flick I could not find it appropriate to--that Mr. Flick could expect a payment of \$ 100,000 five days from today [as the Deal Point Memorandum provided] and in the event that he does approve the licensing agreement and settlement agreement and signs it within 30 days of today, then it would seem appropriate and reasonable that Weddington . . . have 15 business days within which to make the payment called for on November 30." The judgment later entered by the superior court altered the payment schedule specified [***28] in the Deal Point Memorandum to allow Weddington to delay payment of the agreed amounts. While the record is not completely clear as to how this occurred, the superior court's alteration of the payment schedule agreed to in the Deal Point Memorandum was apparently based on the private judge's finding that

the Flick Parties were not acting in "good faith."

g. *The motions in the superior court.*

(1) *The Flick Parties' motion.*

Following these events, the Flick Parties were the first to make a motion in the superior court. They moved to enforce the Deal Point Memorandum alone as a settlement pursuant to [section 664.6](#). The Flick Parties' moving [*808] papers emphasized the language from the Deal Point Memorandum which stated that the "settlement is enforceable [**275] under [C CP 664.6](#)" and that "[t]here are no other significant terms." The theory of the Flick Parties' motion is not completely clear, and it may have been simply a preemptive strike designed to ward off an anticipated Weddington motion to enforce the Licensing Agreement crafted by the private judge. Otherwise, the Flick Parties' theory appeared to be that the Deal Point Memorandum entitled the Flick Parties to unconditional [***29] access and to unconditional use of Weddington's sound library, except for the minimal restrictions expressly stated in the Deal Point Memorandum itself. ³ However, as Weddington notes in its brief on appeal, "pursuant to the explicit language of the Deal Point Memorandum, the only document upon which [the Flick Parties] sought entry of judgment, settlement documentation is not complete without an overall settlement a[nd] license agreement. That is, on its face, the Deal Point Memorandum is not enforceable pursuant to [C CP § 664.6](#) by itself, and cannot possibly serve as the final judgment of the court."

While both Weddington and the Flick Parties clearly agreed to the words "Licensing Agreement" and "fully paid up license" in the Deal Point Memorandum, the record summarized and highlighted above graphically shows [***30] that there was never any meeting of the minds, either subjectively or objectively, as to exactly what these

³The only restrictions expressly stated in the Deal Point Memorandum were that Mr. Flick would return the "masters" and that all parties would "respect 3rd party restrictions (e.g. Disney)."

words meant. Hence, as will be apparent from the legal discussion below, there is substantial evidence supporting the proposition that the Deal Point Memorandum did not constitute an enforceable contract. The superior court therefore did not err in denying the Flick Parties' motion to specifically enforce the Deal Point Memorandum as a judgment. The Flick Parties have appealed from that denial, but we will affirm it.

(2) *Weddington's motion.*

Shortly after the Flick Parties filed their motion to enforce the Deal Point Memorandum pursuant to [section 664.6](#), Weddington filed its own motion. Weddington's motion did not seek to enforce just the Deal Point Memorandum, but instead sought to enforce the private judge's "Order Enforcing Settlement Agreement, etc. and Awarding Attorneys' Fees." Weddington thus sought to specifically enforce not merely the Deal Point Memorandum, but also the Licensing Agreement written by the private judge. The Flick Parties opposed on numerous grounds.

The superior court recognized that the Flick Parties had never agreed to the terms contained [***31] in the private judge's "order," and had never signed any [*809] "writing" containing those terms. Nevertheless, the superior court placed great importance on the proceedings which had taken place before the private judge. The superior court noted that the private judge had "considered all the arguments which are here presented and just as certainly rejected each and every one of them. Accordingly, it seems to me that [Weddington's] motion should be granted" Weddington's motion was granted on this basis. In subsequent proceedings regarding the proper form of the judgment, the payment schedule agreed to in the Deal Point Memorandum was modified in Weddington's favor as noted above. The one-page Deal Point Memorandum thus became a thirty-five page judgment including a licensing agreement containing numerous material provisions never agreed to by the Flick Parties. It is this judgment

which must be reversed.

II. DISCUSSION AS TO [SECTION 664.6](#).

a. *The terms of [section 664.6](#).*

Prior to the enactment of [section 664.6](#), a party seeking to enforce a settlement agreement had to file a new action alleging breach of contract and seeking either contract damages or specific [***32] performance of the settlement terms, or alternatively had to supplement the pleadings in a pending case. (See, e.g., Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, P 12:951, p. 12(II)-70; [Viejo Bancorp, Inc. v. Wood \(1989\) 217 Cal. App. 3d 200, 208 \[265 Cal. Rptr. 620\]](#) ["Prior to [**276] the enactment of [section 664.6](#), a party who sought to enforce a settlement agreement could file a separate action for specific performance, or could seek leave to file a supplemental pleading in the first action."] Although a summary judgment motion could be filed based on the newly pleaded contract or specific performance claim, summary judgment could be granted only if the opposing party failed to raise a triable issue of fact. (See, e.g., Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, P 12:951, p. 12(II)-70.) Expeditious enforcement of a settlement agreement was therefore not always possible.

[CA\(2\) \(2\) HN3 Section 664.6](#) was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit. (Cf. [Viejo Bancorp, Inc. v. Wood, supra, 217 Cal. App. 3d 200](#); [In re Jason E. \(1997\) 53 Cal. \[***33\] App. 4th 1540 \[62 Cal. Rptr. 2d 416\]](#) [treating [section 664.6](#) motion as a request for summary specific performance].) The judgment in the instant case specifically enforced the private judge's "order," as modified to delay Weddington's payments, as can easily be seen by reference to its terms: it not only orders the payment of money according to a specified schedule, but also the transfer of real property, the terms of a [*810] license agreement, an arbitration clause, and many

other terms in great detail. Although a judge hearing a [section 664.6](#) motion may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial *supra*, P 12:975 et seq., pp. 12(II)-76 to 12(II)-82-7; [Fiore v. Alvord \(1985\) 182 Cal. App. 3d 561 \[221 Cal. Rptr. 400\]](#) [court may interpret terms of settlement agreement]), nothing in [section 664.6](#) authorizes a judge to *create* the material terms of a settlement, as opposed to deciding what terms *the parties themselves* have previously agreed upon.

[HN4](#) In order to be enforceable pursuant to the summary procedures of [section 664.6](#), a settlement [***34] agreement must either be entered into orally before a court (a possibility not involved here) or must be in writing and signed by the parties. The reason for the party-signature requirement is that "settlement is such a serious step that it requires the client's knowledge and express consent. (1 Witkin, Cal. Procedure (3d ed. 1985) Attorneys, § 194, pp. 221-222.)" ([Levy v. Superior Court \(1995\) 10 Cal. 4th 578, 583 \[41 Cal. Rptr. 2d 878, 896 P.2d 171\]](#).) ". . . in 1981 . . . the Legislature enacted [section 664.6](#), which created a summary, expedited procedure to enforce settlement agreements when certain requirements that decrease the likelihood of misunderstandings are met. Thus the statute requires the 'parties' to stipulate in writing or orally before the court that they have settled the case. The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent. This protects the parties against hasty and improvident settlement agreements by impressing upon them the seriousness and finality of the decision to settle, and minimizes the possibility of conflicting interpretations of the settlement. (See [In \[***35\] re Marriage of Assemi \[\(1994\)\] 7 Cal. 4th \[896,\] 905 \[30 Cal. Rptr. 2d 265, 872 P.2d 1190\]](#); [City of Fresno v. Maroot \[\(1987\)\] 189 Cal. App. 3d \[755,\] 762 \[234 Cal. Rptr. 353\]](#); [Datatronic Systems Corp. v. Speron, Inc. \[\(1986\)\] 176 Cal. App. 3d \[1168,\] 1174 \[222 Cal. Rptr.](#)

[658\]](#).) It also protects parties from impairment of their substantial rights without their knowledge and consent. (See [Blanton v. Womancare, Inc. \[\(1985\)\] 38 Cal. 3d \[396,\] 404 \[212 Cal. Rptr. 151, 696 P.2d 645, 48 A.L.R.4th 109\]](#).) [Fn. omitted.]" ([Levy, supra, 10 Cal. 4th at pp. 585-586](#).)

Thus in the circumstances of the instant case, no settlement can be specifically enforced against the Flick Parties pursuant to [section 664.6](#) unless it can be found that the Flick Parties expressly consented in writing to the material terms of that settlement.

b. *The controlling principles of contract law.*

[CA\(3\)](#) (3) [HN5](#) A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts. (See, e.g., [Gorman \[*811\] v. Holte \(1985\) 164 Cal. App. 3d 984, 988 \[211 Cal. Rptr. 34\]](#) ["Compromise settlements are governed by [**277] the [***36] legal principles applicable to contracts generally"].) [CA\(4\)](#) (4) An essential element of any contract is "consent." ([Civ. Code, § 1550](#); 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 6, p. 44.) The "consent" must be "mutual." ([Civ. Code, § 1565](#); 1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 119, p. 144 ["Every contract requires mutual assent or consent."]; [Meyer v. Benko \(1976\) 55 Cal. App. 3d 937 \[127 Cal. Rptr. 846\]](#).) "Consent is not mutual, unless the parties all agree upon the same thing in the same sense." ([Civ. Code, § 1580](#); see also [Civ. Code, § 1636](#) [contracts must be enforced according to the "mutual intention of the parties as it existed at the time of contracting."].)

"The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe." ([Meyer v. Benko, supra, 55 Cal. App. 3d 937, 942-943](#).) Outward manifestations thus govern the finding of mutual consent required by [Civil Code sections 1550, 1565 and 1580](#) for contract formation. (See also 1 Witkin, Summary of Cal. Law, *supra*,

Contracts, § 119, p. 144 [". . . *****37**] the outward manifestation or expression of assent is controlling. Mutual assent is gathered from the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understanding."].) The parties' outward manifestations must show that the parties all agreed "upon the same thing in the same sense." ([Civ. Code, § 1580](#).) If there is no evidence establishing a manifestation of assent to the "same thing" by both parties, then there is no mutual consent to contract and no contract formation. ([Civ. Code, § 1550, 1565 & 1580](#).)

[CA\(5\)](#) (5) [HN6](#) In order for acceptance of a proposal to result in the formation of a contract, the proposal "must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain." (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 145, p. 169.) A proposal "cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain. [P] . . . The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." (*Ibid.*, quoting from *Rest.2d Contracts*, *****38** § 33.) If, by contrast, a supposed "contract" does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract. (See, e.g., 1 Williston on Contracts (4th ed. 1990) § 4:18, p. 414 ["It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the courts to give it an exact meaning."]; see also [Civ. Code, § 3390, subd. 5](#) [a contract is not specifically enforceable unless the terms are ***812** "sufficiently certain to make the precise act which is to be done clearly ascertainable."].) "In particular . . . a provision that some matter shall be settled by future agreement, has often caused a promise to be too indefinite for enforcement." (1 Williston, *supra*, § 4:18, pp. 418-420.) [[HN7](#) If an essential element is reserved for the future agreement of both parties, as a general

rule the promise can give rise to no legal obligation until such future agreement. Since either party in such a case may, by the very terms of the promise, refuse to agree to anything to which the other party *****39** will agree, it is impossible for the law to affix any obligation to such a promise." (*Id.*, § 4:26, pp. 585-587, fn. omitted.)

[Ladas v. California State Auto. Assn. \(1993\) 19 Cal. App. 4th 761, 771 \[23 Cal. Rptr. 2d 810\]](#), provides an example of a supposed contract that was too uncertain to support enforcement. Plaintiffs were insurance sales representatives who claimed that their employer had breached a contract to "consider" parity with other insurance companies in setting compensation rates. The *Ladas* court held this alleged contract too uncertain to be enforceable, stating: "An amorphous promise to 'consider' what employees at other companies are earning cannot rise to the level of a contractual duty. . . . By what standard would a court or a jury determine that the [employer] failed to meet its obligation to 'consider' commissions earned by competitors? What would be the *****278** relevant market on which such a duty would be predicated? [The employer's] four major competitors? All insurers in the state? Eighty companies nationwide? How would 'damages' be calculated? By totaling up all yearly commissions earned by other agents, averaging them and subtracting the difference? *****40** By coming up with an 'industry standard' factor and increasing [the employer's] unit value ratio by that factor? The nature of the obligation asserted provides no rational method for determining breach or computing damages." The court thus found no contract.

[Peterson Development Co. v. Torrey Pines Bank \(1991\) 233 Cal. App. 3d 103 \[284 Cal. Rptr. 367\]](#), was a similar case. In *Peterson* a builder sued a lender, claiming breach of a contract to provide take-out financing. The builder relied on a "letter of commitment," but the "letter of commitment" did not specify identity of the borrower (whether the builder or his homebuyers), loan amount, percentage of purchase price, interest rates or

repayment terms. The court preliminarily noted that " '[a] loan commitment is not binding on the lender unless it contains all of the material terms of the loan, and either the lender's obligation is unconditional or the stated conditions have been satisfied. When the commitment does not contain all of the essential terms . . . the prospective borrower cannot rely reasonably on the commitment, and the lender is not liable for either a breach of the contract or promissory estoppel.' (9 [***41] Miller & Starr, [Cal. Real Estate (2d ed. 1989)] [*813] § 28.4, at p. 8, fn. omitted.) The material terms of a loan include the identity of the lender and borrower, the amount of the loan, and the terms for repayment." (*Id. at p. 115.*) The court then found the material terms not stated with sufficient certainty to create a contract, stating: "These material contractual terms of the letter of commitment are so broadly defined that they do not appear to be capable of being made certain; on this record, no binding agreement could have been reached to supply permanent financing on mutually agreed-upon terms. . . . No enforceable contract to provide permanent financing is created by this document." (*Ibid.*)

Goldberg v. City of Santa Clara (1971) 21 Cal. App. 3d 857 [98 Cal. Rptr. 862], provides another example. In *Goldberg*, an attorney had a contract calling for additional compensation if he achieved "savings to the City of such magnitude" as would justify additional compensation. The court found these terms "too vague to permit a true meeting of the minds." (21 Cal. App. 3d at p. 863; see also 1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 146, p. 169 [***42] [collecting cases in which supposed contracts were found too uncertain and hence unenforceable].)

A related situation is distinguishable. There are occasions in which "minor matters" in elaborate contracts are left for future agreement. When this occurs, it does not necessarily mean that the entire contract is unenforceable. "The Restatement suggests as an illustration of this a building contract which is definite in all particulars except for a

provision that the form of window fastening shall be afterwards be agreed upon This would not make the entire building contract unenforceable; by contrast, if the nature of the window fastenings was fixed by the agreement while the dimensions of the building were left to future agreement, there would be no enforceable obligation. Obviously, the question is one of degree; the question is whether the indefinite promise is so essential to the bargain that inability to enforce that promise strictly . . . makes it also unfair to enforce the remainder of the agreement. The more important the subject matter to be agreed upon, the more likely it is that the uncertainty will prevent or hinder enforcement. If the contract cannot be performed [***43] without settlement of the undetermined point . . . the entire contract may fail." (1 Williston on Contracts, *supra*, § 4:28, pp. 602-605, fns. omitted.) The "minor matter" situation is not presented in the instant case. If this "minor matter" body of law applied here, it might justify enforcement of the other provisions of the Deal Point Memorandum, with the issue of right to use the library reserved for trial. However, neither party has asked for that remedy, and Weddington specifically declined it when suggested during oral argument. Moreover, the record in the instant case makes clear that the Licensing Agreement [**279] is centrally material, and not a "minor matter." [*814] HN8

CA(6) (6) A settlement agreement which incorporates other documents can be enforced pursuant to section 664.6, but only if there was a meeting of the minds regarding the terms of the incorporated documents. In *Corkland v. Boscoe* (1984) 156 Cal. App. 3d 989, 992 [203 Cal. Rptr. 356], for example, the court specifically enforced a settlement agreement in a real estate case, stating " 'it is clear that the settlement agreement includes not only that document denominated "Settlement Agreement," but the two promissory [***44] notes and deeds of trust *executed pursuant thereto and later withdrawn by Boscoe*. It is undisputed [*sic*] that there was a meeting of the minds of all the parties as to all material portions of the notes and deeds, and there is no substantial reason to further

delay the consummation of the agreement.' "

In [Chan v. Drexel Burnham Lambert, Inc. \(1986\) 178 Cal. App. 3d 632, 641-642 \[223 Cal. Rptr. 838\]](#), the court stated " '[a] contract may validly include the provisions of a document not physically a part of the basic contract. . . . 'It is, of course, the law that the parties may incorporate by reference into their contract the terms of some other document. [Citations.] But each case must turn on its facts. [Citation.] For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties.' " (Williams Constr. Co. v. [Standard-Pacific Corp. \(1967\) 254 Cal. App. 2d 442, 454 \[61 Cal. Rptr. \[***45\] 912\]](#), italics added; accord [King v. Larsen Realty, Inc. \[\(1981\)\] 121 Cal. App. 3d \[349,\] 357 \[175 Cal. Rptr. 226\].](#)) [P] In *King*, arbitration provisions were determined to be incorporated into a contract, where: (1) appellant Larsen, upon applying for membership in a local real estate board, had read the bylaws requiring arbitration; (2) appellant Doty had read his application prior to signing it, which application required the applicant to abide by all bylaws, and Doty enjoyed familiarity with the arbitration manual, having referred thereto on occasion; and (3) the arbitration manual was readily available to both appellants. ([Id.](#), at pp. 353, 357.)"

The purported settlement in the instant case, supposedly memorialized in the Deal Point Memorandum, thus might be enforceable even though all terms of the Licensing Agreement were not expressly stated in the Deal Point Memorandum. However, this could be true only if the parties had objectively manifested a "meeting of the minds" as to "all material portions" of the licensing agreement, perhaps by reference to a standardized document, so that their use of the terms "Licensing Agreement" and "fully paid-up license" could [***46] be found to have a specific,

understood and agreed meaning.

[*815] c. *The standard of review.*

[CA\(7\) \(7\) HN9](#) Factual determinations made by a trial court on a [section 664.6](#) motion to enforce a settlement must be affirmed if the trial court's factual findings are supported by substantial evidence. ([In re Marriage of Assemi \(1994\) 7 Cal. 4th 896, 911 \[30 Cal. Rptr. 2d 265, 872 P.2d 1190\]](#); [Fiore v. Alvord, supra, 182 Cal. App. 3d 561.](#)) Other rulings are reviewed de novo for errors of law. (9 Witkin, Cal. Procedure, *supra*, Appeal, § 316, p. 354.)

d. *Application of the law to the facts of this case.*

(1) *The Licensing Agreement was material.*

As the factual recitation above shows, the issue of the use of the sound library was a material issue to both sides. This is clearly not a case in which the terms of the Licensing Agreement can be regarded as a minor, immaterial or separable issue, and both parties acknowledge that. Therefore, if there was no licensing contract, there was no contract at all.

(2) *The question is whether contract formation took place.*

The analysis in the post-Deal Point Memorandum ADR proceedings and in the trial court seems to have [***47] been deflected off course by the settlement context and a [**280] fervor that ADR be successful. The fact that the context was one of settlement negotiation, however, has no analytical impact on the question of whether an enforceable contract was ever formed. [Section 664.6](#) provides only for enforcement of settlement contracts. Contracts are formed in the same way in both the settlement and the nonsettlement context. (See, e.g., [Civ. Code, § 1550 et seq.](#) and discussion, *ante.*) The analysis necessary here may therefore be brought into sharper focus by parsing out and disregarding the settlement context. The ultimate issue here is simply whether the parties formed an enforceable licensing contract. The question can thus be stated as whether the record here would support a

judgment that Weddington and the Flick Parties had agreed upon an enforceable license agreement. Clearly the answer is no. The facts clearly show that "mutual consent" to the "same thing" never occurred. Moreover, if the [section 664.6](#) context is taken into account, the additional requirement of a signed writing must be satisfied. The evidence is uncontradicted that the parties never objectively manifested agreement, [***48] and certainly not in writing, to such material terms as the scope of the license, permitted uses, grounds and procedures for termination, indemnity provisions, whether the license would contain an arbitration clause or whether the right to jury trial would be preserved, etc. It is [*816] therefore clear that no specifically enforceable license contract was ever formed.

(3) *The White Point case.*

[White Point Co. v. Harrington \(1968\) 268 Cal. App. 2d 458 \[73 Cal. Rptr. 885\]](#) is closely on point. *White Point* involved escrow instructions for an alleged real estate sale contract and a related promissory note secured by a deed of trust. The issue of whether contract formation had occurred was created by an ambiguous clause providing for piecemeal release of the real property from the deed of trust. Although the trial court "was impressed that the ambiguity of the provision for release clauses cast doubt upon the validity and enforceability of the contract . . . the court sought to incorporate therein an implied-in-law covenant of good faith requiring the parties 'to sincerely and earnestly negotiate to complete adequate details so as to make the contract fair and [***49] reasonable.' The court further declared ' . . . I feel that the matter of formulating release details beyond the expressed fundamentals, in order to insure fairness, lends itself adequately to the supervisory capacity of the court.' " ([268 Cal. App. 2d 458, 464.](#)) The court therefore "directed counsel for plaintiffs to prepare findings and to propose in writing the necessary details for implementing specific performance of the contract. ([268 Cal. App. 2d 458, 465.](#)) Plaintiffs then filed a document entitled "Plaintiffs' Proposed Details of Judgment,"

which proposed a release clause. The court then incorporated that release clause, which defendants had never agreed to, into the judgment. (*Ibid.*)

The Court of Appeal reversed. "It is well established," stated the Court of Appeal, that "[[HN10](#)] an agreement cannot be specifically enforced unless the terms are "sufficiently certain to make the precise act which is to be done clearly ascertainable." ([Civ. Code, § 3390, subd. 5.](#)) It must not only contain all the material terms but also express each in a reasonably definite manner. [Citations.]" ([Spellman v. Dixon, 256 Cal. App. 2d 1, 3 \[63 Cal. Rptr. 668\].](#)) The trial court in the [***50] instant case was clearly and with reason concerned about the ambiguity of the release clause provision in the escrow instructions which constitute the only concrete embodiment of the purported contract. If this provision constitutes a material term of the contract, rather than merely a term requiring good faith elaboration of detail, its patent uncertainty voids the entire agreement. The legal principles requiring that material terms be set forth in a reasonably definite manner 'have been applied in denying specific performance of agreements which are incomplete, indefinite or uncertain with respect to the terms of payment of deferred balances or the terms of encumbrances representing such deferred balances. [Citations.]" ([Magna Development Co. v. Reed, 228 Cal. App. 2d 230, 236 \[39 Cal. Rptr. 284\].](#)) In [*817] recent years subordination agreements have frequently been reviewed by appellate courts with respect to the issues of uncertainty, materiality [**281] and fairness. Where the subordination provisions have been found uncertain and incapable of ascertainment by reference to an objective standard, the contracts have been deemed void for the uncertainty of a material provision [***51] [Citations.]" ([White Point Co. v. Herrington, supra, 268 Cal. App. 2d 458, 465-466.](#)) When such material details " 'are left to the future agreement of buyer and seller, then the contract is uncertain and unenforceable.' " ([268 Cal. App. 2d 458, 466](#), italics omitted.) "It has clearly been established," the court explained, "that such clauses constitute material

provisions of the contract" (*Ibid.*) "The rule . . . is that when something is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. "Since either party, by the very terms of the promise, may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise." [Citations.]' ([Magna Development Co. v. Reed, supra, 228 Cal. App. 2d 230, 238.](#)) There appearing no external standards nor any reference to custom and usage by which the parties in the present case agreed to be bound, and insufficient parol evidence of what the release clause was intended to contain, there was no sound legal basis upon which to supply the missing terms." ([268 Cal. App. 2d 458, 468.](#)) [***52]

The Court of Appeal then turned to the trial judge's efforts to create "a new agreement" for the parties, an effort similar to the one undertaken by the private judge in the instant case. These efforts were found invalid: "The court's attempt to decree in the alternative that respondents pay cash for the property, or the parties negotiate in good faith acceptable terms for the release clause failed and the court was ultimately forced to its third alternative whereby the court supervised the drafting of the release clause. The court in this role in fact constructed, on the basis of judicial notice taken of legal custom and usage, a new agreement between the parties. '[I]t is a well-established principle that [HN11](#) although custom is admissible for the purpose of interpreting the contract or agreement of the parties, or for furnishing details not expressly covered thereby, it is not admissible to *establish* a contract. [Citations.]' ([Magna Development Co. v. Reed, supra, \[228 Cal. App. 2d 230, 240\].](#)) Only the valid and binding agreement of the parties, including all material terms well-defined and clearly expressed, may be ordered specifically performed." ([White Point Co. \[***53\] v. Herrington, supra, 268 Cal. App. 2d 458, 468.](#))

White Point and the instant case are closely

analogous. Both instances involve an attempt to conclude a contract, but a failure to agree on material terms. In *White Point*, the missing material terms were created by a superior **[*818]** court judge and then included in a judgment just as if the parties had agreed to them. In the instant case, the missing material terms were created by a private judge, and a superior court judge then specifically enforced those terms as a judgment, just as if the parties had agreed to them.

(4) *The superior court's order enforcing the private judge's "order" was an error.*

[CA\(1b\)](#) (1b) The superior court focused on what the private judge had considered and had "ordered." To the extent that the superior court's judgment was based simply on the proposition that the superior court should accept what the private judge had done, there is no legal basis for it, and it must be reversed. The private judge gained no authority from [section 664.6](#) to select and impose the terms of a settlement agreement. There was no complaint for specific performance of a contract calling for some other form of ADR. [***54] ⁴ [***55] There was no complaint for declaratory relief regarding the effect of the ADR clause. The private judge could theoretically have been empowered to do what he did by an arbitration agreement, and the parties could hence have invoked the summary specific enforcement procedures of the Code of Civil Procedure relating to arbitration **[**282]** agreements, but both sides agree that they never did that. ⁵ The private judge himself hinted at the dubious validity of the post-Deal Point Memorandum ADR proceedings by commenting: "we're treading on some new territory here in terms of the enforcement of a settlement and I'm perfectly comfortable going there because I know that that's where our legal system is going" It thus

⁴It seems doubtful that this ADR clause, given its ambiguities, would be specifically enforceable according to the general law of specific performance.

⁵Nor was there a reference (see [Code Civ. Proc., § 638 & 639](#)), nor a temporary judge appointment (see [Cal. Const., art. VI, § 21](#)).

appears that the post-Deal Point Memorandum ADR proceedings were an attempt to "push the envelope" of [section 664.6](#) into "new territory." As the analysis above shows, these proceedings did push far beyond the boundaries of any existing legal authority.

To the extent that the superior court's judgment may have been based upon a factual finding that the parties had reached an agreement as to license terms, it must be reversed since such a conclusion must be supported by substantial evidence. Moreover, it is undisputed that there was no "writing signed by the parties" setting forth the terms of the licensing agreement. Hence the only possible basis on which the judgment here could properly have been entered would be a theory that the Deal Point Memorandum incorporated the terms of a licensing agreement by reference. However, no one has ever made that argument in the trial court or on appeal, and neither [*819] the private judge nor the superior court judge ever made such a finding. In addition, the transcripts and other documents filed by the parties show that there was no document of agreed content to which the parties were referring when they used the terms "Licensing Agreement" and "fully paid-up license" [***56] in the Deal Point Memorandum. To the contrary, the parties had sharply conflicting ideas of what terms a licensing agreement should contain. There is no substantial evidence supporting the superior court's entry of that licensing agreement as a judgment. The judgment is therefore reversed.⁶

⁶The Flick Parties also raise [Evidence Code section 1152.5](#), which restricts the admissibility of "evidence of anything said or of any admission made in the course of [a] mediation." The Flick Parties regard the post-Deal Point Memorandum ADR proceedings as a continuing mediation. They further contend that the Deal Point Memorandum should be specifically enforced without embellishment. They hence quite consistently contend that the transcripts of the post-Deal Point Memorandum ADR proceedings are not admissible in evidence. However, regardless of what the post-Deal Point Memorandum ADR proceedings *should* have been, they were not treated as a mediation by either Weddington, the private judge, or the superior court. If they had been so treated, the judgment now being reversed would never have been entered. In view of this fact and our disposition reversing the judgment, we need

[***57] III. DISCUSSION AS TO THE PRELIMINARY INJUNCTION. *

IV. DISPOSITION.

The judgment entered pursuant to [section 664.6](#) is reversed, including the award of attorney's fees to Weddington. The denial of the Flick Parties' motion to enter the terms of the Deal Point Memorandum as a judgment pursuant to [section 664.6](#) is affirmed. The preliminary injunction and the motion denying modification of the injunction are affirmed. In view of developments, the preliminary injunction is modified as stated in (unpublished) part III, *ante*. Appellants to recover costs on appeal. The matter is remanded for further proceedings not inconsistent with this opinion.

Boren, P. J., and Nott, J., concurred.

Petitions for a rehearing were denied January 26, 1998, and January 28, 1998, and respondent's petition for review by the Supreme Court was denied April 22, 1998.

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not entertain the [Evidence Code section 1152.5](#) issue further.

* See footnote, *ante*, page 793.



Questioned

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

White v. Davis

Supreme Court of California

March 24, 1975; March 24, 1975

L.A. No. 30348

Reporter

13 Cal. 3d 757 *; 533 P.2d 222 **; 120 Cal. Rptr. 94 ***; 1975 Cal. LEXIS 208 ****

HAYDEN V. WHITE, Plaintiff and Appellant, v.
EDWARD M. DAVIS, as Chief of Police, etc.,
Defendant and Respondent

Prior History: [****1] Superior Court of Los Angeles County, No. C 32177, David N. Eagleson, Judge.

Disposition: The judgment is reversed.

Core Terms

privacy, surveillance, police surveillance, gather, covert, classroom, intelligence, undercover, dossier, police department, instant case, demurrer, government activity, undercover agent, justiciable, intrusion, inhibit, allegation of the complaint, state constitution, public funds, investigatory, routine, enjoin, chill, government and business, prima facie violation, sustain a demurrer, taxpayer's suit, no illegality, ongoing

Case Summary

Procedural Posture

Appellant college professor challenged the decision of the Superior Court of Los Angeles County (California), which sustained respondent police department's demurrer in a taxpayer's challenge alleging violation of freedom of speech and of assembly as well as of the state constitutional right of privacy.

Overview

The court reversed the decision of the trial court,

which sustained respondent police department's demurrer in appellant college professor's taxpayer challenge alleging violation of freedom of speech and of assembly as well as of the state constitutional right of privacy. Appellant claimed, inter alia, that members of the Los Angeles Police Department, serving as secret informers and undercover agents, registered as students at UCLA, attended classes held at the university and submitted reports to the police department of discussions occurring in such classes. The complaint also alleged that the reports and dossiers compiled by the police pursuant to these covert surveillance activities pertained to no illegal activity or acts. The court agreed, holding that the demurrer to the complaint was improperly sustained. The court found that respondent's conduct presumptively violated both state and federal constitutions, reasoning that because of the potentially substantial inhibition of free expression and association posed by the police department's alleged covert surveillance of university classes and organization meetings.

Outcome

The court reversed the trial court's demurrer in appellant college professor's challenge alleging violation of freedom of speech, assembly, and the state constitutional right of privacy. Police conduct violated both state and federal constitutions because of the potentially substantial inhibition of free expression and association posed by the police department's alleged covert surveillance of university classes and organization meetings.

LexisNexis® Headnotes

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN1 Substantive Due Process, Privacy

A principal aim of [Cal. Const. art. 1, § 1](#), is to limit the infringement upon personal privacy arising from the government's increasing collection and retention of data relating to all facets of an individual's life.

Constitutional Law > ... > Case or
Controversy > Standing > General Overview

HN2 Case or Controversy, Standing

See [Cal. Civ. Proc. Code § 526a](#).

Constitutional Law > ... > Case or
Controversy > Standing > General Overview

Criminal Law & Procedure > Search &
Seizure > Search Warrants > General Overview

Tax Law > State & Local
Taxes > Administration & Procedure > General
Overview

HN3 Case or Controversy, Standing

While it is elementary that public officials must themselves obey the law, [Cal. Civ. Proc. Code § 526a](#) provides a citizens a remedy for controlling illegal governmental activity.

Constitutional Law > ... > Case or
Controversy > Standing > General Overview

HN4 Case or Controversy, Standing

An individual must suffer more specific harm than the mere subjection to governmental scrutiny, as the basis for his First Amendment legal challenge.

Constitutional Law > ... > Case or
Controversy > Standing > General Overview

HN5 Case or Controversy, Standing

Under [Cal. Civ. Proc. Code § 526a](#) no showing of special damage to the particular taxpayer is necessary. The primary purpose of [§ 526a](#) is to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.

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

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

HN6 Bill of Rights, Fundamental Rights

The inherent legitimacy of the police intelligence gathering function does not grant the police the unbridled power to pursue that function by any and all means. In this realm, as in all others, the permissible limits of governmental action are circumscribed by the [federal bill of rights](#) and the comparable protections of our state constitution.

Constitutional Law > ... > Fundamental
Rights > Search & Seizure > Scope of
Protection

Criminal Law & Procedure > Search &
Seizure > Warrantless Searches > National
Security

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > General Overview

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > Warrantless Eavesdropping

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > General Overview

HN7 Search & Seizure, Scope of Protection

The police may not practice warrantless surveillance of private residences by means of concealed microphones, nor conduct covert police investigation involving routine and continual surveillance of public restrooms. Governmental intelligence operations in domestic security cases are not immune from [Fourth Amendment](#) proscriptions.

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

HN8 Fundamental Freedoms, Freedom of Speech

To compel an individual to disclose his political ideas or affiliations to the government is to deter the exercise of First Amendment rights.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

Civil Procedure > Appeals > Standards of Review > General Overview

HN9 Defenses, Demurrers & Objections, Demurrers

Following the dismissal of a case upon a sustained

demurrer, the allegations of the complaint must be accepted as true for purposes of the appeal.

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

HN10 Bill of Rights, Fundamental Freedoms

See [Cal. Const. art. 1, § 1](#).

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The complaint in a taxpayer's suit against a city's chief of police, seeking to enjoin the alleged illegal expenditure of public funds in connection with the police department's covert intelligence gathering activities, alleged that with the chief's authorization, members of the department, serving as secret informers and undercover agents, registered as students at a state university, attended classes, and submitted reports of class discussions to the police department, that the reports pertained to no illegal acts, and that the police activity inhibited the exercise of freedom of speech and assembly, and abridged the rights of due process of law and of privacy in violation of the federal and state Constitutions. The trial court sustained a general demurrer without leave to amend and entered judgment for defendant. (Superior Court of Los Angeles County, No. C 32177, David N. Eagleson, Judge.)

The Supreme Court reversed. Preliminarily, it was noted that for purposes of the appeal, the demurrer admitted the truthfulness of the properly pleaded factual allegations of the complaint. Observing that the crucible of new thought is in the university classroom and that the alleged facts demonstrate police surveillance activity which is likely to pose a

substantial restraint on the exercise of [First Amendment](#) rights, the court held that the complaint demonstrated a prima facie violation of such rights and that, therefore, it had been error to sustain the demurrer. Furthermore, it was held that the complaint also stated a cause of action grounded on violation of the recently adopted provision of [Cal. Const., art. I, § 1](#), recognizing the right of privacy. Although the constitutional provision had not been adopted until after the demurrer had been sustained, the court held it applicable under the rules that relief by injunction, which was the only relief sought by the complaint, operates in futuro, and that the right to a sought injunction must be determined as of the date of the appellate court's decision. (Opinion by Tobriner, J., expressing the unanimous view of the court.)

Headnotes

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

Public Funds § 6—Illegal Expenditures—Standing to Sue Public Officer.

--Plaintiff, as a taxpayer, had standing under [Code Civ. Proc., § 526a](#), governing actions against public officers, to seek an injunction against expenditure of public funds by a city's chief of police in connection with allegedly illegal police investigatory activities.

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

Public Officers and Employees § 16—Powers, Duties and Liabilities—Actions Against Public Officers—Standing to Sue.

--In a taxpayer's action under [Code Civ. Proc., § 526a](#), governing actions against public officers, no showing of special damage to the particular taxpayer is necessary.

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

Constitutional Law § 55—[First Amendment](#) and Other Fundamental Rights—Covert Surveillance of College Classes.

--Because of the potentially substantial inhibition of free expression and association posed by a police department's alleged covert surveillance of university classes and organization meetings, such conduct presumptively violates the federal and state Constitutions.

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

Law Enforcement Officers § 18—Police—Rights and Duties—Investigation—Constitutional Limits.

--The inherent legitimacy of the police intelligence gathering function does not grant the police the unbridled power to pursue that function by any and all means. In this realm, as in all others, the permissible limits of governmental action are circumscribed by the federal [Bill of Rights](#) and the comparable protections of the California Constitution.

[CA\(5\)](#) (5)

Constitutional Law § 52—[First Amendment](#) and Other Fundamental Rights—As Extending to Indirect Interference.

--With respect to the so-called [First Amendment](#) freedoms, the protection afforded by both the federal and state Constitutions is not limited to direct interference with fundamental rights.

[CA\(6\)](#) (6)

Constitutional Law § 52—[First Amendment](#) and Other Fundamental Rights—Forced Disclosure of Political Affiliations.

--To compel an individual to disclose his political ideas or affiliations to the government is to deter the exercise of so called [First Amendment](#) rights

under the federal and state Constitutions.

CA(7) (7)

Constitutional Law § 54—First Amendment and Other Fundamental Rights—Covert Surveillance of College Classes.

--It was error to sustain a general demurrer without leave to amend to a complaint which sought to enjoin the expenditure of public funds in connection with a police department's intelligence gathering activities, and which demonstrated a prima facie violation of so-called First Amendment rights, under both the federal and state Constitutions, in allegations that police officers, serving as secret informers and undercover agents, registered as students at a state university, attended classes, and submitted reports of the class discussions to the police department, that the reports pertained to no illegal acts, and that the surveillance inhibited the exercise of freedom of speech and assembly.

CA(8) (8)

Privacy § 7—Actions—Applicability of Constitutional Provision.

--In view of the rules that relief by injunction operates in futuro and that the right to the sought injunction must be determined as of the date of the appellate court's decision, Cal. Const., art. I, § 1, recognizing the right of privacy, was controlling on appeal from a judgment of dismissal entered on the sustaining of a demurrer without leave to amend to a complaint, even though the provision was not adopted until after the demurrer was sustained, where the only relief sought by the complaint was an injunction.

CA(9) (9)

Constitutional Law § 12—Operation, Effect and

Construction—Background, Purpose and Intent—Use of Election Brochures in Aid of Construction.

--The courts may properly refer to election brochure arguments as an aid in construing constitutional amendments adopted pursuant to a vote of the people.

CA(10) (10)

Constitutional Law § 58—First Amendment and Other Fundamental Rights—Right of Privacy—Constitutional Provision.

--A prima facie violation of the right of privacy set forth in Cal. Const., art. I, § 1, was stated by a complaint which sought to enjoin the expenditure of public funds in connection with a police department's intelligence gathering activities, and which alleged that police officers, serving as secret informers and undercover agents, registered as students at a state university, attended classes, and submitted reports of the class discussions to the police department, and that the reports pertained to no illegal acts. Thus, it was error to sustain a general demurrer to the complaint without leave to amend.

Counsel: A. L. Wirin, Fred Okrand, John D. O'Loughlin and Jill Jakes for Plaintiff and Appellant.

Burt Pines, City Attorney, John T. Neville, Assistant City Attorney, Robert E. Shannon and Burk M. Wiedner, Deputy City Attorneys, for Defendant and Respondent.

Judges: In Bank. Opinion by Tobriner, J., expressing the unanimous view of the court. Wright, C. J., McComb, J., Mosk, J., Sullivan, J., Clark, J., and Burke, J., * concurred.

Opinion by: TOBRINER

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

Opinion

[*760] [**224] [***96] Do the state and federal Constitutions permit police officers, posing as students, to enroll in a major university and engage in the covert practice of recording class discussions, compiling police dossiers and filing "intelligence" reports, so that the police have "records" on the professors and students? Is this "intelligence gathering" by the police covering discussions in university classes and in public and private meetings of university-sponsored organizations, constitutionally [****2] valid when such reports "pertain to no illegal activity or acts"? The complaint in the present action challenges this practice of police surveillance as violative of the federal and state constitutional guarantees of freedom of speech, assembly, privacy and due process of law. To this complaint the superior court sustained a demurrer without leave to amend, and thereafter entered judgment in favor of defendant.

We have determined that the superior court erred in sustaining the demurrer; we conclude that the allegations of the complaint state a prima facie violation of freedom of speech and of assembly as well as of the state constitutional right of privacy. As we shall explain, a host of decisions of both the United States Supreme Court and of this court firmly establish the constitutionally enshrined status of freedom of [*761] speech and freedom of association in our nation's universities and colleges. Although the covert surveillance at issue here does not directly prohibit the exercise of protected rights in this realm, it is by now black letter First Amendment law that government activity which even indirectly inhibits the exercise of protected activity may run afoul [****3] of the First Amendment proscriptions. Given the delicate nature of academic freedom, we visualize a substantial probability that this alleged covert police surveillance will chill the exercise of First Amendment rights.

In light of this potentially grave threat to freedom of expression, constitutional authorities establish that the government bears the responsibility of demonstrating a compelling state interest which justifies such impingement and of showing that its purposes cannot be achieved by less restrictive means. At this stage of the proceedings, however, defendant has demonstrated no such justification; indeed, because the case arises upon the sustaining of a demurrer, defendant has yet even to file an answer in this litigation. Accordingly, we think that the demurrer should not have been sustained.

Moreover, the surveillance alleged in the complaint also constitutes a prima facie violation of the explicit "right of privacy" recently added to our state Constitution. [**225] [***97] As we point out, [HN1](#) a principal aim of the constitutional provision is to limit the infringement upon personal privacy arising from the government's increasing collection and retention [****4] of data relating to all facets of an individual's life. The alleged accumulation in "police dossiers" of information gleaned from classroom discussions or organization meetings presents one clear example of activity which the constitutional amendment envisions as a threat to personal privacy and security. Though the amendment does not purport to invalidate all such information gathering, it does require that the government establish a compelling justification for such conduct. Once again, because the case arises after the sustaining of a demurrer, the government has not yet proffered any justification for the alleged covert information network and police dossiers. Consequently, the demurrer should have been overruled on this basis as well.

Accordingly, we reverse the judgment and remand for a trial on the merits.

1. *The allegations of the complaint.*

Plaintiff Hayden White, a professor of history at the University of [*762] California at Los Angeles and a resident taxpayer of the City of Los Angeles, instituted this taxpayer's suit against defendant Edward M. Davis, Chief of Police of the City of

Los Angeles, seeking to enjoin the alleged illegal expenditure of [****5] public funds in connection with the police department's conduct of covert intelligence gathering activities at UCLA. The complaint alleges that with the authorization of Chief Davis, members of the Los Angeles Police Department, serving as "secret informers and undercover agents," have registered as students at UCLA, have attended classes held at the university and have submitted reports to the police department of discussions occurring in such classes. The complaint also alleges that the undercover police agents have joined university-recognized organizations, have attended public and private meetings of such organizations and have made reports on discussions at such meetings. The reports of these undercover agents are allegedly maintained by the police department in files, "commonly designated as 'police dossiers'." Finally, the complaint alleges that the reports and dossiers compiled by the police pursuant to these covert surveillance activities "pertain to no illegal activity or acts."

Asserting that the expenditure of public funds for such operation is illegal because such activity "inhibits the exercise of freedom of speech and assembly, and abridges the right of due process [****6] of law and of privacy" in violation of the federal and state Constitutions, the complaint sought to enjoin the police department from expending funds for such activities in the future.

Defendant demurred to the complaint, contending that the above allegations failed to state a cause of action in view of past judicial decisions approving the use of undercover agents in police investigations. Defendant also relied heavily on an earlier federal district court decision which had dismissed a similar complaint directed at identical police surveillance operations at UCLA. As we have stated, the superior court sustained the demurrer without leave to amend and thereafter entered judgment in favor of defendant, dismissing the action.

2. CA(1) (1) As a taxpayer, plaintiff has standing under section 526a of the Code of Civil Procedure to seek an injunction against defendant's expenditure of public funds in connection with allegedly illegal police investigatory activities.

We have noted that this action is brought as a taxpayer's suit under section 526a of the Code of Civil Procedure to enjoin the allegedly illegal [*763] expenditure of public funds.¹ The use of section 526a as a means [****7] of challenging the legality of [**226] [***98] ongoing police investigatory activities has a long and firmly established heritage in this state. In Wirin v. Horrall (1948) 85 Cal. App. 2d 497, 504-505 [193 P.2d 470], for example, a Los Angeles taxpayer instituted an action attacking the constitutionality of a police practice of establishing dragnet "police blockades" at which individuals and automobiles were routinely stopped and searched without a search warrant. In holding that the alleged police conduct violated applicable Fourth Amendment proscriptions, the Court of Appeal explicitly recognized the propriety of enjoining such illegal conduct by means of a taxpayer's suit.

Similarly in Wirin v. [****8] Parker (1957) 48 Cal.2d 890 [313 P.2d 844], our court upheld a taxpayer's challenge to a police department practice of conducting surveillance of private residences by means of concealed microphones without first obtaining a search warrant. Observing that HN3 "[it] is elementary that public officials must themselves obey the law" we held in Parker that section 526a provided a general citizen remedy for controlling illegal governmental activity. (Id. at p. 894.)

In view of these California precedents, plaintiff's present challenge to the alleged police conduct

¹ HN2 Section 526a provides in relevant part: "An action to obtain a judgment, restraining and preventing any illegal expenditure of . . . funds . . . of a county, town, city or city and county of the state may be maintained against any officer thereof . . . by a citizen resident therein. . . ."

clearly constitutes a justiciable controversy, requiring this court to determine the constitutional validity of the underlying governmental activity; we do not understand defendant to assert otherwise. In this respect, however, the instant case differs fundamentally from the two federal court decisions, [*Laird v. Tatum* \(1972\) 408 U.S. 1 \[33 L. Ed. 2d 154, 92 S. Ct. 2318\]](#) and *Bagley v. City of Los Angeles* (C.D. Cal. 1971) (No. 71-166-JWC), upon which defendant places his principal reliance. As we explain, in dismissing complaints challenging governmental surveillance activities, the *Laird* and [****9] *Bagley* decisions rested on a restrictive federal doctrine of justiciability which does not apply to taxpayer suits in California.

In *Laird* various individuals, who claimed to be the subjects of an intelligence gathering operation conducted by the United States Army, brought suit to enjoin the governmental activities on the ground that the operation inhibited the exercise of First Amendment rights. The *Laird* court phrased the narrow issue before it as "whether the jurisdiction of a [*764] federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose." (Italics added.) (408 U.S. at p. 10 [33 L. Ed. 2d at pp. 161-162].) In *Laird* a five-man majority ruled that such a complaint did not present a justiciable controversy cognizable in federal court. It concluded that [HN4](#) an individual must suffer more specific harm than the mere subjection to governmental scrutiny, as the basis for his legal [****10] challenge. Because the complaint failed to allege any such specific harm, the *Laird* majority held that it failed to state a federal cause of action.

In *Bagley* -- the prior action challenging the police surveillance activities at issue here -- the federal district court grounded its decision on the same narrow doctrine of justiciability articulated in

Laird. Characterizing the plaintiff's "main complaint" as a fear that the police would, in the future, make some unlawful use of the information obtained through undercover agents, the court concluded that "[this] contention simply does not present any justiciable issue under the Civil Rights Act. . . . 'The mere intention to take some action at some time in the future which might not occur . . . does not present any justiciable question . . . at this time.'"

Thus, in both *Laird* and *Bagley*, the courts held simply that the plaintiffs before them had not suffered the kind of specific harm from the questioned governmental activity which would enable them to challenge the legality of such activity in a federal court. Neither case reaches the [**227] [****99] question of the constitutionality of the actual [****11] intelligence-gathering operation at issue; as the *Laird* court stated in summarizing its holding: "[Our] conclusion is a narrow one, namely, that on this record the respondents have not presented a case for resolution by the [federal] courts." (408 U.S. at p. 15 [33 L. Ed. 2d at p. 164].)

As explained above, the principles of justiciability in taxpayer's suits under [section 526a](#) differ fundamentally from the restrictive federal doctrine articulated in *Laird*. [CA\(2\) \(2\)](#) Past cases make clear that [HN5](#) under [section 526a](#) "no showing of special damage to the particular taxpayer [is] necessary" (e.g., [Crowe v. Boyle](#) (1920) 184 Cal. 117, 152 [193 P. 111]); indeed, as we recently stated in [Blair v. Pitchess](#) (1971) 5 Cal.3d 258, 267-268 [96 Cal. Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206], "[the] primary purpose of [\[section 526a\]](#) . . . is to 'enable a large body of the [*765] citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.' [Citation.]"

Thus, we must proceed to the merits of this case and determine whether the allegations of the complaint state a prima facie case of illegal governmental [****12] activity.

3. [CA\(3\)](#) (3) *Because of the potentially substantial inhibition of free expression and association posed by the police department's alleged covert surveillance of university classes and organization meetings, such conduct presumptively violates our state and federal Constitutions.*

At the outset we note that for purposes of the present appeal, defendant's demurrer admits the truthfulness of the properly pleaded factual allegations of the complaint. (See, e.g., [Serrano v. Priest \(1971\) 5 Cal.3d 584, 591 \[96 Cal. Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187\]](#).) Accordingly, we must assume that the Los Angeles Police Department is conducting a regular, ongoing covert surveillance operation of university classes and university-recognized organizations, and is compiling police dossiers on "matters which pertain to no illegal activity or acts." The present pleadings do not indicate any limits on the scope or extent of these undercover activities.

In support of the trial court's ruling that these facts, even if true, do not demonstrate illegal governmental behavior, defendant argues that the undercover activities at issue here are no different than the "normal" undercover [\[****13\]](#) police operations which the courts have regularly sanctioned. In this connection, defendant relies heavily on the statement of the United States Supreme Court in [Lewis v. United States \(1966\) 385 U.S. 206, 209 \[17 L. Ed. 2d 312, 315, 87 S. Ct. 424\]](#), declaring that "in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents." The undercover police activity at issue in *Lewis* -- involving the investigation of *specific criminal activity* by an undercover narcotics agent -- is, however, a far cry from the police surveillance network at issue in this case. Moreover, even within the realm of the investigation of specific crimes, the *Lewis* court did not grant blanket approval to all covert operations, emphasizing that "in this area, each case must be judged on its own particular facts." ([385 U.S. at p. 212 \[17 L. Ed. 2d at p. 316\]](#).)

The gist of defendant's position, as we understand it, is that the [\[*766\]](#) gathering of intelligence information to enable the police to anticipate and perhaps prevent future criminal activity is a legitimate and important police function and consequently that under all circumstances [\[****14\]](#) the police may routinely utilize undercover agents to fulfill such a function. Although the police unquestionably pursue a legitimate interest in gathering information to forestall future criminal acts, the identification of that legitimate interest is just the beginning point of analysis in this case, not, as defendant suggests, the conclusion. [CA\(4\)](#) (4) [HN6](#) The inherent legitimacy of the police "intelligence gathering" function does not grant the police the unbridled power to pursue that function by any and all means. In this realm, as in all others, the permissible limits of governmental [\[**228\]](#) [\[***100\]](#) action are circumscribed by the federal Bill of Rights and the comparable protections of our state Constitution.²

[\[****15\]](#) The most familiar limitations on police investigatory and surveillance activities, of course, find embodiment in the [Fourth Amendment of the federal Constitution](#) and [article I, section 13](#) (formerly [art. I, § 19](#)) of the California Constitution. On numerous occasions in the past, these provisions have been applied to preclude specific ongoing police investigatory practices. Thus, for example, [HN7](#) the court in [Wirin v. Parker, supra, 48 Cal.2d 890](#), prohibited the police practice of conducting warrantless surveillance of private residences by means of concealed microphones. And, in a series of cases culminating in the recent opinion in [People v. Triggs \(1973\) 8 Cal.3d 884 \[106 Cal. Rptr. 408, 506 P.2d 232\]](#), our court has invalidated covert police investigation

² As Professor Westin has recently noted: "[One] of the central elements of the history of liberty in Western societies since the days of the Greek city-state has been the struggle to install limits on the powers of economic, political and religious authorities to place individuals and private groups under surveillance against their will. The whole network of American constitutional rights . . . was established to curtail the ancient surveillance claims of governmental authorities." (Westin, *Privacy and Freedom* (1967) p. 57.)

involving routine and continual surveillance of public restrooms. (See [Bielicki v. Superior Court \(1962\) 57 Cal.2d 602 \[21 Cal. Rptr. 552, 371 P.2d 288\]](#); [Britt v. Superior Court \(1962\) 58 Cal.2d 469 \[24 Cal. Rptr. 849, 374 P.2d 817\]](#).) Indeed, in [United States v. United States District Court \(1972\) 407 U.S. 297 \[32 L. Ed. 2d 752, 92 S. Ct. 2125\]](#), the United States Supreme Court recently [****16] rejected a contention -- somewhat analogous to that proposed in the instant case -- that governmental intelligence operations in "domestic security" cases were immune from Fourth Amendment proscriptions, holding that the traditional constitutional guarantees could not be disregarded.

[*767] Unlike these past cases involving the limits on police surveillance prescribed by the constitutional "search and seizure" provisions, the instant case presents the more unusual question of the limits placed upon police investigatory activities by the guarantees of freedom of speech. ([U.S. Const., 1st & 14th Amends.](#); [Cal. Const., art. I, § 2.](#))³ As discussed below, this issue is not entirely novel; to our knowledge, however, the present case represents the first instance in which a court has confronted the issue in relation to ongoing police surveillance of a *university community*.

[****17] [CA\(5\)](#) (5) Our analysis of the limits imposed by the First Amendment upon police surveillance activities must begin with the recognition that with respect to First Amendment freedoms "the Constitution's protection is not limited to direct interference with fundamental rights." ([Healy v. James \(1972\) 408 U.S. 169, 183](#)

[\[33 L. Ed. 2d 266, 280, 92 S. Ct. 2338\]](#).) Thus, although police surveillance of university classrooms and organization meetings may not constitute a direct prohibition of speech or association, such surveillance may still run afoul of the constitutional guarantee if the effect of such activity is to chill constitutionally protected activity. "In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even [**229] [***101] though unintended, may inevitably follow from varied forms of governmental action." ([N.A.A.C.P. v. Alabama \(1958\) 357 U.S. 449, 461 \[2 L. Ed. 2d 1488, 1499, 78 S. Ct. 1163\]](#).) As the United States Supreme Court stated recently in [Healy v. James, supra, 408 U.S. 169, 183 \[33 L. Ed. 2d 266, 280-281\]](#): "We are not free to disregard the [****18] practical realities. Mr. Justice Stewart has made the salient point: 'Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.' [Citation.]"

As a practical matter, the presence in a university classroom of undercover officers taking notes to be preserved in police dossiers must inevitably inhibit the exercise of free speech both by professors and students. [CA\(6\)](#) (6) In a line of cases stretching over the past two decades, [*768] the United States Supreme Court has repeatedly recognized that [HN8](#) to compel an individual to disclose his political ideas or affiliations to the government is to deter the exercise of First Amendment rights. Thus, for example, in [N.A.A.C.P. v. Alabama, supra, 357 U.S. 449, 462 \[2 L. Ed. 2d 1488, 1499-1500\]](#), the Supreme Court struck down a court order requiring the NAACP to disclose its membership lists, declaring: "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association Inviolability of privacy in group association may in many [****19] circumstances be indispensable to preservation of freedom of association, particularly where a group espouses

³Our present decision is grounded in both the federal and state Constitutions. Although recent decisions of this court have established that comparable federal and state constitutional provisions are not necessarily co-extensive (see, e.g., [People v. Krivda \(1973\) 8 Cal.3d 623, 624 \[105 Cal. Rptr. 521, 504 P.2d 457\]](#); [Rios v. Cozens \(1973\) 9 Cal.3d 454, 455 \[107 Cal. Rptr. 784, 509 P.2d 696\]](#)), we need not explore potential variances in application here for we believe the same conclusion is mandated by each fundamental document. For convenience, this opinion utilizes the term "First Amendment" and "First Amendment rights" to refer to the relevant freedom of speech guarantees of both the federal and state Constitutions.

dissident beliefs." And in *Talley v. California* (1960) 362 U.S. 60, 64 [4 L. Ed. 2d 559, 563, 80 S. Ct. 536], the court invalidated a city ordinance requiring all handbills to include the names and addresses of the persons who had prepared the material, finding that "[there] can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." (See also *Lamont v. Postmaster General* (1965) 381 U.S. 301, 307 [14 L. Ed. 2d 398, 402, 85 S. Ct. 1493].)⁴

[****20] In like manner, covert police surveillance and intelligence gathering may potentially impose a significant inhibiting effect on the free expression of ideas. As the United States Supreme Court only recently observed: "Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech." (*United States v. United States District Court*, *supra*, 407 U.S. 297, 320 [32 L. Ed. 2d 752, 768].)

The threat to First Amendment freedoms posed by any covert intelligence gathering network is considerably exacerbated when, as in the instant case, the police surveillance activities focus upon university classrooms and their environs. As the United States Supreme Court has [*769] recognized time and again: "The vigilant protection

of constitutional freedoms is nowhere more vital than in the community of American schools." (*Shelton v. Tucker* (1960) 364 U.S. 479, 487 [5 L. Ed. 2d 231, 236, 81 S. Ct. 247].) "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers [and [**230] [***102] students] [****21] concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection' [Citation.]" (*Keyishian v. Board of Regents* (1967) 385 U.S. 589, 603 [17 L. Ed. 2d 629, 640, 87 S. Ct. 675].)

In the past, threats to academic freedom have generally arisen from governmental conduct involving significantly less intrusion into the academic community than posed by the police activities at issue in the instant case. Thus, prior cases have most frequently involved either state statutes inquiring into teacher's organizational associations (see, e.g., *Shelton v. Tucker*, *supra*, 364 U.S. 479) or provisions requiring teachers to sign overly broad loyalty oaths. (See, e.g., *Wieman v. Updegraff* (1952) 344 U.S. 183 [97 L. Ed. 216, 73 S. Ct. 215]; *Baggett v. Bullitt* (1964) 377 U.S. 360 [12 L. Ed. 2d 377, 84 S. Ct. [****22] 1316]; *Monroe v. Trustees of the California State Colleges* (1971) 6 Cal.3d 399 [99 Cal. Rptr. 129, 491 P.2d 1105].) Our research reveals only one previous instance, *Sweezy v. New Hampshire* (1957) 354 U.S. 234 [1 L. Ed. 2d 1311, 77 S. Ct. 1203], in which governmental inquiry sought to reach inside the classroom itself; the Supreme Court's stinging condemnation of that intrusive investigative effort illuminates the constitutional issues presented by the instant case.

In *Sweezy* a state attorney general, in the course of a far-reaching investigation into subversive

⁴Although defendant contends that the "semi-public" nature of a university classroom negates any claim of "First Amendment privacy," the controlling Supreme Court rulings refute this assertion. For example, in both *N.A.A.C.P.* and *Talley*, the fact that the private individuals involved had revealed their associations or beliefs to many people was not viewed by the court as curtailing their basic interest in preventing the government from prying into such matters. Although if either a teacher or student speaks in class he takes the "risk" that another class member will take note of the statement and perhaps recall it in the future, such a risk is qualitatively different than that posed by a governmental surveillance system involving the filing of reports in permanent police records. The greatly increased "chilling effect" resulting from the latter governmental activity brings constitutional considerations into play. (See Note, *Developments in the Law -- Academic Freedom* (1968) 81 Harv. L. Rev. 1045, 1073-1074.)

activities, asked Sweezy, a college professor, several questions about the contents of a guest lecture Sweezy had delivered to a class at the University of New Hampshire.⁵ Sweezy [*770] refused to answer any questions about the lecture on the ground that such inquiries violated his First Amendment rights, but a state court held the professor in contempt. On appeal, the United States Supreme Court reversed the contempt order, and, in two separate opinions, emphasized in strong language the grave dangers presented by governmental intrusion into the contents of classroom discussion.

[****23] Chief Justice Warren, writing for four justices, declared: "The essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust." (354 U.S. at p. 250 [1 L. Ed. 2d at pp. 1324-1325].) Justice Frankfurter, in a concurrence joined by Justice Harlan, was even more emphatic: "These pages need not be burdened with proof . . . of the dependence of a free society on free universities. *This means the exclusion of governmental intervention in the intellectual life of a university.* It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor. . . . [In] these matters of the spirit inroads on legitimacy must be resisted at their incipency." (Italics added.) (354 U.S. at pp. 262-263 [1 L. Ed. 2d at pp. 1331-1332].)

⁵The attorney general asked Professor Sweezy the following questions: "What was the subject of your lecture?" "Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this country?" "Did you advocate Marxism at that time?" "Did you express the opinion, or did you make the statement at that time that Socialism was inevitable in America?" "Did you in this last lecture on March 22 or in any of the former lectures espouse the theory of dialectical materialism?" (354 U.S. at pp. 243-244 [1 L. Ed. 2d at p. 1321].)

The police investigatory conduct at issue unquestionably poses at [****24] least as debilitating [**231] [***103] a threat to academic freedom as that presented by the governmental inquiry in *Sweezy*. According to [HN9](#) the allegations of the complaint, which for purposes of this appeal must be accepted as true, the Los Angeles Police Department has established a network of undercover agents which keeps regular check on discussions occurring in various university classes. Because the identity of such police officers is unknown, no professor or student can be confident that whatever opinion he may express in class will not find its way into a police file. If the after-the-fact inquiry conducted in *Sweezy* threatened to cast a pall of orthodoxy over classroom debates, the covert presence of governmental agents within the classroom itself must cast a deeper shadow.

The crucible of new thought is the university classroom; the campus is the sacred ground of free discussion. Once we expose the teacher or the student to possible future prosecution for the ideas he may express, we forfeit the security that nourishes change and advancement. The censorship of totalitarian regimes that so often condemns developments in art, science and politics is but a [****25] step removed from the inchoate [*771] surveillance of free discussion in the university; such intrusion stifles creativity and to a large degree shackles democracy.

In other contexts, a number of courts have issued injunctions against continued police surveillance in cases in which such conduct imposed a similar chilling effect on First Amendment rights. In [Local 309 v. Gates \(N.D. Ind. 1948\) 75 F. Supp. 620](#), strike activity by a local union had been accompanied by occasional outbreaks of violence. The state police initiated a practice of sending several uniformed policemen to all union meetings to take notes of the discussions that there occurred; the police justified the practice as an attempt to obtain information relating to future incidents of violence. The union sought an injunction against

the police surveillance practice on First Amendment grounds. After a full hearing, the trial court granted the injunction, finding first that the presence of the police had in fact kept the union members from fully discussing their affairs, and second that the surveillance could not be justified as necessary to prevent violence because no evidence indicated that the union meetings [****26] had any connection with the sporadic incidents of violence.

In *Bee See Books Inc. v. Leary* (S.D.N.Y. 1968) 291 F. Supp. 622, another federal court reached a similar conclusion in a different setting. In *Bee See*, the New York City Police Department had begun stationing uniformed police officers in "adult bookstores" to oversee the bookstore's operations and to detect sales of obscene material. Finding that the practical effect of the constant police surveillance substantially inhibited the sale of protected material, the court in *Bee See* enjoined the surveillance operations, concluding that the government could achieve the legitimate objective of controlling obscenity through alternative means less destructive of First Amendment rights.

The First Amendment analysis undertaken by the courts in *Gates* and *Bee See* accords with the approach established by controlling United States Supreme Court precedent. Having found that the governmental activity in question (police surveillance) had a substantial inhibitory effect on the exercise of First Amendment rights, both courts carefully analyzed the proffered governmental explanation for the surveillance to determine [****27] whether it was sufficient to justify the resulting impingement on protected expression.⁶

⁶ In *United States v. McLeod* (5th Cir. 1967) 385 F.2d 734, 750, the Fifth Circuit took a similar approach and found police surveillance of several public mass meetings to be justified because of the potential danger to the public peace, a situation negated by the allegations of the instant complaint. In *McLeod*, civil rights advocates contended that the stationing of numerous police officers at a number of voter registration rallies in Selma, Alabama had impermissibly chilled First Amendment rights. Although explicitly recognizing "that

[****28] [*772] [**232] [***104] [CA\(7\) \(7\)](#) As we have discussed above, the facts alleged in the instant complaint demonstrate police surveillance activity which is likely to pose a substantial restraint upon the exercise of First Amendment rights in university classes and organization meetings. In view of this significant potential chilling effect, the challenged surveillance activities can only be sustained if defendant can demonstrate a "compelling" state interest which justifies the resultant deterrence of First Amendment rights and which cannot be served by alternative means less intrusive on fundamental rights. (See, e.g., *United States v. O'Brien* (1968) 391 U.S. 367, 376-377 [20 L. Ed. 2d 672, 679-680, 88 S. Ct. 1673]; *N.A.A.C.P. v. Alabama*, *supra*, 357 U.S. 449, 463 [2 L. Ed. 2d 1488, 1500]; *Shelton v. Tucker*, *supra*, 364 U.S. 479, 488 [5 L. Ed. 2d 231, 237]; cf. *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 506-508 [55 Cal. Rptr. 401, 421 P.2d 409].)⁷

surveillance of meetings may tend to deter the exercise of federally guaranteed rights," the court concluded that "[in] the explosive situation prevailing in Selma in 1963, it would have been a dereliction of duty for the county not to have provided law enforcement coverage of these mass meetings." (385 F.2d at p. 750.)

In *Anderson v. Sills* (1970) 56 N.J. 210 [265 A.2d 678], the New Jersey Supreme Court reversed a lower court decision which had granted summary judgment to individuals seeking to restrain the implementation of a state-wide intelligence gathering apparatus, and remanded for a trial on the merits. Although defendant suggests that *Anderson* supports the trial court decision in this case, the cases are clearly distinguishable on several grounds. First, as just noted, the court in *Anderson* did not affirm a decision sustaining a demurrer, but rather held that a full trial on the merits was needed, a conclusion which supports our present holding. Second, the intelligence gathering operation at issue in *Anderson* did not involve covert intrusion into academic classrooms but rather attendance at public mass meetings and demonstrations. Moreover, although the *Anderson* court does suggest at one point that courts should decline to interfere with police information gathering absent a showing of "bad faith" (265 A.2d at p. 688), the controlling United States Supreme Court decisions establish that when governmental action significantly inhibits First Amendment activity, *whether intentionally or inadvertently*, a compelling justification for such inhibition must be demonstrated. (See, e.g., *N.A.A.C.P. v. Alabama*, *supra*, 357 U.S. 449, 461.)

⁷ As the United States Supreme Court stated in *Gibson v. Florida*

[****29] In the instant case, defendant's burden of justification is very heavy indeed. Not only does the alleged covert intrusion into university classes [*773] and meetings pose a grave threat to the freedom of expression necessary for the preservation of the university as we know it today, but the complaint also alleges that the information gathered by the undercover police officers "pertains to no illegal activity or acts." Because this case arises upon the sustaining of a demurrer, defendant has as yet given no explanation or justification for the alleged surveillance; indeed, defendant has yet to file any answer at all in this case. Thus, inasmuch as we have determined that the complaint does demonstrate a prima facie violation of First Amendment rights, the trial court erred in sustaining defendant's demurrer. The judgment must accordingly be reversed and the case remanded for a trial on the merits.

4. *The alleged police surveillance and data gathering activities constitute a prima facie violation of the recently enacted state constitutional right of privacy.*

The complaint in the instant case asserts that in addition to infringing the constitutional freedoms of speech [****30] and association, [**233] [***105] the conduct challenged here abridges students' and teachers' constitutional "right of privacy." [CA\(8\)](#) (8) (See fn. 8.) Shortly after the court sustained the demurrer to the complaint, the people of California amended the state Constitution to provide explicit protection to every individual's interest in "privacy." Although the full contours of the new constitutional provision have as yet not even tentatively been sketched, we have concluded

that the surveillance and data gathering activities challenged in this case do fall within the aegis of that provision.⁸

[****31] In November 1972, the voters of California specifically [amended article I, section 1 of our state Constitution](#) to include among the various "inalienable" rights of "all people" the right of "privacy."⁹ Although the [*774] general concept of privacy relates, of course, to an enormously broad and diverse field of personal action and belief,¹⁰ the moving force behind the new constitutional provision was a more focussed privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society. The new provision's primary purpose is to afford

⁸ Although the voters did not adopt the new constitutional provision until after the filing of the instant suit and the sustaining of the demurrer, the new constitutional provision is controlling on this appeal because the complaint sought only injunctive relief to restrain the continuation of the alleged surveillance and data collecting practice in the future. "Relief by injunction operates in futuro, and the right to it must be determined as of the date of decision by an appellate court." ([American Fruit Growers v. Parker \(1943\) 22 Cal.2d 513, 515 \[140 P.2d 23\]](#); see, e.g., [Cal-Dak Co. v. Sav-On Drugs, Inc. \(1953\) 40 Cal.2d 492, 496-497 \[254 P.2d 497\]](#); [United States v. Alabama \(1960\) 362 U.S. 602, 604 \[4 L. Ed. 2d 982, 983, 80 S. Ct. 924\]](#); 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 222, p. 4212.)

⁹ [Article I, section 1](#) (as reworded by constitutional amendment in November 1974) now reads: "[HN10](#) All people are by nature free and independent, and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

[Legislative Comm. \(1963\) 372 U.S. 539, 545 \[9 L. Ed. 2d 929, 935, 83 S. Ct. 889\]](#): "[The] power to investigate, broad as it may be, is not without limit. . . . When . . . the claim is made that particular [governmental] inquiries . . . infringe substantially upon First and Fourteenth Amendment . . . rights of individuals, the courts are called upon to, and must, determine the permissibility of the challenged actions [citation]; '[The] delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.' [Citation.]"

¹⁰ The breadth of the concept of privacy is illustrated by the wide variety of contexts in which the constitutional privacy analysis has been employed. (See, e.g., [Griswold v. Connecticut \(1965\) 381 U.S. 479 \[14 L. Ed. 2d 510, 85 S. Ct. 1678\]](#) (privacy of marital relationship); [Stanley v. Georgia \(1969\) 394 U.S. 557, 564, 565 \[22 L. Ed. 2d 542, 549, 550, 89 S. Ct. 1243\]](#) (privacy of one's personal library); [City of Carmel-By-The-Sea v. Young \(1970\) 2 Cal.3d 259, 266-268 \[85 Cal. Rptr. 1, 466 P.2d 225, 37 A.L.R.3d 1313\]](#) (privacy of personal financial affairs); [In re Lifschutz \(1970\) 2 Cal.3d 415, 431-432 \[85 Cal. Rptr. 829, 467 P.2d 557, 44 A.L.R.3d 1\]](#) (privacy of psychotherapist-patient relationship).)

individuals some measure of protection against this most modern threat to personal privacy.

[**32]** The principal objectives of the newly adopted provision are set out in a statement drafted by the proponents of the provision and included in the state's election brochure. The statement begins: "The proliferation of government snooping and data collecting is threatening to destroy our traditional freedoms. Government agencies seem to be competing to compile the most extensive sets of dossiers of American citizens. Computerization of records makes it possible to create "cradle-to-grave" profiles of every American. [para.] *At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian.*" (Italics in original.)

The argument in favor of the amendment then continues: "The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with the people we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about **[****33]** us and from misusing information gathered **[**234]** **[***106]** for one purpose in order to serve other purposes or to embarrass us.

"Fundamental to our privacy is the ability to control circulation of personal information. [Italics in original.] This is essential to social relationships and personal freedom. The proliferation of government and business records over which we have no control limits our ability to control our personal lives. Often we do not know that these records even exist and we are certainly unable to determine who has access to them.

[*775] "Even more dangerous is the loss of control over the accuracy of government and business records of individuals. Obviously if the person is unaware of the record, he or she cannot

review the file and correct inevitable mistakes. . . . [para.] The average citizen . . . does not have control over what information is collected about him. Much is secretly collected. . . ."

The argument concludes: "The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the [First](#), [Third](#), [Fourth](#), [Fifth](#) and [Ninth Amendments to the U.S. Constitution](#). This right should be **[****34]** abridged only when there is a compelling public need. . . ."

[CA\(9\)](#) (9) (See fn. 11.) Several important points emerge from this election brochure "argument," a statement which represents, in essence, the only "legislative history" of the constitutional amendment available to us.¹¹ First, the statement identifies the principal "mischiefs" at which the amendment is directed: (1) "government snooping" and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing records. Second, the statement makes clear that the amendment does not purport to prohibit all incursion into individual privacy but rather that any such intervention must be justified by a compelling interest. Third, the statement indicates that the amendment is intended to be self-executing, i.e., that the constitutional provision, in itself, "creates a legal and enforceable right of privacy for **[****35]** every Californian."

¹¹ California decisions have long recognized the propriety of resorting to such election brochure arguments as an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people. (See, e.g., [Carter v. Com. on Qualifications, etc.](#) (1939) 14 Cal.2d 179, 185 [93 P.2d 140]; [Beneficial Loan Society, Ltd. v. Haight](#) (1932) 215 Cal. 506, 515 [11 P.2d 857]; [Story v. Richardson](#) (1921) 186 Cal. 162, 165-166 [198 P. 1057, 18 A.L.R. 750]; [In re Quinn](#) (1973) 35 Cal. App. 3d 473, 483-486 [110 Cal. Rptr. 881].)

In several respects, the police surveillance operation challenged in the instant complaint epitomizes the kind of governmental conduct which the new constitutional amendment condemns. In the first place, the routine stationing of covert, undercover police agents in university classrooms and association meetings, both public and *private*, constitutes [*776] "government snooping" in the extreme. Second, as noted [****36] above, the instant complaint alleges that the information gathered by the undercover agents from class discussion and organization meetings "pertains to no illegal activity or acts"; if this allegation is true, and we must assume it is at this stage of the proceedings, a strong suspicion is raised that the gathered material, preserved in "police dossiers," may be largely unnecessary for any legitimate, let alone "compelling," governmental interest.

CA(10) (10) In view of these considerations, we believe that the allegations of the present complaint state a prima facie violation of the state constitutional right of privacy. At trial, of course, defendant will be free to contest any of the allegations of the complaint as well as to designate the compelling governmental interests upon which [**235] [****107] they rely for their intrusive conduct. (See County of Nevada v. MacMillen (1974) 11 Cal.3d 662, 670-672 [114 Cal. Rptr. 345, 522 P.2d 1345]; City of Carmel-By-The-Sea v. Young, supra, 2 Cal.3d 259, 268; Griswold v. Connecticut, supra, 381 U.S. 479, 497 [14 L. Ed. 2d 510, 522].) We intimate no opinion as to the resolution of the ultimate constitutional question [****37] after trial. We hold only that the demurrer to the complaint was improperly sustained.

5. Conclusion.

As far as we are aware, the extensive, routine, covert police surveillance of university classes and organization meetings alleged by the instant complaint are unprecedented in our nation's history. The dangers implicit in such police operations, however, have long been understood.

The English historian, Sir Thomas Erskine May, writing in the middle of the 19th century, observed: "Next in importance to personal freedom is immunity from suspicions and jealous observation. Men may be without restraints upon their liberty; they may pass to and fro at pleasure: but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators, -- who shall say that they are free? Nothing is more revolting . . . than the espionage which forms part of the administrative system of continental despotisms. It haunts men like an evil genius, chills their gayety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful [****38] agency." (2 May, Constitutional History of England (1863) p. 275.)

[*777] The motto of one of our great universities - Stanford University -- is "The wind of freedom blows," but the air of its classrooms would be befouled indeed by the presence of secret police. In the course of classroom debate some thoughts will be hazarded only as the trial balloons of new theories. Yet such propositions, that are tentative only, will nevertheless be recorded by police officers, filtered through the minds of the listening informers, often incorrectly misstated to their superiors and sometimes maliciously distended. Only a brave soul would dare to express anything other than orthodoxy under such circumstances. But the classroom of the university should be a forum of free expression; its very function would largely be destroyed by the practices described in the complaint before us.

The judgment is reversed.

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Wolf v. Superior Court

Court of Appeal of California, Second Appellate District, Division Seven

January 21, 2004, Filed

B169265

Reporter

114 Cal. App. 4th 1343 *; 8 Cal. Rptr. 3d 649 **; 2004 Cal. App. LEXIS 65 ***; 2004 Daily Journal DAR 701; 2004 Cal. Daily Op. Service 508

GARY K. WOLF et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; WALT DISNEY PICTURES AND TELEVISION, Real Party in Interest.

Notice: As modified Feb. 19, 2004.

Subsequent History: Rehearing denied by [Wolf v. Superior Court, 2004 Cal. App. LEXIS 193 \(Cal. App. 2d Dist., Feb. 19, 2004\)](#)

Review denied by, Request denied by [Wolf v. S.C. \(Walt Disney Pictures\), 2004 Cal. LEXIS 3077 \(Cal., Apr. 14, 2004\)](#)

Subsequent appeal at, Remanded by [Wolf v. Walt Disney Pictures & Tv, 2008 Cal. App. LEXIS 685 \(Cal. App. 2d Dist., May 9, 2008\)](#)

Prior History: [***1] ORIGINAL PROCEEDING: Petition for writ of mandate, Superior Court of Los Angeles County, No. BC251199, Mary Ann Murphy, Judge.

[Wolf v. Superior Court, 107 Cal. App. 4th 25, 130 Cal. Rptr. 2d 860, 2003 Cal. App. LEXIS 615 \(Cal. App. 2d Dist., 2003\)](#)

Disposition: Petition for writ of mandate granted; petitioners awarded costs. Case remanded for further proceedings.

Case Summary

Procedural Posture

Petitioner author sought a writ of mandate to compel respondent Superior Court of Los Angeles County (California) to vacate its order of summary adjudication in favor of real party in interest entertainment company on its cross-claim for a declaration that it was not required to pay royalties on the value of promotional agreements with third parties for which the company received no cash.

Overview

The author had written a popular novel. The company purchased the rights to the novel and the parties executed a purchase agreement, which entitled the author to a five percent royalty on gross receipts from character merchandise. The author claimed that he was entitled to a royalty each time the company licensed the characters for use in any merchandising venture. The company claimed that it was not obligated to pay the author any royalty unless or until the company received actual cash from a merchandising venture. The trial court held that the term "gross receipts" in the parties' agreement was not susceptible to the meaning urged by the author. Thus, the trial court granted the company summary adjudication. The court issued a writ of mandate and directed that the ruling be vacated. The court concluded that the term "gross receipts" could be reasonably interpreted to mean cash as well as valuable in-kind consideration. The trial court erred in rejecting certain extrinsic evidence and in concluding that the author's interpretation of the term was incorrect.

The conflicting interpretations of the term raised factual issues that precluded a determination as a matter of law.

Outcome

The court granted the petition and directed the trial court to vacate its order. The matter was remanded for further proceedings.

LexisNexis® Headnotes

Civil Procedure > ... > Summary
Judgment > Appellate Review > Standards of Review

Civil Procedure > Appeals > Standards of
Review > De Novo Review

HN1 On review of an order summarily adjudicating issues, the appellate court reviews the record de novo to determine whether the prevailing party has conclusively negated necessary elements of his opponent's case or demonstrated under no hypothesis is there a material issue of fact which requires the process of a trial.

Civil Procedure > Appeals > Standards of
Review > Reversible Errors

Contracts Law > Contract Interpretation > Parol
Evidence > General Overview

Contracts Law > Defenses > Ambiguities &
Mistakes > General Overview

HN2 Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears

unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible.

Contracts Law > Contract Interpretation > General
Overview

Contracts Law > Contract
Interpretation > Ambiguities & Contra
Proferentem > General Overview

Contracts Law > Contract Interpretation > Parol
Evidence > General Overview

Contracts Law > Defenses > Ambiguities &
Mistakes > General Overview

HN3 The interpretation of a contract involves a two-step process: First the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine ambiguity, that is, whether the language is reasonably susceptible to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is reasonably susceptible to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step--interpreting the contract.

Civil Procedure > Appeals > Standards of
Review > De Novo Review

Contracts Law > Contract
Interpretation > Ambiguities & Contra
Proferentem > General Overview

Contracts Law > Contract Interpretation > Parol
Evidence > General Overview

Contracts Law > Defenses > Ambiguities &
Mistakes > General Overview

Evidence > Types of Evidence > Documentary
Evidence > Parol Evidence

Evidence > Admissibility > Statements as
Evidence > Parol Evidence

HN4 The trial court's determination of whether an

ambiguity exists is a question of law, subject to independent review on appeal. The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence. Furthermore, when two equally plausible interpretations of the language of a contract may be made, parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN5 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 > General Overview

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN6 The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. [Cal. Civ. Code §§ 1635-1656](#); [Cal. Code Civ. Proc. §§ 1859-1861, 1864](#).

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

HN7 When a term is found to be ambiguous, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it. [Cal. Civ. Code § 1649](#). This rule does not mean the promisor's subjective intent controls. The rule is instead designed to override the promisor's subjective intent whenever necessary to protect the promisee's objectively reasonable expectations.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Contracts Law > Contract Interpretation > Parol Evidence > Custom & Usage

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

HN8 The correct rule with reference to the admissibility of evidence as to trade usage under the circumstances here presented is that while words in a contract are ordinarily to be construed according to their plain, ordinary, popular or legal meaning, as the case may be, yet if in reference to the subject matter of the contract, particular expressions have by trade usage acquired a different meaning, and both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage. Parol evidence is admissible to establish the trade usage, and that is true even though the words are in their ordinary or legal meaning entirely unambiguous, inasmuch as by reason of the usage the words are used by the parties in a different sense. The basis of this rule is that to accomplish a purpose of paramount importance in interpretation of documents, namely, to ascertain the true intent of the parties, it may well be said that the usage evidence does not alter the contract of the parties,

but on the contrary gives the effect to the words there used as intended by the parties. The usage becomes a part of the contract in aid of its correct interpretation.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Contracts Law > Contract Interpretation > General Overview

HN9 Where no extrinsic evidence is introduced or the evidence is not in conflict, an appellate court will independently construe the contract. Where, however, a conflict in the evidence exists, it must be resolved in the trial court, as with any question of fact, before the court can declare the meaning of the contract as a matter of law.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

An author filed suit against an entertainment company alleging he was entitled to receive a 5 percent royalty from the entertainment company based on noncash consideration it received from merchandising characters the author had created. The author and the entertainment company had entered into a contract agreement under which the company purchased rights to a novel the author wrote, and the author was to receive a 5 percent royalty for merchandise based on characters he created from the novel. Thereafter, the entertainment company entered into alliance agreements with various corporate entities, licensing to them the use of characters in their advertising and promotion. The terms of the promotional agreements varied. Sometimes the entertainment company received cash from the company, and sometimes it received noncash consideration. After the author filed suit, the

entertainment company filed a cross-complaint for declaratory relief, reformation, money had and received and unjust enrichment. The entertainment company then moved for summary adjudication on three of the causes of action in its cross-complaint, which sought a declaration the parties' contract only obligated it to pay a 5 percent royalty on cash it received for character merchandising, and that it had no obligation to pay a royalty on any noncash consideration it received from licensing the author's characters for use in merchandise for promotional purposes. Testimony was presented by an industry expert regarding the meaning of the term "gross receipts." The trial court granted summary adjudication for the entertainment company and found the term "gross receipts" was not reasonably susceptible to the meaning urged by the author and rejected his proffered extrinsic evidence. The author then filed a petition for a writ of mandate to compel the trial court to vacate its order for summary adjudication. (Superior Court of Los Angeles County, No. BC251199, Mary Ann Murphy, Judge.)

The Court of Appeal ordered the trial court to vacate its order granting the motion for summary adjudication of the cross-complainant's causes of actions for declaratory relief and to enter a new and different order denying the **[*1344]** motion. The court held the trial court erred in rejecting the extrinsic evidence and in concluding the term "gross receipts" was not reasonably susceptible to the industry expert testimony that according to industry custom and usage "gross receipts" meant cash and other valuable consideration received. Because there was no evidence in this case of objective manifestations of the parties' intent, and because the term at issue was undefined in the parties' contract, the only way to construe the meaning of the term "gross receipts" was to consider the nature of the contract and the circumstances under which the parties negotiated. Both the nature of the contract and the circumstances involved the motion picture industry. The offered evidence of industry custom and usage revealed the term "gross receipts" had more than

one possible meaning. Thus, the industry expert's statements of fact were relevant and admissible to expose the latent ambiguity in the contract language regarding the industry's customary usage of the term. The proffered evidence regarding trade usage and custom was relevant to prove an interpretation to which the agreements were reasonably susceptible in the entertainment industry context. Further, the court held that the conflicting interpretation of the contract raised triable issues of fact regarding the proper meaning of the term "gross receipts" which precluded the court's interpretation of the contract as a matter of law. (Opinion by Johnson, J., with Perluss, P. J., and Woods, J., concurring.)

Headnotes

CA(1) (1)

Appellate Review § 126—Scope of Review—Order of Summary Adjudication of Issues—De Novo Review.

In review of an order summarily adjudicating issues, an appellate court will review the record de novo to determine whether the prevailing party has conclusively negated necessary elements of his opponent's case or demonstrated under no hypothesis is there a material issue of fact which requires the process of a trial.

CA(2) (2)

Contracts § 27—Construction and Interpretation—Evidence to Aid—Extrinsic Evidence—Latent Ambiguity.

It is reversible error for a trial court to refuse to consider extrinsic evidence that is relevant to show whether contract is reasonably susceptible to a particular meaning on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face,

a latent [*1345] ambiguity may be exposed by extrinsic evidence that reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible.

CA(3) (3)

Contracts § 27—Construction and Interpretation—Evidence to Aid—Court Function—Ambiguities.

A trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence.

CA(4) (4)

Contracts § 27—Construction and Interpretation—Evidence to Aid—Extrinsic Evidence—Industry and Custom Usage.

Extrinsic evidence may be used to conclude the term "gross receipts" contained in a contract between two parties engaged in the movie industry trade was reasonably susceptible to an interpretation presented by an industry expert that according to industry custom and usage "gross receipts" meant cash and other valuable consideration received. The extrinsic evidence of trade usage exposed a latent ambiguity in the contract language and presented an alternative interpretation to which the term "gross receipts" was reasonably susceptible in the circumstances.

[2 Witkin, Cal. Evidence (4th ed. 2000) Documentary Evidence, §§ 82, 85; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 688.]

CA(5) (5)

Appellate Review § 144—Scope of Review— Questions of Law and Fact—Triable Issues of Fact Preclude Appellate Court Determination as a Matter of Law.

Where triable issues of fact remained regarding the proper meaning to be given the term “gross receipts,” contained in a contract between an entertainment company and an author, this precluded an appellate court from independent interpretation of the contract as a matter of law. There existed conflicting evidence between the parties whether the entertainment company received any monetary benefit for in-kind promotional activities received from noncash alliance agreements.

Counsel: Rintala, Smoot, Jaenicke & Rees, J. Larson Jaenicke, Robert W. Hodges, Michael B. Garfinkel and Heather M. Noelte for Petitioners.

No appearance for Respondent.

Sheppard, Mullin, Richter & Hampton, Martin D. Katz, Lisa N. Stutz and Ann B. Clark for Real Party in Interest. [*1346]

Judges: JOHNSON, J.; Perluss, P. J., and Woods, J., concurred.

Opinion by: JOHNSON

Opinion

[**651] **JOHNSON, J.**—An author seeks a writ of mandate to compel the trial court to vacate its order granting summary adjudication of issues in favor of an entertainment industry conglomerate [**652] on its cross-claims for a declaration it was not required to pay royalties on the value of promotional agreements with third parties for which it received no cash. At issue is whether the term “gross receipts” as used in the royalty agreement is reasonably susceptible to an

interpretation urged by the author to mean other valuable in-kind consideration as well as cash. The trial court found the term “gross receipts” clearly and unambiguously meant “cash” only, and rejected expert extrinsic evidence indicating the term in [***2] the entertainment context meant money as well as the value of other consideration received. We conclude the trial court erred in concluding the term “gross receipts” was not reasonably susceptible to the interpretation urged by the author. Accordingly, we grant the petition for writ of mandate with directions for the trial court to vacate its order granting summary adjudication and remand for further proceedings.

FACTS AND PROCEEDINGS BELOW

Gary K. Wolf and his company Cry Wolf!, Inc. (Wolf), are the petitioners in this case. Petitioner, Gary K. Wolf, is the author of an original novel entitled Who Censored Roger Rabbit? In his novel Wolf created characters such as Roger Rabbit, Jessica Rabbit, Baby Herman and Detective Eddie Valiant. Wolf's novel also created and introduced the concept of Toontown as the place where these cartoon characters lived.

Shortly after the book's release in 1981, real party in interest, Walt Disney Pictures and Television (Disney), reached an agreement with Wolf to option nearly all rights to Who Censored Roger Rabbit? Disney memorialized the terms of the parties' oral agreement in a letter dated May 1981. According to this deal memo, if [***3] Disney exercised its option, Wolf would be entitled to a 5 percent royalty on children's story books, children's story-telling records and on merchandise based on the characters he had developed in Who Censored Roger Rabbit? as well as other rights.

In 1983, Disney exercised its option to purchase the rights to Who Censored Roger Rabbit? The parties thereafter executed a “long form” purchase agreement. This 1983 agreement superceded the 1981 deal memo and expanded on the parties' respective rights regarding motion picture rights, television series rights, and other matters. In the

1983 agreement, Wolf also assigned to Disney the right to exploit the characters he created in his novel.

Not one of the parties who played a role in, or who helped negotiate the terms of, the 1983 agreement could recall any discussion they held at the time **[*1347]** regarding the meaning of the term “gross receipts” as used in paragraph 21 governing royalty rights to character merchandise.

Thereafter, Disney developed and coproduced the motion picture *Who Framed Roger Rabbit?* with Steven Spielberg's Amblin Entertainment. Disney released the movie in June 1988. It proved to be an extraordinarily **[***4]** successful feature combining cartoon and live action actors.

By 1989 a dispute arose among the parties regarding use of Wolf characters at theme parks and in movie cels, auditing rights, and other matters. The parties resolved their dispute by entering into another agreement in 1989 which clarified and/or modified certain terms of the 1983 agreement. However, Wolf's right to a 5 percent royalty on merchandise depicting his characters remained intact. Again, none of the negotiating parties to the 1989 agreement could recall any discussion regarding the meaning of Wolf's right to a royalty on “gross receipts” from character merchandise.

[653]** In order to promote the theatrical and home video releases of the film (and at various times thereafter to promote and sustain the Roger Rabbit franchise), Disney entered into alliance agreements with corporate entities such as Kodak, Coca-Cola, and Burger King, licensing them to use Roger Rabbit and Disney characters in their advertising and promotions. The terms of Disney's promotional agreements with these third parties varied: sometimes Disney received money from the other company; sometimes Disney paid the other company, and in still other situations, **[***5]** no cash exchanged hands. An example of this latter type of agreement is a Disney/McDonald's agreement entered into in 1988 in connection with

the picture's release. In this agreement Disney allowed McDonald's to use Wolf as well as Disney characters in a “tie-in” promotion between its menu items and the motion picture *Who Framed Roger Rabbit?* Under this agreement McDonald's agreed to: (1) conduct a promotion featuring the licensed characters on 18 million collector cups; (2) purchase \$ 12 million worth of specified advertising themed to the motion picture; and (3) place approximately \$ 100 worth of point-of-purchase materials at each of the McDonald's stores throughout the United States. Disney received no cash directly from McDonald's under this particular licensing agreement.

In 1991, Disney entered into another so-called alliance agreement with Eckerd/Kodak. The agreement called for Eckerd Drug Company to fund and produce television and radio ads, print ads, in-store advertisements and to undertake other promotional efforts. The agreement required Kodak to underwrite the cost of producing hundreds of thousands of Walt Disney World collector pins depicting Disney as well as **[***6]** Roger Rabbit characters. In exchange, Disney provided six grand prize travel packages to Walt Disney World. Disney received no cash directly from this arrangement.

[*1348] On the other hand, Disney did receive cash under its 1995 licensing agreement with McDonald's to promote Disneyland's 40th anniversary. McDonald's Disneyland 40th Anniversary Happy Meal agreement was a licensing arrangement which allowed McDonald's to give away eight toy car “premiums” featuring various Disney characters, including one car which featured two of the Roger Rabbit characters. McDonald's paid Disney \$ 400,000 under the licensing agreement for the eight cars. Because the Wolf characters represented one eighth of this amount, Disney reported \$ 50,000 attributable to the Roger Rabbit characters and paid Wolf 5 percent of this amount, or \$ 2,500.

Wolf claimed he was entitled to a 5 percent royalty

every time Disney licensed Roger Rabbit characters for use in any merchandising venture by Disney or through its alliance agreements. He asserted he was entitled to this royalty based on the value of the licensing agreement to Disney from use of the Roger Rabbit characters, whether or not Disney chose to receive [***7] the benefit in cash. Disney countered it was not obligated to pay Wolf any royalty unless or until it received actual cash from a licensing agreement.

Unable to resolve the dispute, Wolf filed suit against Disney in May 2001. In March 2002, Disney filed a cross-complaint for declaratory relief, reformation, money had and received and unjust enrichment. In October 2002, Disney moved for summary adjudication on three of the causes of action in its cross-complaint which sought a declaration the parties' 1983 contract only obligated it to pay a 5 percent royalty on cash it received for character merchandising, and that it had no obligation to pay a royalty on any noncash [**654] consideration it received from licensing Wolf's characters for use in merchandise for promotional purposes.¹

[***8] In its motion Disney argued it was entitled to summary adjudication of issues because the "clear and unambiguous meaning" of "gross receipts" in the contract could only mean receipt of cash money. Disney claimed the contract language was clear and unambiguous because the contract did not obligate it to account for royalties to Wolf unless and until it had *received* funds in the United

States. In opposition, Wolf presented extrinsic evidence in the form of expert testimony to refute Disney's assertion. According to [*1349] Wolf's expert, the term "gross receipts" in the entertainment industry means "money or the value of other consideration received by the studio," when not otherwise defined or limited by written agreement.

The trial court heard several hours of arguments on the motion over two court days. The trial court questioned Wolf regarding his proffered extrinsic evidence that the term "gross receipts" was interpreted in the entertainment industry to mean cash or other valuable consideration.² The court acknowledged Wolf's expert's testimony created an ambiguity regarding the meaning of the term "gross receipts." However, the court was persuaded the contract term clearly and [***9] unambiguously meant Disney's obligation to pay Wolf royalties only arose with actual receipt of cash in connection with the merchandising of Wolf's characters. The trial court found the term "gross receipts" was not reasonably susceptible to the meaning urged by Wolf and rejected his proffered extrinsic evidence.

In its written order the trial court ruled Disney had met its burden of showing there were no triable issues of material fact and Wolf had failed to raise a triable issue of material fact. The court thus granted summary adjudication in favor of Disney on its first, fourth and seventh causes of action in its cross-complaint. The court reasoned: "Wolfe [*sic*] claims entitlement to 5% of the 'promotional value' of the two Alliance Agreements at issue, that is, monies *not actually received* by Disney. However, the plain and unambiguous language of [] Wolfe's [*sic*] contract provides that he is entitled [***10] to 5% of the monies *received* by Disney. The contract at issue was negotiated at arms length between the parties. The contract is clear and unambiguous and extrinsic evidence is not received to interpret the contract. The contract does not require the addition

¹ Specifically, the motion for summary adjudication of issues sought declarations: (1) Disney had no obligation to pay Wolf anything in connection with the 1991 Eckerd/Kodak promotional agreement because neither Disney nor its subsidiaries received cash under this particular agreement; (2) Disney had already satisfied its contractual obligation to pay Wolf what it owed in connection with the McDonald's Disneyland 40th Anniversary Happy Meal agreement; and (3) Disney had no obligation to pay Wolf anything in connection with any third party agreement if Disney or its subsidiaries received, or will receive, no cash from the third party, because the parties' 1983 agreement specifies its obligation to pay royalties does not accrue unless or until monies are received by Disney or its subsidiaries.

² The trial court read, and thus to this extent, "considered" Wolf's proffered extrinsic evidence.

of fictional receipts, nor does it require payment to Wolfe [sic] of 5% of monies that were never received by Disney.

“Cross-Complainants’ motion for summary adjudication of issues on the first, fourth, and seventh causes of action of Disney’s cross-complaint against Wolfe [sic], filed on March 11, 2002, is granted. Pursuant to [] paragraph 21 of the 1983 **[**655]** agreement, with regard to the July 18, 1991 Kodak agreement and the March 21, 1995 McDonald’s agreement, Disney has no obligation to pay Wolfe [sic] 5% of the gross receipts, until monies have been received by Disney. Although the court has read all papers filed in support of and opposition to the instant motion, extrinsic evidence is not admitted for the reasons stated. Only admissible nonextrinsic evidence has been considered in deciding this motion.”³

[*11] [*1350]** Wolf filed a petition for writ of mandate to compel the trial court to vacate its order for summary adjudication. We issued an order directing the trial court to either vacate its order for summary adjudication and make a new and different order denying the motion for summary adjudication, or in the alternative, to show cause why the requested relief should not be granted. Respondent Superior Court did not respond and we now consider the petition.

DISCUSSION

I. STANDARD OF REVIEW.

HN1 CA(1) (1) On review of an order summarily adjudicating issues, we review the record de novo to determine whether the prevailing party has conclusively negated necessary elements of his opponent’s case or demonstrated under no hypothesis is there a material issue of fact which requires the process of a trial.⁴

II. THE TERM “GROSS RECEIPTS” IN

PARAGRAPH 21 OF THE 1983 AGREEMENT CAN BE REASONABLY INTERPRETED **[***12]** TO MEAN CASH AS WELL AS VALUABLE IN-KIND CONSIDERATION.

The dispute in this case is over the meaning of the term “gross receipts” for purposes of triggering Disney’s obligation to pay Wolf royalties on character merchandising. Wolf contends “gross receipts” as used in the royalty agreement means “cash and other valuable consideration.” Disney contends the agreement clearly and unambiguously provides its obligation to pay Wolf royalties from the exploitation of certain merchandising rights arises only upon receipt of monies. The trial court ruled the term “gross receipts” was not ambiguous—it meant only cash actually received by Disney. The court further found the term was not reasonably susceptible to the meaning Wolf urged claiming the term as used in this context included not just cash, but also other valuable consideration such as promotions undertaken by third parties employing his characters. We disagree with the trial court.

HN2 CA(2) (2) “Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. **[***13]** (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39–40 [69 Cal. Rptr. 561, 442 P.2d 641]; *Pacific Gas & Electric **[*1351]** Co. v. Zuckerman* (1987) 189 Cal. App. 3d 1113, 1140–1141 [234 Cal. Rptr. 630].) Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court’s own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals **[**656]** more than one possible meaning to which the language of the contract is yet reasonably susceptible. (*Pacific Gas & E. Co. v. G. W. Thomas*

³ Italics in original.

⁴ See *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673–674 [25 Cal. Rptr. 2d 137, 863 P.2d 207].

Drayage etc. Co., supra, 69 Cal.2d at p. 40 & fn. 8; *Pacific Gas & Electric Co. v. Zuckerman, supra*, 189 Cal. App. 3d at pp. 1140–1141.)”⁵

HN3 HN4 CA(3) (3) The interpretation of a contract involves “a two-step process: [***14] ‘First the court provisionally receives (without actually admitting) all credible evidence concerning the parties’ intentions to determine “ambiguity,” i.e., whether the language is “reasonably susceptible” to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is “reasonably susceptible” to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract. [Citation.]’ (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165 [6 Cal. Rptr. 2d 554].) The trial court’s determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. (*Ibid.*) The trial court’s resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court’s resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence. (*Id. at p. 1166.*) Furthermore, ‘[w]hen two equally plausible interpretations of the language of a contract may be made ... parol evidence is admissible to aid in interpreting [***15] the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.’ (*Walter E. Heller Western, Inc. v. Tecrim Corp.* (1987) 196 Cal. App. 3d 149, 158 [241 Cal. Rptr. 677].)”⁶

⁵ *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912 [75 Cal. Rptr. 2d 573].

⁶ *WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710 [50 Cal. Rptr. 2d 323]; see also *Morey v. Vannucci, supra*, 64 Cal.App.4th 904, 913 [“An appellate court is not bound by a trial court’s construction of a contract where (a) the trial court’s contractual interpretation is based solely upon the terms of the written instrument without the aid of extrinsic evidence; ...”].

The term “gross receipts” appears several times in the parties’ agreement. In the exhibit attached to the contract discussing motion picture rights, the term appears in a separate section heading and is given a specific definition peculiar to motion picture revenue and exclusions. “Gross receipts” also appears as a separate section heading in the exhibit discussing television [***16] series rights. Again, the term is defined and given a peculiar meaning tied to revenue sources and exclusions uniquely relevant to production of a potential [*1352] television series. In the section of the contract discussing Wolf’s royalty rights to *character merchandising* the term “gross receipts” again appears. This time, however, the term does not appear in a separate section heading, and “gross receipts” is not defined. Moreover, the term is not even capitalized to suggest it has a special or limited meaning in the merchandising context. As a result, the term “gross receipts” must be considered in light of all the circumstances and the overall context of the contract.

Paragraph 2 of the agreement describes the merchandising rights Disney purchased:“(h) The sole and exclusive right to make, publish and vend, throughout the world, or to license others so to make, [**657] publish and vend, representations of the characters created by the Seller [Wolf] which are in the work (including said characters from the work appearing in any such motion pictures or other adaptations), upon, in and/or in connection with articles of merchandise, or the advertising, display or exploitation of merchandise [***17] or in connection with any commercial activities.”⁷

Paragraph 21 of the 1983 agreement concerns Disney’s obligation to pay royalties for the merchandising of Wolf’s characters. This paragraph provides:“21. In the event that Purchaser [Disney] exercises any of the rights granted to it in and by Subparagraph 2(h), (i) and (k) hereof, Purchaser

⁷ Disney also purchased the right to use Wolf’s characters in children’s storytelling recordings, and in various types of children’s books.

agrees to pay to Seller [Wolf] a sum equal to five percent (5%) of Purchaser's *gross receipts* derived from the exercise of such rights, which, in the event of Purchaser's licensing of any such rights to others, shall be composed of Purchaser's royalties so derived from the licensee. In the event that such licensee is a subsidiary of Purchaser, then such royalties received by Purchaser from such subsidiary shall be deemed to be not less than five percent (5%) of such subsidiary's gross receipts derived from the exercise of [***18] such rights. Purchaser's obligation to pay such sums to Seller shall not accrue unless and until monies with respect to which the same are to be paid shall have been received within the United States of America by, and placed at the unrestricted disposal of, Purchaser or Purchaser's subsidiary (or if restricted from being transmitted to the United States by applicable law or regulations ['restricted funds'] then the restricted funds shall be deemed to have been so received to the extent used by Purchaser or Purchaser's subsidiary in such territory from which such monies would have otherwise been transmitted). So long as such monies are so received, Purchaser shall render semi-annual statements to the Seller within forty-five (45) days after the end of each half [*1353] of the calendar year, showing the sums of money so received during the preceding half with respect to which the said obligation applies; and said statements shall be accompanied by payment of the amount appearing thereby to be then due from Purchaser to Seller. All such statements shall be mailed to Seller at the address specified for notices herein, unless or until Purchaser is otherwise instructed in writing. All statements [***19] and accountings furnished by Purchaser hereunder shall be conclusively deemed correct unless the same shall be objected to within ninety (90) days from Purchaser's rendition thereof... ”⁸

⁸ Italics added. The balance of paragraph 21 provides: “Purchaser's said obligation shall not apply to picture books or other books containing no text material (or containing text material averaging not more than two lines per page), comic strips, comic books, magazines or other similar types of publications, nor to or in connection with

[***20] [**658] Disney emphasizes this paragraph uses the terms “monies” and “monies so received” and discusses “statements” for monies “so received.” Based on this language in the paragraph on royalty rights Disney argues “gross receipts” clearly and unambiguously means only cash, and then only when actual cash is received.

In support of its argument “gross receipts” can only mean “cash received,” Disney relies on the decision in *County of Sacramento v. Pacific Gas & Elec. Co.*⁹ There the court held the utility's gross receipts for purposes of calculating its franchise fee did not include the value of electricity consumed by the utility itself in generating electricity for sale to consumers. The decision in *County of Sacramento* is of no assistance here. In the context of franchise fees on public utilities, the definition of the term “gross receipts” was dictated by statute and prior decisions interpreting the statute at issue, which excluded the monetary value of electricity consumed internally and not sold for cash. Accordingly, the decision in *County of Sacramento* sheds no light on the issue whether the term “gross receipts” may [*1354] be subject to multiple meanings in a private [***21] contract in the entertainment industry context.

publication of, or sound recordings or record albums of, only music or lyrics, or both (as distinguished from children's storytelling records under Subparagraph 2(i)), from any of the Purchaser's versions of the work. Nothing in this paragraph contained shall be construed as requiring Purchaser to manufacture, publish or sell, or to license the manufacture, publication or sale of, any items which are the subject hereof. In the case of restricted funds, at the request and expense of Seller, and subject to applicable law and banking regulations, Purchaser agrees to cause an amount equal to the sum otherwise payable to Seller hereunder with respect to such restricted funds, to be deposited in a bank account in the territory involved in Seller's name, and such deposit shall constitute payment by Purchaser to Seller hereunder. If, other factors being equal, Purchaser has a choice between an interest and noninterest bearing bank account at the same bank, the deposit will be made in the bank account which is interest bearing. Purchaser shall in no event be liable for interest on sums deposited regardless of whether such deposit is made in an interest or non-interest bearing account.”

⁹ [*County of Sacramento v. Pacific Gas & Elec. Co.* \(1987\) 193 Cal. App. 3d 300 \[238 Cal. Rptr. 305\]](#).

Wolf offered extrinsic evidence to show the term “gross receipts” meant not just cash receipts but also other valuable consideration received. Wolf pointed out the interpretation he urged was consistent with the legal definition of “gross receipts” as defined in Black's Law Dictionary, namely, “[t]he total amount of money or the value of other consideration received from selling property or from performing services.” ¹⁰ [***22] Wolf also referred the court to an appellate decision in which the court stated the term “gross receipts” was such a familiar and commonplace term in accounting and taxation that when used in its ordinary sense it meant the “total amount of money or the value of other consideration received.” ¹¹

Wolf argued this is the definition of “gross receipts” customarily used in the entertainment industry when the term is not otherwise limited or defined by written contract. Wolf thus urged the court to read paragraph 21 in the context of custom and practice in the entertainment industry. The extrinsic evidence Wolf offered to explain industry custom consisted of expert testimony from David Held. Mr. Held is an attorney who has worked in the motion picture industry since 1973. United Artists Corporation, Paramount Pictures Corporation and the Samuel Goldwyn Company have employed him. He initially worked as an attorney in the legal department then in such capacities as Director of Business Affairs, Vice President of Business Affairs and was ultimately promoted [**659] to the position of Executive Vice President in Charge of Business Affairs [***23] in Paramount's Motion Picture Group. Since 1988, Held has been employed as a consultant in the entertainment industry. In his 28 years of experience Held had personally negotiated, or supervised negotiations of, thousands of agreements and also reviewed thousands of

proposals involving third party participation agreements, film performance reports, and the like.

Held stated, from the start of his career until the present, the term “gross receipts” in the entertainment industry “means the total amount of money or the value of other consideration received by the studio” when not otherwise specifically defined to limit the term's meaning.

[*1355] In his declaration, Held explained the portion of paragraph 21 which uses the terms “monies” [***24] does not purport to define the term “gross receipts.” Instead, it specifies Disney's obligation to pay royalties does not arise unless or until potential or proposed licensing of the Wolf characters became a fait accompli and the terms of such agreements carried out so as to ensure the studio did not become responsible to pay royalties on failed or aborted projects. Regarding alliance agreements in which the licensor received promotional benefits rather than cash, Held stated industry custom for purposes of paying royalties was to attribute a cash value to the benefits a studio received.

The trial court read Held's declaration and questioned Wolf about its meaning. The court noted, “So where we are here is that personally I think ‘gross receipts,’ as the parties wrote it in paragraph 21, means ‘money.’ But if I have to consider that Held declaration, you win the summary judgment. There's a disputed issue of fact. That's where we are. That's the bottom line.” Ultimately, the trial court concluded it did not need to consider Wolf's extrinsic evidence, finding the term “gross receipts” unambiguously meant cash money.

We find the trial court erred in its treatment of the proffered [***25] extrinsic evidence on the issue whether the contract was ambiguous. At the very least, this conflicting evidence exposed an ambiguity in the term's meaning. If Held's definition is the industry norm, then the competing definitions were equally plausible. Disney, on the other hand, argues the parties' contract did not use

¹⁰ Black's Law Dictionary (6th ed. 1990) page 703, 2d column.

¹¹ See *County of Sacramento v. Pacific Gas & Elec. Co.*, *supra*, 193 Cal. App. 3d 300, 309 (“the courts have always considered that gross receipts are measured by money or other consideration actually received by a party or paid for his benefit”).

the term “gross receipts” in a technical sense and for this reason the expert's declaration of industry custom and practice was inadmissible. However, we note, Disney did not—and does not attempt to—refute the expert's factual assertion through independent evidence that in the entertainment industry context “gross receipts” means not only cash, but also the value of other consideration received. Accordingly, the trial court was not justified in rejecting this extrinsic evidence on the ground it did not comport with the court's own view of the contract language as unambiguous.

This case is analogous to the situation presented in *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Company*.¹² In *Thomas Drayage*, the Supreme Court considered a contract clause in which the defendant agreed to indemnify the plaintiff for injury to property arising out [***26] of or connected with the performance of the contract. The trial court agreed with the defendant the clause could be read to cover only injury to the property of third parties. The trial court [**660] nevertheless held the “plain language” of the agreement also required defendant to indemnify plaintiff for [*1356] injuries to plaintiff's property. Once the trial court concluded the contract had a plain meaning it refused to admit any extrinsic evidence contradicting its interpretation.¹³ The Supreme Court observed, “[w]hen the court interprets a contract on this basis, it determines the meaning of the instrument in accordance with the ‘... extrinsic evidence of the judge's own linguistic education and experience.’ [Citation.] The exclusion of testimony that might contradict the linguistic background of the judge reflects a judicial belief in the possibility of perfect verbal expression”¹⁴

¹² *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33 [69 Cal. Rptr. 561, 442 P.2d 641]

¹³ *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, *supra*, 69 Cal.2d 33, 36.

¹⁴ *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, *supra*, 69 Cal.2d 33, 36–37; see also *Southern Pacific*

[***27]

The court explained the test for admitting extrinsic evidence as an aid in interpreting contract terms as follows: “[HN5](#) 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. [Citations.]”¹⁵

[***28] “[HN6](#) The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.”¹⁶ “The mutual intention to which the courts give effect is determined by objective manifestations of the parties’ intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. ([Civ. Code, §§ 1635–1656](#); [Code Civ. Proc., §§ 1859–1861, 1864](#); [Hernandez v. Badger Construction Equipment Co. \(1994\) 28 Cal.App.4th](#)

[Transportation Co. v. Santa Fe Pacific Pipelines, Inc. \(1999\) 74 Cal.App.4th 1232 \[88 Cal. Rptr. 2d 777\]](#) [court erroneously refused to even consider extrinsic evidence of trade usage and custom in evaluating the fair market value of pipeline easements].

¹⁵ *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, *supra*, 69 Cal.2d 33, 37. The Supreme Court provided examples of how extrinsic evidence of trade usage or custom revealed latent ambiguities in the meaning of terms otherwise unambiguous on their face. Such evidence had been admitted to show the word “ton” in a lease meant a long ton or 2,240 pounds and not the statutory ton of 2,000 pounds; the word “stubble” in a lease included not only stumps left in the ground but everything left on the ground after the harvest; the term “north” in a contract dividing mining claims indicated a boundary line running along the magnetic and not the true meridian; and a form contract for purchase and sale was actually an agency contract. (*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, *supra*, 69 Cal.2d 33, 39, *fn. 6* and cases cited.)

¹⁶ *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 [10 Cal. Rptr. 2d 538, 833 P.2d 545]; *Parsons v. Bristol Development Co. (1965) 62 Cal.2d 861, 865 [44 Cal. Rptr. 767, 402 P.2d 839]*.

[1791, 1814 \[34 \[*1357\] Cal. Rptr. 2d 732\]](#); 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 688–689, pp. 621–623.)”¹⁷

[***29]

Because there is no evidence in this case of objective manifestations of the parties’ intent,¹⁸ and because the term at **[**661]** issue is undefined in the parties’ contract, the only way to construe the meaning of the term “gross receipts” is to consider the nature of the contract and the circumstances under which the parties negotiated.¹⁹ In this case, both the nature of the contract and the circumstances involved the motion picture industry. The offered evidence of industry custom and usage revealed the term “gross receipts” had more than one possible meaning. Thus, the industry expert’s statements of fact were relevant and admissible to expose the latent ambiguity in the contract language regarding the industry’s customary usage of the term. Held’s declaration did not violate the parol evidence rule, as Disney suggests.²⁰ On the

¹⁷ [Morey v. Vannucci, supra, 64 Cal.App.4th 904, 912.](#)

¹⁸ This is distinct from evidence of the uncommunicated *subjective* intent of two of Disney’s employees who acknowledged never discussing the term with Wolf or his representatives, but who testified they understood the term “gross receipts” to mean cash received. These employees could only assume Wolf and his representatives had the same meaning in mind. Based on these Disney employees’ testimony, Disney invokes the rule that [HN7](#) when a term is found to be ambiguous, “it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.” (*Civ. Code, § 1649; Bank of the West v. Superior Court, supra, 2 Cal.4th 1254, 1264–1265.*) This rule does not, as Disney suggests, mean the promisor’s subjective intent controls. The rule is instead designed to override the promisor’s subjective intent whenever necessary to protect the promisee’s objectively reasonable expectations. (*Bank of the West v. Superior Court, supra, 2 Cal.4th 1254, 1265.*) As we later note, Wolf’s objectively reasonable expectations at the time of negotiations remains a material triable issue of fact.

¹⁹ See, e.g., [General Motors Corp. v. Superior Court \(1993\) 12 Cal.App.4th 435, 442 \[15 Cal. Rptr. 2d 622\]](#).

²⁰ Compare [Bionghi v. Metropolitan Water Dist. of So. California \(1999\) 70 Cal.App.4th 1358 \[83 Cal. Rptr. 2d 388\]](#) [integrated agreement which gave the district the right to cancel the contract on

contrary, the proffered evidence regarding trade usage and custom was relevant to prove an interpretation to which the agreements were reasonably susceptible in the entertainment industry context. **[***30]**

[*31]**

The Supreme Court discussed the rule regarding the admission of trade usage and custom in *Ermolieff v. R.K.O. Radio Pictures, Inc.*²¹ In *Ermolieff* the parties were producers and distributors in the motion picture industry. The plaintiff had reserved distribution rights in all countries not listed in an exhibit attached to the contract. The exhibit listed the United Kingdom as **[***32]** an area for which plaintiff had assigned his distribution rights. A dispute arose **[*1358]** over the question whether Ireland, or the “Free Irish State,” was included within the global term “United Kingdom.” The plaintiff argued the plain language of the contract made clear Ireland was excluded because it was not a part of the United Kingdom. The studio countered including Ireland within the term “United Kingdom” was the custom and practice in the motion picture industry and such usage was part of the contract.²² Both parties sought declaratory relief.

At the close of the plaintiff’s case the trial court ruled the evidence of trade usage incompetent, struck the defendant’s evidence, and entered judgment in favor of **[**662]** the plaintiff.²³ The

30 days’ written notice could not be contradicted by the plaintiff’s proposed additional condition of cancellation only with good cause]; [General Motors Corp. v. Superior Court, supra, 12 Cal.App.4th 435](#) [current counsel who had not negotiated settlement and release agreement could not offer competent testimony regarding the contracting parties’ subjective intent when executing the agreement].

²¹ [Ermolieff v. R.K.O. Radio Pictures, Inc. \(1942\) 19 Cal.2d 543 \[122 P.2d 3\]](#).

²² [Ermolieff v. R.K.O. Radio Pictures, Inc., supra, 19 Cal.2d 543, 545–546.](#)

²³ [Ermolieff v. R.K.O. Radio Pictures, Inc., supra, 19 Cal.2d 543, 546.](#)

Supreme Court reversed. “[HN8](#) The correct rule with reference to the admissibility of evidence as to trade [***33] usage under the circumstances here presented is that while words in a contract are ordinarily to be construed according to their plain, ordinary, popular or legal meaning, as the case may be, yet if in reference to the subject matter of the contract, particular expressions have by trade usage acquired a different meaning, and both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage. Parol evidence is admissible to establish the trade usage, and that is true even though the words are in their ordinary or legal meaning entirely unambiguous, inasmuch as by reason of the usage the words are used by the parties in a different sense. [Citations.] The basis of this rule is that to accomplish a purpose of paramount importance in interpretation of documents, namely, to ascertain the true intent of the parties, it may well be said that the usage evidence does not alter the contract of the parties, but on the contrary gives the effect to the words there used as intended by the parties. The usage becomes a part of the contract in aid of its correct interpretation.”²⁴

[***34]

[CA\(4\)](#) (4) In *Ermolieff* the trial court at least considered the proffered extrinsic evidence throughout the plaintiff's entire case-in-chief. In the present case, by contrast, the trial court rejected the evidence after reading the expert's declaration and questioning Wolf on its content. Yet, this extrinsic evidence of trade usage exposed a latent ambiguity in the contract language and presented an alternative interpretation to which the term “gross receipts” was reasonably susceptible in the circumstances. Accordingly, we conclude the trial court erred in rejecting the extrinsic evidence and in concluding the term “gross receipts” was not reasonably susceptible to the interpretation urged by Wolf that

according to industry custom and usage “gross receipts” meant cash and other valuable consideration received.

[*1359] III. THE CONFLICTING INTERPRETATIONS OF THE CONTRACT TERM RAISE FACTUAL ISSUES WHICH PRECLUDE A DETERMINATION AS A MATTER OF LAW.

Having determined the contract is reasonably [***35] susceptible to the meaning given it by Wolf, we address the second step in the analysis—the ultimate construction to be placed on the ambiguous language. As noted, [HN9](#) where no extrinsic evidence is introduced or the evidence is not in conflict, an appellate court will independently construe the contract.²⁵ “Where, however, a conflict in the evidence exists, it must be resolved in the trial court, as with any question of fact, before the court can declare the meaning of the contract as a matter of law.”²⁶

[***36] [CA\(5\)](#) (5) [**663] From what this court has observed earlier, it is apparent triable issues of fact remain regarding the proper meaning to be given the term “gross receipts,” thus precluding our independent interpretation of the contract as a matter of law. By way of example only, Disney claims it receives nothing from the noncash alliance agreements. In the alternative, Disney argues even if it derives some intrinsic benefit from participating in joint promotions, it is not feasible for third parties to ascribe values to these promotional activities unless Disney receives cash.

²⁵ [Parsons v. Bristol Development Co.](#), *supra*, 62 Cal.2d 861, 866.

²⁶ [Southern Cal. Edison Co. v. Superior Court](#) (1995) 37 Cal.App.4th 839, 852 [44 Cal. Rptr. 2d 227]; see also [Walter E. Heller Western, Inc. v. Tecrim Corp.](#) (1987) 196 Cal. App. 3d 149, 158 [241 Cal. Rptr. 677] (“[w]hen two equally plausible interpretations of the language of a contract may be made ... parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory”).

²⁴ [Ermolieff v. R.K.O. Radio Pictures, Inc.](#), *supra*, 19 Cal.2d 543, 550.

Disney thus claims under Wolf's interpretation it would be impossible to comply with its contract obligation to provide an accounting for fictional benefits allegedly derived from noncash alliance agreements.

End of Document

Wolf, by contrast, asserts Disney and its vast enterprises receive benefits from the third party promotions in the form of good will, increased theme park attendance, increased merchandise sales, film attendance and the like, most of these benefits not reflected in increased royalty payments to Wolf. For these reasons, Wolf claims attribution of monetary values for in-kind promotional activities is a routine matter in [***37] the entertainment industry.

The reasonableness of the competing interpretations thus must be tested in light of these concerns.

Also as noted, neither side presented any direct or objective evidence regarding the negotiating parties' understanding of the term "gross receipts" [*1360] at the time the parties entered into the contract. Accordingly, Wolf's and Disney's objectively reasonable expectations regarding the scope of the term when they agreed to the contract remain additional triable issues of material fact.

DISPOSITION

Let a peremptory writ issue directing the trial court to vacate its order granting the motion for summary adjudication of the cross-complainant's first, fourth and seventh causes of action for declaratory relief and to enter a new and different order denying said motion. Petitioners are entitled to costs in this proceeding.

Perluss, P. J., and Woods, J., concurred.

A petition for a rehearing was denied February 19, 2004, and the opinion was modified to read as printed above. The petition of real party in interest for review by the Supreme Court was denied April 14, 2004. George, C. J., and Brown, J., did not participate therein.

Zablocki v. Redhail

Supreme Court of the United States
Argued October 4, 1977 ; January 18, 1978
No. 76-879

Reporter

434 U.S. 374 *; 98 S. Ct. 673 **; 54 L. Ed. 2d 618 ***; 1978 U.S. LEXIS 57 ****; 24 Fed. R. Serv. 2d (Callaghan) 1313

ZABLOCKI, MILWAUKEE COUNTY CLERK v.
REDHAIL

Prior History: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Core Terms

marry, marriage, classification, support obligation, due process clause, equal protection clause, invalidate, marital relationship, public charge, privacy, court order, statutory classification, fundamental rights, equal protection, marriage license, state regulation, due process, custody, deprive, divorce, couple, constitutionally protected, legislative judgment, support payment, county clerk, doctrine, fulfill, wedlock

Case Summary

Procedural Posture

Appellants, a class of county clerks, challenged a ruling by the United States District Court for the Eastern District of Wisconsin, which found in favor of appellees, a class of Wisconsin residents, in holding that the marriage prohibition in Wis. Stat. § 245.10 (1973) violated the [equal protection clause, U.S. Const. amend. XIV](#).

Overview

Wisconsin residents were prevented under Wis.

Stat. § 245.10 (1973) from marrying if they were behind in their child support obligations or if the children to whom they were obligated were likely to become public charges. In a class action brought by the residents under [42 U.S.C.S. § 1983](#), the county clerks contended that the statute assisted the state to counsel residents on their financial obligations and protected the children to whom support was owed. The Court, however, found that the statute violated equal protection in that it directly and substantially interfered with the fundamental right to marry without being closely tailored to effectuate the state's interests. The Court noted that other future financial obligations were not curtailed, only those that might be associated with marriage, and further found that the effect of the statute was that more illegitimate children would be born.

Outcome

The Court affirmed the judgment below, holding that the Wisconsin limitations on obtaining a marriage license were unconstitutional.

LexisNexis® Headnotes

Family Law > Child Support > Support Obligations > General Overview

Family Law > Marital Duties & Rights > General Overview

HN1 Child Support, Support Obligations

See Wis. Stat. § 245.10 (1973).

Civil Rights Law > Protection of
Rights > Section 1983 Actions > Scope

HN2 Protection of Rights, Section 1983 Actions

Where there are no ambiguities in a statute for the state courts to resolve, and no issues of state law that might affect the posture of the federal constitutional claims, individuals seeking relief under [42 U.S.C.S. § 1983](#) need not present their federal constitutional claims in state court before coming to a federal forum.

Civil Procedure > Preliminary
Considerations > Federal & State
Interrelationships > Abstention

HN3 Federal & State Interrelationships, Abstention

There is no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy.

Civil Procedure > ... > Class Actions > Class
Members > Absent Members

Civil
Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > ... > Class Actions > Class
Members > Defendants as Class

Civil Procedure > Special Proceedings > Class
Actions > Judicial Discretion

HN4 Class Members, Absent Members

Where a defendant has no personal stake in the

outcome, defendant lacks standing to raise the claim that due process should require prejudgment notice to all members of the defendant class.

Constitutional Law > Equal Protection > Nature
& Scope of Protection

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

HN5 Equal Protection, Nature & Scope of Protection

In evaluating a state's prohibition on the right to marry under the [equal protection clause, U.S. Const. amend. XIV](#), the court must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected. The right to marry is of fundamental importance, and where a classification significantly interferes with the exercise of that right, critical examination of the state interests advanced in support of the classification is required.

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > General
Overview

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Constitutional Law > Substantive Due
Process > Scope

HN6 Fundamental Rights, Procedural Due Process

The right to marry, establish a home and bring up children is a central part of the liberty protected by the [due process clause, U.S. Const. amend. XIV](#).

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN7 Privacy, Personal Decisions

The right to marry is part of the fundamental "right of privacy" implicit in the [Fourteenth Amendment's Due Process Clause](#).

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN8 Substantive Due Process, Privacy

The decision to marry is among the personal decisions protected by the right of privacy.

Constitutional Law > Equal Protection > Nature
& Scope of Protection

Family Law > Child Support > Support
Obligations > General Overview

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Family Law > Marital Duties &
Rights > General Overview

HN9 Equal Protection, Nature & Scope of Protection

The statutory classification under Wis. Stat. § 245.10 (1973) restricting those who may marry to those who are current in their child support obligations and those whose children will not become public charges clearly interferes directly and substantially with the right to marry.

Constitutional Law > Equal
Protection > Judicial Review > Standards of

Review

HN10 Judicial Review, Standards of Review

When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.

Lawyers' Edition Display

Summary

Under the terms of a Wisconsin statute--providing that any resident of Wisconsin having minor issue not in his custody and which he is under an obligation to support by any court order or judgment may not marry, within Wisconsin or elsewhere, without first obtaining a court's permission to marry, which permission cannot be granted unless the applicant submits proof of compliance with the support obligation, and, in addition, demonstrates that the children covered by the support order are not then, and are not likely thereafter, to become public charges--a Wisconsin resident, who was under a court order to support his illegitimate child, was denied a marriage license by the County Clerk of Milwaukee County, on the sole ground that he had not obtained a court order granting him permission to marry. Thereafter, the applicant, who would have been unable to satisfy either of the statutory prerequisites for a court order granting permission to marry, brought a civil rights class action in the United States District Court for the Eastern District of Wisconsin, asserting that the Wisconsin statute violated the United States Constitution. The three-judge District Court held that the statute was unconstitutional under the [equal protection clause of the Fourteenth Amendment](#) and enjoined its enforcement ([418 F Supp 1061](#)).

On direct appeal, the United States Supreme Court affirmed. In an opinion by Marshall, J., joined by Burger, Ch. J., and Brennan, White, and Blackmun, JJ., it was held that the statute violated the

[*Fourteenth Amendment's equal protection clause*](#), since (1) the Wisconsin statute's classification significantly interfered with the exercise of the fundamental right to marry, and (2) the classification could not be justified on the basis of a state interest in (a) counseling marriage applicants as to the necessity of fulfilling prior support obligations, (b) protecting the welfare of out-of-custody children, or (c) protecting the ability of marriage applicants to meet support obligations to prior children.

Burger, Ch. J., concurring, emphasized that the Wisconsin statute intentionally and substantially interfered with the right to marry.

Stewart, J., concurred in the judgment, expressing the view that the Wisconsin statute was unconstitutional because it exceeded the bounds of permissible state regulation of marriage, and invaded the sphere of liberty protected by the [*Fourteenth Amendment's due process clause*](#).

Powell, J., concurring in the judgment, expressed the view that the Wisconsin statute was unconstitutional under either due process or equal protection standards, since the state had not established a justification for the statute's foreclosure of marriage to many of its citizens solely because of their indigency.

Stevens, J., concurring in the judgment, expressed the view that even assuming that the right to marry could sometimes be denied on economic grounds, the Wisconsin statute's discrimination between the rich and the poor was so irrational that it could not withstand scrutiny under the [*Fourteenth Amendment's equal protection clause*](#).

Rehnquist, J., dissenting, expressed the view that under the appropriate standards whereby, for equal protection purposes, the statute had to pass only the rational basis test, and whereby, for purposes of due process, it had only to be shown that the statute bore a rational relation to a constitutionally permissible objective, the Wisconsin statute was a

permissible exercise of the state's power to regulate family life and to assure the support of minor children.

Headnotes

LAW §348.5 > state law -- marriage restriction -- support obligations to children -- equal protection -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

The [*Fourteenth Amendment's equal protection clause*](#) is violated by a state statute providing that any resident having minor issue not in the resident's custody whom the resident is under a court-mandated obligation to support may not marry, within the state or elsewhere, without first obtaining a court's permission to marry, which permission the court cannot grant unless the marriage applicant submits proof of compliance with the support obligation and, in addition, demonstrates that the children covered by the support order are not then, and are not likely thereafter, to become public charges, since (1) the statute's classification significantly interferes with the exercise of the fundamental right to marry, and (2) the classification cannot be justified on the basis of a state interest in (a) counseling marriage applicants as to the necessity of fulfilling prior support obligations, (b) protecting the welfare of out-of-custody children, or (c) protecting the ability of marriage applicants to meet support obligations to prior children. (Rehnquist, J., dissented from this holding.)

COURTS §757.5 > federal court abstention -- constitutionality -- state marriage law -- > Headnote: [LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

In a civil rights action under [42 USCS 1983](#) seeking

declaratory and injunctive relief with regard to an allegedly unconstitutional state law providing that members of a certain class of state residents may not marry without first obtaining a court order granting permission, a Federal District Court is not required to abstain from deciding the case so that the state courts may first have an opportunity to pass on the challenged law's constitutionality, since (1) the lack of any pending state court proceeding in which the statute could have been challenged renders inapplicable the doctrine that a federal court will abstain, absent extraordinary circumstances, when federal jurisdiction has been invoked for the purpose of restraining certain state court proceedings, (2) there are no ambiguities in the statute for state courts to resolve, and (3) abstention out of regard for the independence of state governments in carrying out their domestic policy is not warranted because the case does not involve complex issues of state law, the resolution of which would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

RIGHTS §12.5 > STATES §46 > state remedies -- prerequisite to federal suit -- > Headnote:
[LEdHN\[3A\]](#) [3A][LEdHN\[3B\]](#) [3B]

Individuals seeking relief under the Civil Rights Act ([42 USCS 1983](#)) giving a federal right of action for the deprivation of any right, privilege, or immunity secured by the United States Constitution need not present their federal constitutional claims in state court before coming to a federal forum.

COURTS §757 > abstention -- federal question -- state policy -- > Headnote:
[LEdHN\[4A\]](#) [4A][LEdHN\[4B\]](#) [4B]

There is no doctrine requiring federal court abstention merely because resolution of a federal

question may result in the overturning of a state policy.

ERROR §841 > JUDGMENT §199 > PARTIES §24 > class action -- standing -- defendant class -- prejudgment notice -- > Headnote:
[LEdHN\[5A\]](#) [5A][LEdHN\[5B\]](#) [5B]

On appeal to the United States Supreme Court from a Federal District Court's decision holding unconstitutional a state law requiring a court order granting permission to marry for a certain class of state residents, the named representative of a defendant class found by the District Court to have satisfied the requirements for a class action under [Rule 23\(a\)](#) and [\(b\)\(2\) of the Federal Rules of Civil Procedure](#) lacks standing to raise the claim that due process required prejudgment notice to be given to members of the defendant class in order for the judgment to be binding on them, where the representative of the defendant class would be bound regardless of what might be concluded as to the judgment's binding effect on absent members of the defendant class, and the named representative had not asserted that he was injured in any way by maintenance of the action as a defendant class action; under such circumstances, the absent class members would have to assert their due process rights for themselves, through collateral attack or otherwise.

ERROR §1662 > mootness -- constitutionality of state marriage law -- marriage of named plaintiff -- class action -- > Headnote:
[LEdHN\[6A\]](#) [6A][LEdHN\[6B\]](#) [6B]

On direct appeal from the decision of a Federal District Court holding unconstitutional a state's law providing that members of a certain class of the state's residents may not marry, within the state or elsewhere, without first obtaining a court order

granting permission to marry--which decision the District Court had rendered in an action brought by a state resident, who had been denied a marriage license for not obtaining a court's permission to marry, as representative of a class of all state residents who had been refused marriage licenses under the law--the issues before the United States Supreme Court are not mooted by the named plaintiff's marriage outside the state some time after argument on the merits in the District Court but prior to judgment, since (1) the individual claim of the named plaintiff, who remained a state resident despite his out-of-state marriage, remains unaffected by his marriage, such marriage having been made void under the state law, and (2) regardless of the status of the named plaintiff's individual claim, the dispute over the law's constitutionality is live with respect to members of the plaintiff class, because the named plaintiff's marriage took place well after the plaintiff class had been certified by the District Court.

ERROR §1660 > mootness -- change in challenged statute -- > Headnote:

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

On direct appeal from the decision of a Federal District Court holding unconstitutional, and enjoining enforcement of, a state law providing that members of a certain class of the state's residents may not marry, within the state or elsewhere, without first obtaining a court order granting permission to marry, the United States Supreme Court's inquiry into the constitutionality of the state law is not mooted merely because after argument in the Supreme Court a somewhat narrower version of the challenged law had been signed into law, where (1) the new law provides that it should be enforced only when the provisions of the challenged law and utilization of the procedures under it are stayed or enjoined by the order of any court, and (2) thus, if the Supreme Court were to vacate the District Court's injunction on the appeal, the challenged

statute would go back into full force and effect.

LAW §348.5 > equal protection -- state marriage law -- burden of justification -- > Headnote:

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

In evaluating, under the [equal protection clause of the Fourteenth Amendment](#), a state law providing that members of a certain class of state residents may not marry without first obtaining a court order granting permission to marry, the United States Supreme Court must first determine what burden of justification the classification created by the law must meet, by looking to the nature of the classification and the individual interests affected.

LAW §348.5 > MARRIAGE §1 > equal protection -- analysis -- classification -- state law -- > Headnote:

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

For purposes of the United States Supreme Court's evaluation, under the [Fourteenth Amendment's equal protection clause](#), of a state law providing that members of a certain class of state residents may not marry without first obtaining a court order granting permission to marry, the Supreme Court must conduct a critical examination of the state interests advanced in support of the classification, since the right to marry is of fundamental importance, and since the classification at issue significantly interferes with the exercise of that right. (Rehnquist, J., dissented in part from this holding.)

LAW §525 > liberty to marry -- > Headnote:

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

The freedom to marry is one of the vital personal

rights protected by the [due process clause of the Fourteenth Amendment](#) as essential to the orderly pursuit of happiness by free men.

regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.

MARRIAGE §1 > basic civil right -- > Headnote:
[LEdHN\[11\]](#) [11]

Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.

LAW §528.5 > right to marry -- due process -- privacy
-- > Headnote:
[LEdHN\[12\]](#) [12]

The right to marry is part of the fundamental right of privacy implicit in the [Fourteenth Amendment's due process clause](#).

ABORTION §1 > right of unmarried woman --
> Headnote:
[LEdHN\[13\]](#) [13]

An unmarried pregnant woman has a fundamental right to seek an abortion of her expected child, or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings.

LAW §348.5 > state regulation -- marriage -- equal protection -- > Headnote:
[LEdHN\[14\]](#) [14]

For purposes of equal protection analysis, not every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny; reasonable

LAW §317 > classification -- interference with fundamental rights -- > Headnote:
[LEdHN\[15\]](#) [15]

When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.

Syllabus

[****1] Wisconsin statute providing that any resident of that State "having minor issue not in his custody and which he is under obligation to support by any court order or judgment" may not marry without a court approval order, which cannot be granted absent a showing that the support obligation has been met and that children covered by the support order "are not then and are not likely thereafter to become public charges" held to violate the [Equal Protection Clause of the Fourteenth Amendment](#). Pp. 383-391.

(a) Since the right to marry is of fundamental importance, *e.g.*, [Loving v. Virginia, 388 U.S. 1](#), and the statutory classification involved here significantly interferes with the exercise of that right, "critical examination" of the state interests advanced in support of the classification is required. [Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312, 314](#). Pp. 383-387.

(b) The state interests assertedly served by the challenged statute unnecessarily impinge on the right to marry. If the statute is designed to furnish an opportunity to counsel persons with prior child-support obligations before further such obligations

are incurred, it neither expressly [****2] requires counseling nor provides for automatic approval after counseling is completed. The statute cannot be justified as encouraging an applicant to support his children. By the proceeding the State, which already possesses numerous other means for exacting compliance with support obligations, merely prevents the applicant from getting married, without ensuring support of the applicant's prior children. Though it is suggested that the statute protects the ability of marriage applicants to meet prior support obligations before new ones are incurred, the statute is both underinclusive (as it does not limit new financial commitments other than those arising out of the contemplated marriage) and overinclusive (since the new spouse may better the applicant's financial situation). Pp. 388-390.

[*418 F.Supp. 1061*](#), affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C.J., and BRENNAN, WHITE, and BLACKMUN, JJ., joined. BURGER, C.J., filed a concurring opinion, *post*, p. 391. STEWART, J., *post*, p. 391, POWELL, J., *post*, p. 396, and STEVENS, J., *post*, p. 403, filed opinions concurring in the judgment. REHNQUIST, J., filed a dissenting opinion, [****3] *post*, p. 407.

Counsel: *Ward L. Johnson, Jr.*, Assistant Attorney General of Wisconsin, argued the cause for appellant. With him on the briefs were *Bronson C. La Follette*, Attorney General, *Robert P. Russell*, and *John R. Devitt*.

Robert H. Blondis argued the cause and filed briefs for appellee. *

Judges: Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, Stevens

Opinion by: MARSHALL

Opinion

[*375] [***623] [**675] MR. JUSTICE MARSHALL delivered the opinion of the Court.

[*LEdHN\[1A\]*](#) [1A]At issue in this case is the constitutionality of a Wisconsin statute, Wis. Stat. §§ 245.10 (1), (4), (5) (1973), which provides that members of a certain class of Wisconsin residents may not marry, within the [***624] State or elsewhere, without first obtaining a court order granting permission to marry. The class is defined by the statute to include [****4] any "Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment." The statute specifies that court permission cannot be granted unless the marriage applicant submits proof of compliance with the support obligation and, in addition, demonstrates that the children covered by the support order "are not then and are not likely thereafter to become public charges." No marriage license may lawfully be issued in Wisconsin to a person covered by the statute, except upon court order; any marriage entered into without compliance with § 245.10 is declared void; and persons acquiring marriage licenses in violation of the section are subject to criminal penalties. ¹

¹ [*HN1*](#) Wisconsin Stat. § 245.10 provides in pertinent part:

"(1) No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the court having divorce jurisdiction in the county of this state where such minor issue resides or where the marriage license application is made. No marriage license shall be issued to any such person except upon court order. The court, within 5 days after such permission is sought by verified petition in a special proceeding, shall direct a court hearing to be held in the matter to allow said person to submit proof of his compliance with such prior court obligation. No such order shall be granted, or hearing held, unless both parties to the intended marriage appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of such minor issue is given notice of such

* [*Terry W. Rose*](#) filed a brief for the Wisconsin Civil Liberties Union Foundation, Inc., as *amicus curiae* urging affirmance.

[****5] [*376] After [***625] [**676] being denied a marriage license because of his failure to comply with § 245.10, appellee brought this class action under [42 U.S.C. § 1983](#), challenging the statute as violative [*377] of the Equal Protection and [Due Process Clauses of the Fourteenth](#)

proceeding by personal service of a copy of the petition at least 5 days prior to the hearing, except that such appearance or notice may be waived by the court upon good cause shown, and, if the minor issue were of a prior marriage, unless a 5-day notice thereof is given to the family court commissioner of the county where such permission is sought, who shall attend such hearing, and to the family court commissioner of the court which granted such divorce judgment. If the divorce judgment was granted in a foreign court, service shall be made on the clerk of that court. Upon the hearing, if said person submits such proof and makes a showing that such children are not then and are not likely thereafter to become public charges, the court shall grant such order, a copy of which shall be filed in any prior proceeding...or divorce action of such person in this state affected thereby; otherwise permission for a license shall be withheld until such proof is submitted and such showing is made, but any court order withholding such permission is an appealable order. Any hearing under this section may be waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by said person of his financial resources that the latter has complied with prior court orders or judgments affecting his minor children, and also has shown that such children are not then and are not likely thereafter to become public charges. No county clerk in this state shall issue such license to any person required to comply with this section unless a certified copy of a court order permitting such marriage is filed with said county clerk.

.....

"(4) If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, he must, prior to such marriage, obtain permission of the court under sub. (1), except that in a hearing ordered or held by the court, the other party to the proposed marriage, if domiciled in another state, need not be present at the hearing. If such other party is not present at the hearing, the judge shall within 5 days send a copy of the order of permission to marry, stating the obligations of support, to such party not present.

"(5) This section shall have extraterritorial effect outside the state; and s. 245.04 (1) and (2) [providing that out-of-state marriages to circumvent Wisconsin law are void] are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere."

The criminal penalties for violation of § 245.10 are set forth in Wis. Stat. § 245.30 (1)(f) (1973). See [State v. Mueller, 44 Wis. 2d 387, 171 N.W. 2d 414 \(1969\)](#) (upholding criminal prosecution for failure to comply with § 245.10).

[Amendment](#) and seeking declaratory and injunctive relief. The United States District Court for the Eastern District of Wisconsin held the statute unconstitutional under the [Equal Protection Clause](#) and enjoined its enforcement. [418 F. Supp. 1061 \(1976\)](#). We noted probable jurisdiction, [429 U.S. 1089 \(1977\)](#), and we now affirm.

I

Appellee Redhail is a Wisconsin resident who, under the terms of § 245.10, is unable to enter into a lawful marriage in Wisconsin or elsewhere so long as he maintains his Wisconsin residency. The facts, according to the stipulation filed by the parties in the District Court, are as follows. In January 1972, when appellee was a minor and a high school student, a paternity action was instituted against him in Milwaukee County Court, alleging that he was the father of a baby girl [*378] born out of wedlock on July 5, 1971. After he appeared and admitted that he was the child's father, the [****6] court entered an order on May 12, 1972, adjudging appellee the father and ordering him to pay \$109 per month as support for the child until she reached 18 years of age. From May 1972 until August 1974, appellee was unemployed and indigent, and consequently was unable to make any support payments. ²

On September 27, 1974, appellee filed an application for a marriage license with appellant [*677] Zablocki, the County Clerk of Milwaukee County, ³ and a few days later the application was denied on the sole ground that appellee had not obtained a court order granting him permission to marry, as required by § 245.10. Although appellee did not petition a state court thereafter, it is

²The record does not indicate whether appellee obtained employment subsequent to August 1974.

³Under Wisconsin law, "[m]arriage may be validly solemnized and contracted [within the] state only after a license has been issued therefor," Wis. Stat. § 245.16 (1973), and (with an exception not relevant here) the license must be obtained from "the county clerk of the county in which one of the parties has resided for at least 30 days immediately prior to making application therefor," § 245.05.

stipulated that he would not have been able to satisfy either of the statutory prerequisites for an order granting permission to marry. First, he had not satisfied his support obligations to his illegitimate child, and as of December 1974 there [****7] was an arrearage in excess of \$ 3,700. Second, the child had been a public charge since her birth, receiving benefits under the Aid to Families with Dependent Children program. It is stipulated that the child's benefit payments were such that she would have been a public charge even if appellee had been current in his support payments.

On [***626] December 24, 1974, appellee filed his complaint in the District Court, on behalf of himself and the class of all Wisconsin residents who had been refused a marriage license pursuant to § 245.10(1) by one of the county clerks in Wisconsin. Zablocki was named as the defendant, individually [****8] [*379] and as representative of a class consisting of all county clerks in the State. The complaint alleged, among other things, that appellee and the woman he desired to marry were expecting a child in March 1975 and wished to be lawfully married before that time. The statute was attacked on the grounds that it deprived appellee, and the class he sought to represent, of equal protection and due process rights secured by the *First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution*.

A three-judge court was convened pursuant to 28 U.S.C. §§ 2281, *2284*. Appellee moved for certification of the plaintiff and defendant classes named in his complaint, and by order dated February 20, 1975, the plaintiff class was certified under *Fed. Rule Civ. Proc. 23 (b)(2)*.⁴ After the

parties filed the stipulation of facts, and briefs on the merits, oral argument was heard in the District Court on June 23, 1975, with a representative from the Wisconsin Attorney General's office participating in addition to counsel for the parties.

[****9] *LEdHN[2A]* [2A]*LEdHN[3A]* [3A]*LEdHN[4A]* [4A]*LEdHN[5A]* [5A]The three-judge court handed down a unanimous decision on August 31, 1976. The court ruled, first, that it was not required to abstain from decision under the principles set forth in *Huffman v. Pursue, Ltd.*, *420 U.S. 592 (1975)*, and *Younger v. Harris*, *401 U.S. 37 (1971)*, since there was no pending state-court proceeding that could be frustrated by the declaratory and injunctive relief requested.⁵ [**678] Second, the court [***627] held

for certification of a defendant class. Although appellee thereafter filed a brief in support of the motion, appellant never submitted a brief in opposition.

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LEdHN[2B] [2B] *418 F. Supp. 1061, 1064-1065*. The possibility that abstention might be required under our decision in *Huffman v. Pursue, Ltd.*, was raised by the District Court, *sua sponte*, at argument before that court. Appellee subsequently filed a memorandum contending that abstention was not required; appellant did not submit a response. Appellant now argues, on this appeal that the District Court failed to consider the "doctrine of federalism" set forth in *Younger* and *Huffman*. According to appellant, proper consideration of this doctrine would have led the District Court to require appellee to bring suit first in the state courts, in order to give those courts the initial opportunity to pass on his constitutional attack against § 245.10. We cannot agree.

LEdHN[3B] [3B]First, the District Court was correct in finding *Huffman* and *Younger* inapplicable, since there was no pending state-court proceeding in which appellee could have challenged the statute. See *Wooley v. Maynard*, *430 U.S. 705, 710-711 (1977)*. Second, *HN2* there are no ambiguities in the statute for the state courts to resolve, and -- absent issues of state law that might affect the posture of the federal constitutional claims -- this Court has uniformly held that individuals seeking relief under *42 U.S.C. § 1983* need not present their federal constitutional claims in state court before coming to a federal forum. See, e.g., *Wisconsin v. Constantineau*, *400 U.S. 433, 437-439 (1971)*; *Zwickler v. Koota*, *389 U.S. 241, 245-252 (1967)*. See also *Huffman v. Pursue, Ltd.*, *420 U.S.*, at 609-610, n. 21.

⁴ The order defined the plaintiff class as follows:

"All Wisconsin residents who have minor issue not in their custody and who are under an obligation to support such minor issue by any court order or judgment and to whom the county clerk has refused to issue a marriage license without a court order, pursuant to § 245.10 (1), Wis. Stats. (1971)."

The order also established a briefing schedule on appellee's motion

[*380] that the class of all county clerks in Wisconsin was a proper defendant class under [Rules 23\(a\)](#) and [\(b\)\(2\)](#), and that neither [Rule 23](#) nor due process required prejudgment notice to the members of the plaintiff or the defendant class.⁶

[****10] [*381] On the merits, the three-judge panel analyzed the challenged statute under the [Equal Protection Clause](#) and concluded that "strict

scrutiny" was required because the classification created by the statute infringed upon a fundamental right, the right to marry.⁷ The court then proceeded to evaluate the interests advanced by the State to justify the statute, and, finding that the classification was not necessary for the achievement of those interests, the court held the statute invalid and enjoined the county clerks from enforcing it.⁸

[LEdHN\[4B\]](#) [4B] Appellant also contends on this appeal, for the first time, that the District Court should have abstained out of "regard for the independence of state governments in carrying out their domestic policy." Brief for Appellant 16, citing [Burford v. Sun Oil Co.](#), 319 U.S. 315, 317-318 (1943). Unlike *Burford*, however, this case does not involve complex issues of state law, resolution of which would be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." [Colorado River Water Conservation Dist. v. United States](#), 424 U.S. 800, 814-815 (1976). And [HN3](#) there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy.

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[LEdHN\[5B\]](#) [5B] 418 F. Supp., at 1065-1068. Appellant has not appealed the District Court's finding that the defendant class satisfied the requirements of [Rules 23\(a\)](#) and [\(b\)\(2\)](#), the court's definition of the class to include all county clerks in Wisconsin, or the requirement that appellant send a copy of the judgment to each of the county clerks, and those issues are therefore not before us. Appellant does claim on this appeal that due process required prejudgment notice to the members of the defendant class if the judgment was to be binding on them. As this issue has been framed, however, [HN4](#) we cannot perceive appellant's "personal stake in the outcome," [Baker v. Carr](#), 369 U.S. 186, 204 (1962), and we therefore hold that appellant lacks standing to raise the claim. Appellant would be bound, regardless of what we concluded as to the judgment's binding effect on absent members of the defendant class, and appellant has not asserted that he was injured in any way by the maintenance of this suit as a defendant class action. Indeed, appellant never filed a brief in the District Court in opposition to the defendant class, despite being invited to do so, see n. 4, *supra*, and the notice issue was briefed for the first time on this appeal, after the Wisconsin Attorney General took over as lead counsel for appellant. In these circumstances, the absent class members must be content to assert their due process rights for themselves, through collateral attack or otherwise. See [Hansberry v. Lee](#), 311 U.S. 32 (1940); Advisory Committee Notes on 1966 Amendment to [Rule 23](#), 28 U.S.C. App., p. 7768, citing [Restatement of Judgments § 86, Comment \(h\)](#), § 116 (1942). We note, in any event, that in light of our disposition of this case and the recent revision of Wisconsin's Family Code, see n. 9, *infra*, the question of binding effect on the absent members may be wholly academic.

[LEdHN\[6A\]](#) [6A] [LEdHN\[7A\]](#) [7A] Appellant brought [****11] this direct appeal pursuant to 28 U.S.C. [\[*382\] § 1253](#), claiming that the three-judge court erred in finding §§ 245.10 (1), (4), (5) invalid [***628] under the [Equal Protection Clause](#). Appellee defends the lower court's equal protection holding and, in the alternative, urges affirmance of the [**679] District Court's judgment on the ground that the statute does not satisfy the requirements of substantive due process. We agree with the District Court that the statute violates the [Equal Protection Clause](#).⁹

⁷ 418 F. Supp., at 1068-1071. The court found an additional justification for applying strict scrutiny in the fact that the statute discriminates on the basis of wealth, absolutely denying individuals the opportunity to marry if they lack sufficient financial resources to make the showing required by the statute. *Id.*, at 1070, citing [San Antonio Independent School Dist. v. Rodriguez](#), 411 U.S. 1, 20 (1973).

⁸ 418 F. Supp., at 1071-1073.

⁹ [LEdHN\[6B\]](#) [6B] Counsel for appellee informed us at oral argument that appellee was married in Illinois some time after argument on the merits in the District Court, but prior to judgment. Tr. of Oral Arg. 23, 30-31. This development in no way moots the issues before us. First, appellee's individual claim is unaffected, since he is still a Wisconsin resident and the Illinois marriage is consequently void under the provisions of §§ 245.10(1), (4), (5). See [State v. Mueller](#), 44 Wis. 2d 387, 171 N.W. 2d 414 (1969) (§ 245.10 has extraterritorial effect with respect to Wisconsin residents). Second, regardless of the current status of appellee's individual claim, the dispute over the statute's constitutionality remains live with respect to members of the class appellee represents, and the Illinois marriage took place well after the class was certified. See [Franks v. Bowman Transp. Co.](#), 424 U.S. 747, 752-757 (1976); [Sosna v. Iowa](#), 419 U.S. 393, 397-403 (1975).

[LEdHN\[7B\]](#) [7B] After argument in this Court, the Acting Governor

[****12] [*383] II

[LEdHN\[1B\]](#) [1B][LEdHN\[8\]](#) [8][LEdHN\[9\]](#) [9][HN5](#) In evaluating §§ 245.10(1), (4), (5) under the [Equal Protection Clause](#), "we must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected." [Memorial Hospital v. Maricopa County](#), 415 U.S. 250, 253 (1974). Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that "critical examination" of the state interests advanced in support of the classification is required. [Massachusetts Board of Retirement v. Murgia](#), 427 U.S. 307, 312, 314 (1976); see, e.g., [San Antonio Independent School Dist. v. Rodriguez](#), 411 U.S. 1, 17 (1973).

[LEdHN\[10\]](#) [10][LEdHN\[11\]](#) [11]The leading decision of this Court on the right to marry is [Loving v. Virginia](#), 388 U.S. 1 (1967). In that case, an interracial couple who had been convicted of violating Virginia's miscegenation laws challenged the statutory scheme on both equal protection and due process grounds. The Court's opinion could have rested solely on the ground that the statutes [****13] discriminated on the basis of race

of Wisconsin signed into law a comprehensive revision of the State's marriage laws, effective February 1, 1978. 1977 Wis. Laws, ch. 105, Wis. Legis. Serv. (West 1977). The revision added a new section (§ 245.105) which appears to be a somewhat narrower version of § 245.10. Enactment of this new provision also does not moot our inquiry into the constitutionality of § 245.10. By its terms, the new section "shall be enforced only when the provisions of § 245.10 and utilization of the procedures thereunder are stayed or enjoined by the order of any court." § 245.105(8). As we read this somewhat unusual proviso, and as it was explained to us at argument by the representative of the Wisconsin Attorney General, Tr. of Oral Arg. 4-10, the new section is meant only to serve as a stopgap during such time as enforcement of § 245.10 is barred by court order. Were we to vacate the District Court's injunction on this appeal, § 245.10 would go back into full force and effect; accordingly, the dispute over its validity is quite live. We express no judgment on the constitutionality of the new section.

in violation of the [Equal Protection Clause](#). *Id.*, at 11-12. But the Court went on to hold that the laws arbitrarily deprived the couple of a [****629] fundamental liberty protected by the Due Process Clause, the freedom to marry. The Court's language on the latter point bears repeating: S

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

"Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.*, at 12, quoting [Skinner v. Oklahoma ex rel. Williamson](#), 316 U.S. 535, 541 (1942).I

[*384] Although *Loving* arose in the context of racial discrimination, prior and subsequent [**680] decisions of this Court confirm that the right to marry is of fundamental importance for all individuals. Long ago, in [Maynard v. Hill](#), 125 U.S. 190 (1888), the Court characterized marriage as "the most important relation in life," *id.*, at 205, and as "the foundation of the family and of society, without which there would be neither civilization nor progress," *id.*, at 211. In [Meyer v. Nebraska](#), 262 U.S. [****14] 390 (1923), the Court recognized that [HN6](#) the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the *Due Process Clause*, *id.*, at 399, and in [Skinner v. Oklahoma ex rel. Williamson](#), *supra*, marriage was described as "fundamental to the very existence and survival of the race," 316 U.S., at 541.

[LEdHN\[12\]](#) [12]More recent decisions have established that [HN7](#) the right to marry is part of the fundamental "right of privacy" implicit in the [Fourteenth Amendment's Due Process Clause](#). In [Griswold v. Connecticut](#), 381 U.S. 479 (1965), the Court observed: S

"We deal with a right of privacy older than the [Bill of Rights](#) -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring,

and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Id.*, at 486.¹

See also *id.*, at 495 (Goldberg, J., concurring); *id.*, at 502-503 [****15] (WHITE, J., concurring in judgment).

Cases subsequent to *Griswold* and *Loving* have routinely categorized [HN8](#) the decision to marry as among the personal decisions protected by the right of privacy. See generally *Whalen v. Roe*, 429 U.S. 589, 598-600, and nn. 23-26 (1977). For [*385] example, last Term in *Carey v. Population Services International*, 431 U.S. 678 (1977), we declared: S

"While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference [***630] are personal decisions 'relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-542 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S., at 453-454; *id.*, at 460, 463-465 (WHITE, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, [262 U.S. 390, 399 (1923)]." *Id.*, at 684-685, quoting *Roe* [****16] v. *Wade*, 410 U.S. 113, 152-153 (1973).¹

See also *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the *Due Process Clause of the Fourteenth Amendment*."); *Smith v. Organization of Foster Families*, 431 U.S. 816, 842-844 (1977); *Moore v. East Cleveland*, 431 U.S. 494, 499

(1977); *Paul v. Davis*, [**681] 424 U.S. 693, 713 (1976).¹⁰

[****17]

[*386] [LEdHN\[13\]](#) [13] It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense 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. The woman whom appellee desired to marry had a fundamental right to seek an abortion of their expected child, see *Roe v. Wade*, *supra*, or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings, see *Trimble v. Gordon*, 430 U.S. 762, 768-770, and n. 13 (1977); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-176 (1972). Surely, a decision to marry and raise the child in a traditional [****631] family setting must receive equivalent protection and, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which

¹⁰ Further support for the fundamental importance of marriage is found in our decisions dealing with rights of access to courts in civil cases. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), we wrote that "marriage involves interests of basic importance in our society," *id.*, at 376, and held that filing fees for divorce actions violated the due process rights of indigents unable to pay the fees. Two years later, in *United States v. Kras*, 409 U.S. 434 (1973), the Court concluded that filing fees in bankruptcy actions did not deprive indigents of due process or equal protection. *Boddie* was distinguished on several grounds, including the following: "The denial of access to the judicial forum in *Boddie* touched directly...on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution. See, for example, *Loving v. Virginia*" 409 U.S., at 444.

See also *id.*, at 446 ("Bankruptcy is hardly akin to free speech or marriage...[.] rights...that the Court has come to regard as fundamental").

the State of Wisconsin allows sexual relations legally to take place. ¹¹

[***18] [LEdHN\[14\]](#) [14]By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. See *Califano v. Jobst, ante*, p. 47; [*387] n. 12, *infra*. [HN9](#) The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry.

Under the challenged statute, no Wisconsin resident in the affected class may marry in Wisconsin or elsewhere without a court order, and marriages contracted in violation of the statute are both void and punishable as criminal offenses. Some of those in the affected class, like appellee, will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges. These persons are absolutely prevented from getting married. Many others, able in theory to satisfy the statute's [***19] requirements, will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry. And even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental. ¹²

¹¹ Wisconsin punishes fornication as a criminal offense:

"Whoever has sexual intercourse with a person not his spouse may be fined not more than \$200 or imprisoned not more than 6 months or both." [Wis. Stat. § 944.15](#) (1973).

¹² The directness and substantiality of the interference with the freedom to marry distinguish the instant case from *Califano v. Jobst, ante*, p. 47. In *Jobst*, we upheld sections of the Social Security Act providing, *inter alia*, for termination of a dependent child's benefits

[****20] [*388] III

[**682] [LEdHN\[1C\]](#) [1C][LEdHN\[15\]](#) [15][HN10](#) When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. [***632] See, e.g., [Carey v. Population Services International](#), 431 U.S., at 686; [Memorial Hospital v. Maricopa County](#), 415 U.S., at 262-263; [San Antonio Independent School Dist. v. Rodriguez](#), 411 U.S., at 16-17; [Bullock v. Carter](#), 405 U.S. 134, 144 (1972). Appellant asserts that two interests are served by the challenged statute: the permission-to-marry proceeding furnishes an opportunity to counsel the applicant as to the necessity of fulfilling his prior support obligations; and the welfare of the out-of-custody children is protected. We may accept for present purposes that these are legitimate and substantial interests, but, since the means selected by the State for achieving these interests unnecessarily impinge on the right to marry, the statute cannot be sustained.

There is evidence that the challenged statute, as originally introduced in the Wisconsin Legislature, was intended merely to establish [***21] a mechanism whereby persons with support obligations to children from prior marriages could

upon marriage to an individual not entitled to benefits under the Act. As the opinion for the Court expressly noted, the rule terminating benefits upon marriage was not "an attempt to interfere with the individual's freedom to make a decision as important as marriage." *Ante*, at 54. The Social Security provisions placed no direct legal obstacle in the path of persons desiring to get married, and -- notwithstanding our Brother REHNQUIST's imaginative recasting of the case, see dissenting opinion, *post*, at 408 -- there was no evidence that the laws significantly discouraged, let alone made "practically impossible," any marriages. Indeed, the provisions had not deterred the individual who challenged the statute from getting married, even though he and his wife were both disabled. See *Califano v. Jobst, ante*, at 48. See also *ante*, at 57 n. 17 (because of availability of other federal benefits, total payments to the Jobsts after marriage were only \$20 per month less than they would have been had Mr. Jobst's child benefits not been terminated).

be counseled before they entered into new marital relationships and incurred further support obligations.¹³ Court permission to marry was to be required, but apparently permission was automatically to be granted after counseling was completed.¹⁴ The statute actually enacted, however, does not expressly require or provide for any counseling whatsoever, nor for any automatic granting of permission to marry by the court,¹⁵ and thus it can [*389] hardly be justified as a means for ensuring counseling of the persons within its coverage. Even assuming that counseling does take place -- a fact as to which there is no evidence in the record -- this interest obviously cannot support the withholding of court permission to marry once counseling is completed.

[****22] With regard to safeguarding the welfare of the out-of-custody children, appellant's brief does not make clear the connection between the State's interest and the statute's requirements. At argument, appellant's counsel suggested that, since permission to marry cannot be granted unless the applicant shows that he has satisfied his court-determined support obligations to the prior children and that those children will not become public charges, the statute provides incentive for the applicant to make [*683] support payments to his children. Tr. of Oral Arg. 17-20. This "collection device" rationale cannot justify the statute's broad infringement on the right to marry.

First, with respect to individuals who are unable to meet the statutory requirements, the statute

[***633] merely prevents the applicant from getting married, without delivering any money at all into the hands of the applicant's prior children. More importantly, regardless of the applicant's ability or willingness to meet the statutory requirements, the State already has numerous other means for exacting compliance with support obligations, means that are at least as effective as the instant statute's and yet do not impinge upon [****23] the right to marry. Under Wisconsin law, whether the children are from a prior marriage or were born out of wedlock, court-determined support obligations may be enforced directly via [*390] wage assignments, civil contempt proceedings, and criminal penalties.¹⁶ And, if the State believes that parents of children out of their custody should be responsible for ensuring that those children do not become public charges, this interest can be achieved by adjusting the criteria used for determining the amounts to be paid under their support orders.

[****24] There is also some suggestion that § 245.10 protects the ability of marriage applicants to meet support obligations to prior children by preventing the applicants from incurring new support obligations. But the challenged provisions of § 245.10 are grossly underinclusive with respect to this purpose, since they do not limit in any way new financial commitments by the applicant other than those arising out of the contemplated marriage. The statutory classification is substantially overinclusive as well: Given the possibility that the new spouse will actually better the applicant's financial situation, by contributing income from a job or otherwise, the statute in many cases may prevent affected individuals from improving their

¹³ See Wisconsin Legislative Council Notes, 1959, reprinted following Wis. Stat. Ann. § 245.10 (Supp. 1977-1978); 5 Wisconsin Legislative Council, General Report 68 (1959).

¹⁴ See 5 *ibid.*

¹⁵ Although the statute as originally enacted in 1959 did not provide for automatic granting of permission, it did allow the court to grant permission if it found "good cause" for doing so, even in the absence of a showing that support obligations were being met. 1959 Wis. Laws, ch. 595, § 17. In 1961, the good-cause provision was deleted, and the requirement of a showing that the out-of-custody children are not and will not become public charges was added. 1961 Wis. Laws, ch. 505, § 11.

¹⁶ Wisconsin statutory provisions for civil enforcement of support obligations to children from a prior marriage include §§ 247.232 (wage assignment), 247.265 (same), and 295.03 (civil contempt). Support obligations arising out of paternity actions may be civilly enforced under §§ 52.21 (2) (wage assignment) and 52.40 (civil contempt). See also § 52.39. In addition, failure to meet support obligations may result in conviction of the felony offense of abandonment of a minor child, § 52.05, or the misdemeanor of failure to support a minor child, § 52.055.

ability to satisfy their prior support obligations. And, although it is true that the applicant will incur support obligations to any children born during the contemplated marriage, preventing the marriage may only result in the children being born out of wedlock, as in fact occurred in appellee's case. Since the support obligation is the same whether the child is born in or out of wedlock, the net result of preventing the marriage is simply more illegitimate [****25] children.

The statutory classification created by §§ 245.10(1), (4), [*391] (5) thus cannot be justified by the interests advanced in support of it. The judgment of the District Court is, accordingly,

Affirmed.

Concur by: BURGER; STEWART; POWELL; STEVENS

Concur

MR. CHIEF JUSTICE BURGER, concurring.

I join MR. JUSTICE **MARSHALL**'s opinion for the Court. With all deference, MR. JUSTICE **STEVENS**' opinion does not persuade me that the analysis in the Court's opinion is in any significant way inconsistent with the Court's unanimous holding in *Califano v. Jobst*, ante, p. 47. Unlike the intentional and substantial interference with the right to marry effected by the Wisconsin statute at issue here, the Social Security Act provisions challenged in *Jobst* did not constitute an "attempt to interfere with the individual's freedom to make a decision as important as marriage," *Califano v. Jobst*, ante, at 54, and, at most, had an indirect impact on that decision. It is with this understanding that I join the Court's opinion today.

[**684] MR. JUSTICE STEWART, concurring in the judgment.

I cannot join the opinion of the Court. To hold, as the Court does, that the Wisconsin statute violates [****26] the [Equal Protection Clause](#)

seems to me to misconceive the meaning of that constitutional guarantee. The [Equal Protection Clause](#) deals not with substantive rights or freedoms but with invidiously discriminatory classifications. [San Antonio Independent School Dist. v. Rodriguez](#), 411 U.S. 1, 59 (concurring opinion). The paradigm of its violation is, of course, classification by race. [McLaughlin v. Florida](#), 379 U.S. 184; [Loving v. Virginia](#), 388 U.S. 1, 13 (concurring opinion).

Like almost any law, the Wisconsin statute now before us affects some people and does not affect others. But to say that it thereby creates "classifications" in the equal protection sense strikes me as little short of fantasy. The problem in this case is not one of discriminatory classifications, but of unwarranted encroachment upon a constitutionally protected [*392] freedom. I think that the Wisconsin statute is unconstitutional because it exceeds the bounds of permissible state regulation of marriage, and invades the sphere of liberty protected by the [Due Process Clause of the Fourteenth Amendment](#).

I

I do not agree with the Court that there is a "right to marry" in the constitutional [****27] sense. That right, or more accurately that privilege,¹ is under our federal system peculiarly one to be defined and limited by state law. [Sosna v. Iowa](#), 419 U.S. 393, 404. A State may not only "significantly interfere with decisions to enter into the marital relationship,"² but may in many circumstances

¹ See Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L. J. 16 (1913).

² See ante, at 386.

³ *Boddie* was an "as applied" challenge; it does not require invalidation of § 245.10 as unconstitutional on its face. In ordinary circumstances, the Court should merely require that Wisconsin permit those members of the appellee class to marry if they can demonstrate "the bona fides of [their] indigency," 401 U.S., at 382. The statute in question, however, does not contain a severability clause, and the Wisconsin Legislature has made specific provision

absolutely prohibit it. Surely, for example, a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry who has a living husband or wife. But, just as surely, in regulating the intimate human relationship of marriage, there is a limit beyond which a State may not constitutionally go.

The Constitution does not specifically mention freedom to marry, but it is settled that the "liberty" protected [****28] by the Due Process Clause of the Fourteenth Amendment embraces [***635] more than those freedoms expressly enumerated in the Bill of Rights. See Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239; Pierce v. Society of Sisters, 268 U.S. 510, 534-535; Meyers v. Nebraska, 262 U.S. 390, 399-400. Cf. Shapiro v. Thompson, 294 U.S. 618, 629-630; United States v. Guest, 383 U.S. 745, 757-758; Aptheker v. Secretary of State, 378 U.S. 500, 505; Kent v. Dulles, 357 U.S. 116, 127; Truax v. Raich, 239 U.S.

33, 41. And the decisions of this Court [*393] have made clear that freedom of personal choice in matters of marriage and family life is one of the liberties so protected. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639; Roe v. Wade, 410 U.S. 113, 152-153; Loving v. Virginia, *supra*, at 12; Griswold v. Connecticut, 381 U.S. 479, 485-486; Pierce v. Society of Sisters, *supra*; Meyer v. Nebraska, *supra*. See also Prince v. Massachusetts, 321 U.S. 158; Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541.

[**685] It is evident that the Wisconsin law now before [****29] us directly abridges that freedom. The question is whether the state interests that support the abridgment can overcome the substantive protections of the Constitution.

The Wisconsin law makes permission to marry turn on the payment of money in support of one's children by a previous marriage or liaison. Those who cannot show both that they have kept up with their support obligations and that their children are not and will not become wards of the State are altogether prohibited from marrying.

If Wisconsin had said that no one could marry who had not paid all of the fines assessed against him for traffic violations, I suppose the constitutional invalidity of the law would be apparent. For while the state interest would certainly be legitimate, that interest would be both disproportionate and unrelated to the restriction of liberty imposed by the State. But the invalidity of the law before us is hardly so clear, because its restriction of liberty seems largely to be imposed only on those who have abused the same liberty in the past.

Looked at in one way, the law may be seen as simply a collection device additional to those used by Wisconsin and other States for enforcing parental [****30] support obligations. But since it operates by denying permission to marry, it also clearly reflects a legislative judgment that a person should not be permitted to incur new family financial obligations until he has fulfilled those he already has. Insofar as this judgment is

for the contingency that "utilization of the procedures [under § 245.10 may be] stayed or enjoined by the order of any court." In the event of such a stay or injunction after February 1, 1978, 1977 Wis. Laws, ch. 105, § 3 (Wis. Stat. § 245.105(3)), Wis. Legis. Serv. (West 1977), provides that "permission to remarry may likewise be granted to any petitioner who submits clear and convincing proof to the court that for reasonable cause he or she was not able to comply with a previous court obligation for child support."

The dissenting opinion of MR. JUSTICE REHNQUIST suggests that appellee may no longer be "incapable of discharging the arrearage as required by the support order and contributing sufficient funds in the future to remove his child from the welfare rolls." *Post*, at 410. There is no basis in the record for such speculation. The parties entered into a stipulation that as of August 1974, a month before appellee was denied a marriage license, appellee "was unemployed and indigent and unable to pay any sum for support of his issue." App. 21. In its opinion dated August 31, 1976, the District Court noted that "[i]n Redhail's case, because of his poverty he has been unable to satisfy the support obligation ordered in the paternity action, and, hence, a state court could not grant him permission to marry." 418 F. Supp. 1061, 1070 (ED Wis.). Appellant has not challenged the factual predicate of the trial court's determination, or even intimated that appellee's financial situation has improved materially. Such matters, of course, may be inquired into by the local court pursuant to the new procedures that will go into effect after February 1, 1978.

paternalistic rather than punitive, it manifests a concern [*394] for the economic well-being of a prospective marital household. These interests are legitimate concerns of the State. But it does not follow that they justify the absolute deprivation of the benefits of a legal marriage.

On several occasions this Court has held that a person's inability to [***636] pay money demanded by the State does not justify the total deprivation of a constitutionally protected liberty. In *Boddie v. Connecticut*, 401 U.S. 371, the Court held that the State's legitimate purposes in collecting filing fees for divorce actions were insufficient under the Due Process Clause to deprive the indigent of access to the courts where that access was necessary to dissolve the marital relationship. In *Tate v. Short*, 401 U.S. 395, and *Williams v. Illinois*, 399 U.S. 235, the Court held that an indigent offender could [****31] not have his term of imprisonment increased, and his liberty curtailed, simply by reason of his inability to pay a fine.

The principle of those cases applies here as well. The Wisconsin law makes no allowance for the truly indigent. The State flatly denies a marriage license to anyone who cannot afford to fulfill his support obligations and keep his children from becoming wards of the State. We may assume that the State has legitimate interests in collecting delinquent support payments and in reducing its welfare load. We may also assume that, as applied to those who can afford to meet the statute's financial requirements but choose not to do so, the law advances the State's objectives in ways superior to other means available to the State. The fact remains that some people simply cannot afford to meet the statute's financial requirements. To deny these people permission to marry penalizes them for failing to do that which they cannot do. Insofar as it applies to indigents, the state law is an irrational means of achieving these objectives of the State.

As directed against either the indigent or the

delinquent parent, the law is substantially more rational if viewed as [****32] a means of assuring the financial viability of future marriages. [*395] In this context, it reflects a plausible judgment that those who have not fulfilled their financial obligations and have not kept their children off the welfare rolls in the past are likely to encounter similar difficulties in the future. But the State's [**686] legitimate concern with the financial soundness of prospective marriages must stop short of telling people they may not marry because they are too poor or because they might persist in their financial irresponsibility. The invasion of constitutionally protected liberty and the chance of erroneous prediction are simply too great. A legislative judgment so alien to our traditions and so offensive to our shared notions of fairness offends the *Due Process Clause of the Fourteenth Amendment*.

II

In an opinion of the Court half a century ago, Mr. Justice Holmes described an equal protection claim as "the usual last resort of constitutional arguments." *Buck v. Bell*, 274 U.S. 200, 208. Today equal protection doctrine has become the Court's chief instrument for invalidating state laws. Yet, in a case like this one, the doctrine is no more than substantive [****33] due process by another name.

Although the Court purports to examine the bases for legislative classifications and to compare the treatment of legislatively defined groups, it actually corrects substantive limitations on what States may do. Thus, the effect of the Court's decision [***637] in this case is not to require Wisconsin to draw its legislative classifications with greater precision or to afford similar treatment to similarly situated persons. Rather, the message of the Court's opinion is that Wisconsin may not use its control over marriage to achieve the objectives of the state statute. Such restrictions on basic governmental power are at the heart of substantive due process.

The Court is understandably reluctant to rely on

substantive due process. See [Roe v. Wade](#), 410 U.S. at 167-168 (concurring opinion). But to embrace the essence of that doctrine under the guise of equal protection serves no purpose [*396] but obfuscation. "[C]ouched in slogans and ringing phrases," the Court's equal protection doctrine shifts the focus of the judicial inquiry away from its proper concerns, which include "the nature of the individual interest affected, the extent to which it [****34] is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen." [Williams v. Illinois](#), *supra*, at 260 (Harlan, J., concurring in result).

To conceal this appropriate inquiry invites mechanical or thoughtless application of misfocused doctrine. To bring it into the open forces a healthy and responsible recognition of the nature and purpose of the extreme power we wield when, in invalidating a state law in the name of the Constitution, we invalidate *pro tanto* the process of representative democracy in one of the sovereign States of the Union.

MR. JUSTICE POWELL, concurring in the judgment.

I concur in the judgment of the Court that Wisconsin's restrictions on the exclusive means of creating the marital bond, erected by Wis. Stat. §§ 245.10(1), (4), and (5) (1973), cannot meet applicable constitutional standards. I write separately because the majority's rationale sweeps too broadly in an area which traditionally has been subject [****35] to pervasive state regulation. The Court apparently would subject all state regulation which "directly and substantially" interferes with the decision to marry in a traditional family setting to "critical examination" or "compelling state interest" analysis. Presumably, "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Ante*, at 386. The Court

does not present, however, any principled means for distinguishing between the two types of regulations. Since state regulation in [*397] this area typically takes the form of a prerequisite or barrier to marriage or divorce, the degree of "direct" interference with the [**687] decision to marry or to divorce is unlikely to provide either guidance for state legislatures or a basis for judicial oversight.

I

On several occasions, the Court has acknowledged the importance of the marriage relationship to the maintenance of values essential [***638] to organized society. "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the *Due Process Clause of the Fourteenth Amendment*." [****36] [Cleveland Board of Education v. LaFleur](#), 414 U.S. 632, 639-640 (1974). Our decisions indicate that the guarantee of personal privacy or autonomy secured against unjustifiable governmental interference by the Due Process Clause "has some extension to activities relating to marriage, [Loving v. Virginia](#), 388 U.S. 1, 12 (1967)...." [Roe v. Wade](#), 410 U.S. 113, 152 (1973). "While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage....'" [Carey v. Population Services International](#), 431 U.S. 678, 684-685 (1977).

Thus, it is fair to say that there is a right of marital and familial privacy which places some substantive limits on the regulatory power of government. But the Court has yet to hold that all regulation touching upon marriage implicates a "fundamental right" triggering the most exacting judicial scrutiny.

1

¹ Although the cases cited in the text indicate that there is a sphere of privacy or autonomy surrounding an existing marital relationship

[****37] [*398] The principal authority cited by the majority is [*Loving v. Virginia*, 388 U.S. 1 \(1967\)](#). Although *Loving* speaks of the "freedom to marry" as "one of the vital personal rights essential to the orderly pursuit of happiness by free men," the Court focused on the miscegenation statute before it. Mr. Chief Justice Warren stated:

"Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. [*Skinner v. Oklahoma*, 316 U.S. 535, 541 \(1942\)](#). See also [*Maynard v. Hill*, 125 U.S. 190 \(1888\)](#). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the [*Fourteenth Amendment*](#), is surely to deprive all the State's citizens of liberty without due process of law. The [*Fourteenth Amendment*](#) requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Id.*, at 12.

Thus, *Loving* involved [****38] a denial of a "fundamental freedom" on a wholly unsupportable basis -- the use of classifications "directly subversive of the principle of equality at the heart of the [*Fourteenth Amendment*](#)...." It does not speak to the level of judicial scrutiny of, or governmental [***639] justification for, "supportable" restrictions on the "fundamental freedom" of individuals to marry or divorce.

In my view, analysis must start from the recognition of domestic relations as "an area that has long been regarded as a virtually exclusive province of the States." [*Sosna v. Iowa*, 419 U.S. 393, 404 \(1975\)](#). The marriage relation traditionally has been subject to regulation, initially by the

ecclesiastical authorities, [**688] and later by the secular state. As early as [*399] [*Pennoyer v. Neff*, 95 U.S. 714, 734-735 \(1878\)](#), this Court noted that a State "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." The State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of [****39] its people. S

"Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." [*Maynard v. Hill*, 125 U.S. 190, 209 \(1888\)](#).I

State regulation has included bans on incest, bigamy, and homosexuality, as well as various preconditions to marriage, such as blood tests. Likewise, a showing of fault on the part of one of the partners traditionally has been a prerequisite to the dissolution of an unsuccessful union. A "compelling state purpose" inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce.

II

State power over domestic relations is not without constitutional limits. The Due Process Clause requires a showing of justification "when the government intrudes on choices [****40] concerning family living arrangements" in a manner which is contrary to deeply rooted traditions. [*Moore v. East Cleveland*, 431 U.S. 494, 499, 503-504 \(1977\)](#) (plurality opinion). Cf. [*Smith v. Organization of Foster Families*, 431 U.S. 816, \[400\] 842-847 \(1977\)](#). Due process constraints

into which the State may not lightly intrude, they do not necessarily suggest that the same barrier of justification blocks regulation of the conditions of entry into or the dissolution of the marital bond. See generally Henkin, Privacy and Autonomy, 74 Colum. L. Rev. 1410, 1429-1432 (1974).

also limit the extent to which the State may monopolize the process of ordering certain human relationships while excluding the truly indigent from that process. Boddie v. Connecticut, 401 U.S. 371 (1971). Furthermore, under the Equal Protection Clause the means chosen by the State in this case must bear "a fair and substantial relation" to the object of the legislation. Reed v. Reed, 404 U.S. 71, 76 (1971), quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Craig v. Boren, 429 U.S. 190, 210-211 (1976) (POWELL, J., concurring).

[***640] The Wisconsin measure in this case does not pass muster under either due process or equal protection standards. Appellant identifies three objectives which are supposedly furthered by the statute in question: (i) a counseling function; (ii) an incentive to satisfy outstanding support obligations; and (iii) [****41] a deterrent against incurring further obligations. The opinion of the Court amply demonstrates that the asserted counseling objective bears no relation to this statute. *Ante*, at 388-389. No further discussion is required here.

The so-called "collection device" rationale presents a somewhat more difficult question. I do not agree with the suggestion in the Court's opinion that a State may never condition the right to marry on satisfaction of existing support obligations simply because the State has alternative methods of compelling such payments. To the extent this restriction applies to persons who are able to make the required support payments but simply wish to shirk their moral and legal obligation, the Constitution interposes no bar to this additional collection mechanism. The vice inheres, not in the collection concept, but in the failure to make provision for those without the means to comply with child-support obligations. I draw support from Mr. Justice Harlan's opinion in [**689] Boddie v. Connecticut. In that case, the Court struck down filing fees for divorce actions as applied to those wholly unable to pay, holding "that a State may not, consistent with the [****42] obligations [*401] imposed on it by the Due Process Clause of the

Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." 401 U.S., at 383. The monopolization present in this case is total, for Wisconsin will not recognize foreign marriages that fail to conform to the requirements of § 245.10. ²

[****43] The [***641] third justification, only obliquely advanced by appellant, is that the statute preserves the ability of marriage [*402] applicants to support their prior issue by preventing them from incurring new obligations. The challenged provisions of § 245.10 are so grossly underinclusive with respect to this objective, given the many ways that additional financial obligations may be incurred by the applicant quite apart from a contemplated marriage, that the classification "does not bear a fair and substantial relation to the object of the legislation." Craig v. Boren, *supra*, at 211 (POWELL, J., concurring). See Eisenstadt v. Baird, 405 U.S. 438, 447-450 (1972); cf. Moore v. East Cleveland, 431 U.S., at 499-500 (plurality opinion).

The marriage applicant is required by the Wisconsin statute not only to submit proof of compliance with his support obligation, but also to demonstrate -- in some unspecified way -- that his children "are not then and are not likely thereafter to become public charges." ³ This statute does more than simply "fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action." [****44] Griffin v. Illinois, 351 U.S. 12, 34 (1956) (Harlan, J., dissenting). It tells the truly indigent, whether they have met their support obligations or not, that they may not marry so long as their children are public charges or there is a danger that their children might go on public assistance in the future.

³The plaintiff in the companion case, Leipzig v. Pallamolla, 418 F. Supp. 1073 (E.D. Wis. 1976), had complied with his support obligations but was denied permission to marry because his four minor children received welfare benefits.

⁴ Apparently, no other jurisdiction [**690] has embraced this approach as a method of reducing the number of children on public assistance. Because the State has not established a justification for [*403] this unprecedented foreclosure of marriage to many of its citizens solely because of their indigency, I concur in the judgment of the Court.

[****45] MR. JUSTICE STEVENS, concurring in the judgment.

Because of the tension between some of the language in MR. JUSTICE MARSHALL'S opinion for the Court and the Court's unanimous holding in *Califano v. Jobst*, ante, p. 47, a further exposition of the reasons why the Wisconsin statute offends the [Equal Protection Clause of the Fourteenth Amendment](#) is necessary.

When a State allocates benefits or burdens, it may have valid reasons for treating married and unmarried persons differently. Classification based on marital status has been an [***642] accepted characteristic of tax legislation, Selective Service rules, and Social Security regulations. As cases like *Jobst* demonstrate, such laws may "significantly interfere with decisions to enter into the marital relationship." Ante, at 386. That kind of interference, however, is not a sufficient reason for invalidating every law reflecting a legislative judgment that there are relevant differences between married persons as a class and unmarried persons as a class. ¹

⁴ Quite apart from any impact on the truly indigent, the statute appears to "confer upon [the judge] a license for arbitrary procedure," *Kent v. United States*, 383 U.S. 541, 553 (1966), in the determination of whether an applicant's children are "likely thereafter to become public charges." A serious question of procedural due process is raised by this feature of standardless discretion, particularly in light of the hazards of prediction in this area.

¹ In *Jobst*, we pointed out that "it was rational for Congress to assume that marital status is a relevant test of probable dependency...." We had explained:

[****46] A classification based on marital status is fundamentally [*404] different from a classification which determines who may lawfully enter into the marriage relationship.² The individual's interest in making the marriage decision independently is sufficiently important to merit special constitutional protection. See [Whalen v. Roe](#), 429 U.S. 589, 599-600. It is not, however, an interest which is constitutionally immune from evenhanded regulation. Thus, laws prohibiting marriage to a child, a close relative, or a person afflicted with venereal disease, are unchallenged even though they "interfere directly and substantially with the right to marry." Ante, at 387. This Wisconsin statute has a different character.

Under this statute, a person's economic status may determine his eligibility to enter into a lawful marriage. A noncustodial parent whose children are "public charges" may not marry even if he [****47] has met his court-ordered obligations. ³ Thus, within the class of parents who have fulfilled their court-ordered obligations, the rich may marry and the poor may not. This type of statutory discrimination is, I believe, totally unprecedented, ⁴ as well as inconsistent with

"Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status. Traditionally, the event not only creates a new family with attendant new responsibilities, but also modifies the pre-existing relationships between the bride and groom and their respective families. Frequently, of course, financial independence and marriage do not go hand in hand. Nevertheless, there can be no question about the validity of the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried." Ante, at 53.

² *Jobst* is in the former category; [Loving v. Virginia](#), 388 U.S. 1, is in the latter.

³ As MR. JUSTICE POWELL demonstrates, a constitutional defect in this provision invalidates the entire statute. Ante, at 401 n. 2.

⁴ The economic aspects of a prospective marriage are unquestionably relevant to almost every individual's marriage decision. But I know of no other state statute that denies the individual marriage partners the right to assess the financial consequences of their decision independently. I seriously question whether any limitation on the right to marry may be predicated on economic status, but that

[**691] our tradition of administering justice equally to the rich and to the poor.⁵

[****48] The statute appears to reflect a legislative judgment that persons who have demonstrated an inability to support their offspring should not [***643] be permitted to marry and thereafter to [*405] bring additional children into the world.⁶ Even putting to one side the growing number of childless marriages and the burgeoning number of children born out of wedlock, that sort of reasoning cannot justify this deliberate discrimination against the poor.

The statute prevents impoverished parents from marrying even though their intended spouses are economically independent. Presumably, the Wisconsin Legislature [****49] assumed (a) that only fathers would be affected by the legislation, and (b) that they would never marry employed women. The first assumption ignores the fact that fathers are sometimes awarded custody,⁷ and the second ignores the composition of today's work force.⁸ To the extent that the statute denies a hard-pressed parent any opportunity to prove that an intended marriage will ease rather than aggravate

his financial straits, it not only rests on unreliable premises, but also defeats its own objectives.

[****50] These questionable assumptions also explain why this statutory blunderbuss is wide of the target in another respect. The prohibition on marriage applies to the noncustodial parent but allows the parent who has custody to marry without the State's leave. Yet the danger that new children will further strain [*406] an inadequate budget is equally great for custodial and noncustodial parents, unless one assumes (a) that only mothers will ever have custody and (b) that they will never marry unemployed men.

Characteristically, this law fails to regulate the marriages of those parents who are least likely to be able to afford another family, for it applies only to parents under a court order to support their children. Wis. Stat. § 245.10 (1) (1973). The very poorest parents are unlikely to be the objects of support orders.⁹ If the State meant to prevent the marriage of those who have demonstrated their inability to provide for children, it overlooked the most obvious targets of legislative concern.

[****51] In sum, the public-charge provision is either futile or perverse insofar as it applies to childless couples, [***644] couples who will have illegitimate children if they are forbidden to marry, couples whose economic status will be improved by marriage, and couples who are so poor that the marriage will have [**692] no impact on the welfare status of their children in any event. Even assuming that the right to marry may sometimes be denied on economic grounds, this clumsy and

question need not be answered in this case.

⁵ This tradition explains why each member of the federal judiciary has sworn or affirmed that he will "do equal right to the poor and to the rich...." See [28 U.S.C. § 453](#).

⁶ The "public charge" provision, which falls on parents who have faithfully met their obligations, but who are unable to pay enough to remove their children from the welfare rolls, obviously cannot be justified by a state interest in assuring the payment of child support. And, of course, it would be absurd for the State to contend that an interest in providing paternalistic counseling supports a total ban on marriage.

⁷ The Wisconsin Legislature has itself provided:

"In determining the parent with whom a child shall remain, the court shall consider all facts in the best interest of the child and shall not prefer one parent over the other solely on the basis of the sex of the parent." Wis. Stat. § 247.24 (3) (1977).

⁸ Plainly, both of these assumptions are the product of a habitual way of thinking about male and female roles "rather than analysis or actual reflection." See [Califano v. Goldfarb](#), [430 U.S. 199](#), [222](#) (STEVENS, J., concurring in judgment).

⁹ Although Wisconsin precedents are scarce, the State's courts seem to follow the general rule that child-support orders are heavily influenced by the parent's ability to pay. See H. Clark, *Law of Domestic Relations* 496 (1968); see also [Miller v. Miller](#), [67 Wis. 2d 435](#), [227 N.W. 2d 626](#) (1975). A parent who is so disabled that he will never earn enough to pay child support is unlikely to be sued, and a court order is unlikely to be granted. Cf. [Ponath v. Hedrick](#), [22 Wis. 2d 382](#), [126 N.W. 2d 28](#) (1964) (social security benefits not to be included in determining relative's ability to make support payments).

deliberate legislative discrimination between the rich and the poor is irrational in so many ways that it cannot withstand scrutiny under the [Equal Protection Clause of the Fourteenth Amendment](#).¹⁰

[***52]

Dissent by: REHNQUIST

Dissent

[*407] MR. JUSTICE REHNQUIST, dissenting.

I substantially agree with my Brother POWELL's reasons for rejecting the Court's conclusion that marriage is the sort of "fundamental right" which must invariably trigger the strictest judicial scrutiny. I disagree with his imposition of an "intermediate" standard of review, which leads him to conclude that the statute, though generally valid as an "additional collection mechanism" offends the Constitution by its "failure to make provision for those without the means to comply with child-support obligations." *Ante*, at 400. For similar reasons, I disagree with my Brother STEWART'S conclusion that the statute is invalid for its failure to exempt those persons who "simply cannot afford to meet the statute's financial requirements." *Ante*, at 394. I would view this legislative judgment in the light of the traditional presumption of validity. I think that under the [Equal Protection Clause](#) the statute need pass only the "rational basis test," [Dandridge v. Williams, 397 U.S. 471, 485 \(1970\)](#), and that under the Due Process Clause it need only be shown that it bears a rational relation to a constitutionally permissible [***53] objective,

¹⁰Neither the fact that the appellee's interest is constitutionally protected, nor the fact that the classification is based on economic status is sufficient to justify a "level of scrutiny" so strict that a holding of unconstitutionality is virtually foreordained. On the other hand, the presence of these factors precludes a holding that a rational expectation of occasional and random benefit is sufficient to demonstrate compliance with the constitutional command to govern impartially. See [Craig v. Boren, 429 U.S. 190, 211](#) (STEVENS, J., concurring).

[Williamson v. Lee Optical Co., 348 U.S. 483, 491 \(1955\)](#); [Ferguson v. Skrupa, 372 U.S. 726, 733 \(1963\)](#) (Harlan, J., concurring). The statute so viewed is a permissible exercise of the State's power to regulate family life and to assure the support of minor children, despite its possible imprecision in the extreme cases envisioned in the concurring opinions.

Earlier this Term the traditional standard of review was applied in *Califano v. Jobst, ante*, p. 47, despite the claim that the statute there in question burdened the exercise of the right to marry. The extreme situation considered there involved a permanently disabled appellee whose benefits under the Social Security Act had been terminated because of his [*408] marriage to an equally disabled woman who was not, however, a beneficiary under the Act. This Court recognized that Congress, in granting the original benefit, could reasonably assume that a disabled [***645] adult child remained dependent upon his parents for support. The Court concluded that, upon a beneficiary's marriage, Congress could terminate his benefits, because "there can be no question about the validity of the assumption [****54] that a married person is less likely to be dependent on his parents for support than one who is unmarried." *Ante*, at 53. Although that assumption had been proved false as applied in that individual case, the statute was nevertheless rational. "The broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *Ante*, at 55.

The analysis applied in *Jobst* is equally applicable here. Here, too, the Wisconsin Legislature has "adopted this rule in the course of constructing a complex social welfare [**693] system that necessarily deals with the intimacies of family life." *Ante*, at 54 n. 11. Because of the limited amount of funds available for the support of needy children, the State has an exceptionally strong interest in securing as much support as their parents are able to pay. Nor does the extent of the burden imposed

by this statute so differentiate it from that considered in *Jobst* as to warrant a different result. In the case of some applicants, this statute makes the proposed marriage legally impossible for financial reasons; in a similar number of extreme cases, [****55] the Social Security Act makes the proposed marriage practically impossible for the same reasons. I cannot conclude that such a difference justifies the application of a heightened standard of review to the statute in question here. In short, I conclude that the statute, despite its imperfections, is sufficiently rational to satisfy the demands of the [Fourteenth Amendment](#).

Two of the opinions concurring in the judgment seem to agree that the statute is sufficiently rational except as applied to the truly indigent. *Ante*, at 394 (STEWART, J.); *ante*, at [*409] 400 (POWELL, J.). Under this view, the statute could, I suppose, be constitutionally applied to forbid the marriages of those applicants who had willfully failed to contribute so much as was in their means to the support of their dependent children. Even were I to agree that a statute based upon generally valid assumptions could be struck down on the basis of "selected, atypical examples," *Jobst, ante*, at 55, I could not concur in the judgment of the Court, because there has been no showing that this appellee is so truly indigent that the State could not refuse to sanction his marriage.

Under well-established [****56] rules of standing, a litigant may assert the invalidity of a statute only as applied in his case. "[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the Court." [Broadrick v. Oklahoma, 413 U.S. 601, 610 \(1973\)](#). See also [Barrows v. Jackson, 346 U.S. 249, 256-257 \(1953\)](#). We have made a limited exception to this rule in cases arising under the [First Amendment](#), allowing the invalidation of facially [***646] overbroad statutes to guard against a chilling effect on the exercise of constitutionally protected free speech. See, e.g., [Coates v.](#)

[Cincinnati, 402 U.S. 611 \(1971\)](#). But no claim based on the [First Amendment](#) is or could be made by this appellee.

Appellee's standing to contest the validity of the statute as applied to him must be considered on the basis of the facts as stipulated before the District Court. The State conceded, without requiring proof, that "[f]rom May of 1972 until August of 1974, [appellee] was unemployed and indigent and unable to pay any sum for support of his issue." App. 21. There is [****57] no stipulation in this record that appellee was indigent at the time he was denied a marriage license on September 30, 1974, or that he was indigent at the time he filed his complaint on December 24, 1974, or that he was indigent at the time the District Court rendered its judgment on August 31, 1976. All we know of his more recent financial [*410] condition is his counsel's concession at oral argument that appellee had married in Illinois, Tr. of Oral Arg. 23, clearly demonstrating that he knows how to obtain funds for a purpose which he deems sufficiently important. On these inartfully stipulated facts, it cannot be said, even now, that this appellee is incapable of discharging the arrearage as required by the support order and contributing sufficient funds in the future to remove his child from the welfare rolls. Therefore, even under the view taken by the opinions concurring in the judgment, appellee has not shown that this statute is unconstitutional as applied to him.

[**694] Because of my conclusion that the statute is valid despite its possible application to the truly indigent, I need not determine whether the named appellee's failure to establish his indigency should preclude [****58] this Court from granting injunctive relief to the indigent members of the class which appellee purports to represent. * Our

* Ordinarily, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." [East Texas Motor Freight v. Rodriguez, 431 U.S. 395, 403 \(1977\)](#), quoting [Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 216 \(1974\)](#). At least where the issue is properly

decisions have demonstrated that, where the claim of the named representative has become moot, this Court is not bound to dismiss the action but may consider a variety of factors in determining whether to proceed. See generally [Kremens v. Bartley](#), [431 U.S. 119, 129-135 \(1977\)](#). It has never been explicitly determined whether [*411] similar considerations apply where the named representative never had a valid claim of his own. But see [Allee v. Medrano](#), [416 U.S. 802, 828-829, and n. 4 \(1974\)](#) (BURGER, C.J., concurring and dissenting). In light of my view on the merits, I am content to save this question for another day.

[****59] I would reverse the judgment of the District Court.

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Federal Quick Index, Equal Protection of the Laws; Marriage

Annotation References:

raised, an appellate court may consider the representative's failure to establish his own claim in determining whether a class action may be maintained. See, e.g., [Donaldson v. Pillsbury Co.](#), [554 F. 2d 825, 831-832, n. 5 \(CA8 1977\)](#); cf. [East Texas](#), [supra](#), at 406 n. 12. In some instances, the court may eliminate from the class those persons whom the named plaintiff may not adequately represent. [La Mar v. H & B Novelty & Loan Co.](#), [489 F. 2d 461 \(CA9 1973\)](#). In this case, such an approach could require the dismissal of the class action altogether, since appellee can represent no one with a valid claim. The State, however, has inexplicably failed to challenge the certification of the plaintiff class, either here or in the trial court.

What circumstances render civil case, or issues arising therein, moot so as to preclude Supreme Court's consideration of their merits. [44 L Ed 2d 745](#).

Supreme Court's views as to the federal legal aspects of the right of privacy. [43 L Ed 2d 871](#).

Supreme Court's construction of Civil Rights Act of 1871 ([42 USCS 1983](#)) providing private right of action for violation of federal rights. [43 L Ed 2d 833](#).

Validity, under Federal Constitution, of abortion laws. [35 L Ed 2d 735](#).

Supreme Court's definition [****60] and application of doctrine of "abstention" where questions of state law are controlling in federal civil case. [20 L Ed 2d 1623](#).

Discretion of federal court to remit relevant state issues to state court in which no action is pending. [94 L Ed 879, 3 L Ed 2d 1827, 8 ALR2d 1228](#).

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