



## **50th Anniversary of the Voting Rights Act of 1965: Where We've Been...and How Far Have We Come?**

A Panel Discussion

Moderator: Paulette Brown, Partner, Locke Lord LLP

Panelists:

Justice Bertina Lampkin, Illinois Appellate Court

Lori Lightfoot, Partner, Mayer Brown

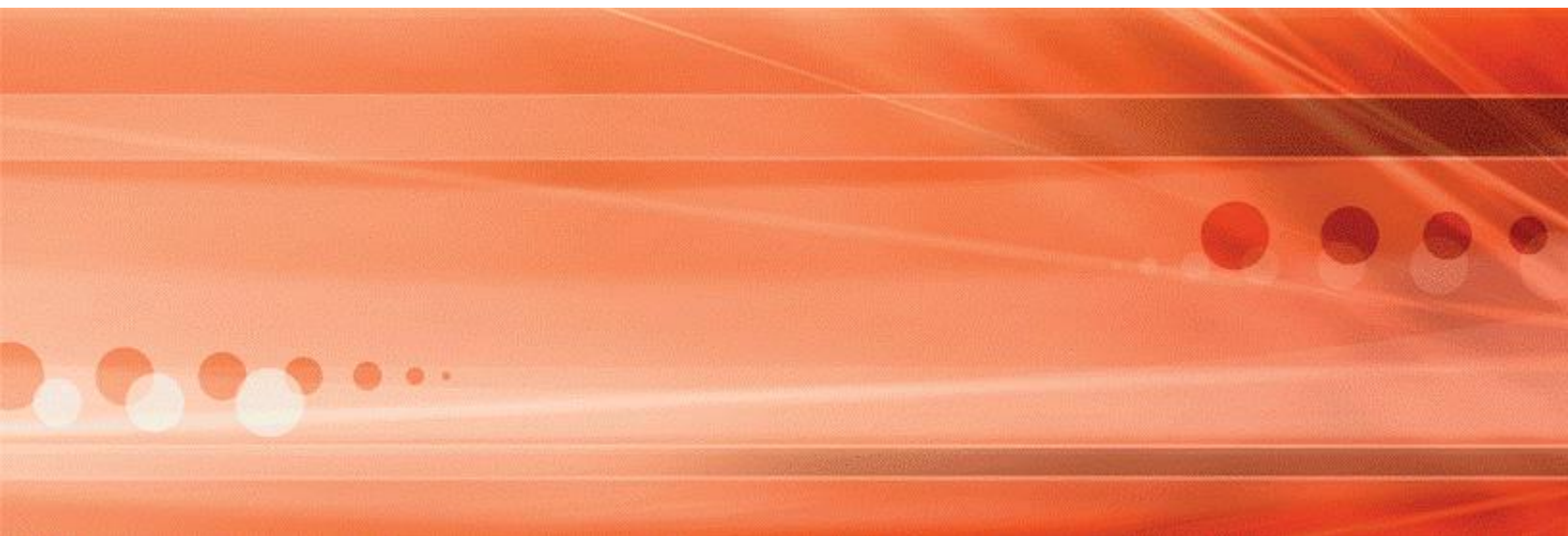
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July 28, 2015

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## **CLE BACKGROUND MATERIALS**



## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

## Syllabus

ALABAMA LEGISLATIVE BLACK CAUCUS ET AL. *v.*  
ALABAMA ET AL.APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
MIDDLE DISTRICT OF ALABAMA

No. 13–895. Argued November 12, 2014—Decided March 25, 2015\*

In 2012 Alabama redrew the boundaries of the State’s 105 House districts and 35 Senate districts. In doing so, while Alabama sought to achieve numerous traditional districting objectives—*e.g.*, compactness, not splitting counties or precincts, minimizing change, and protecting incumbents—it placed yet greater importance on two goals: (1) minimizing a district’s deviation from precisely equal population, by keeping any deviation less than 1% of the theoretical ideal; and (2) seeking to avoid retrogression with respect to racial minorities’ “ability to elect their preferred candidates of choice” under §5 of the Voting Rights Act of 1965, 52 U. S. C. §10304(b), by maintaining roughly the same black population percentage in existing majority-minority districts.

Appellants—Alabama Legislative Black Caucus (Caucus), Alabama Democratic Conference (Conference), and others—claim that Alabama’s new district boundaries create a “racial gerrymander” in violation of the Fourteenth Amendment’s Equal Protection Clause. After a bench trial, the three-judge District Court ruled (2 to 1) for the State. It recognized that electoral districting violates the Equal Protection Clause when race is the “predominant” consideration in deciding “to place a significant number of voters within or without a particular district,” *Miller v. Johnson*, 515 U. S. 900, 913, 916, and the use of race is not “narrowly tailored to serve a compelling state interest,” *Shaw v. Hunt*, 517 U. S. 899, 902 (*Shaw II*).

In ruling against appellants, it made four critical determinations:

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\*Together with No. 13–1138, *Alabama Democratic Conference et al. v. Alabama et al.*, also on appeal from the same court.

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(1) that both appellants had argued “that the Acts *as a whole* constitute racial gerrymanders,” and that the Conference had also argued that the State had racially gerrymandered Senate Districts 7, 11, 22, and 26; (2) that the Conference lacked standing to make its racial gerrymandering claims; (3) that, in any event, appellants’ claims must fail because race “was not the predominant motivating factor” in making the redistricting decisions; and (4) that, even were it wrong about standing and predominance, these claims must fail because any predominant use of race was “narrowly tailored” to serve a “compelling state interest” in avoiding retrogression under §5.

*Held:*

1. The District Court’s analysis of the racial gerrymandering claim as referring to the State “as a whole,” rather than district-by-district, was legally erroneous. Pp. 5–12.

(a) This Court has consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*, see, e.g., *Shaw v. Reno*, 509 U. S. 630, 649 (*Shaw I*), and has described the plaintiff’s evidentiary burden similarly, see *Miller, supra*, at 916. The Court’s district-specific language makes sense in light of the personal nature of the harms that underlie a racial gerrymandering claim, see *Bush v. Vera*, 517 U. S. 952, 957; *Shaw I, supra*, at 648. Pp. 5–6.

(b) The District Court found the fact that racial criteria had not predominated in the drawing of some Alabama districts sufficient to defeat a claim of racial gerrymandering with respect to the State *as an undifferentiated whole*. But a showing that race-based criteria did not significantly affect the drawing of *some* Alabama districts would have done little to defeat a claim that race-based criteria predominantly affected the drawing of *other* Alabama districts. Thus, the District Court’s undifferentiated statewide analysis is insufficient, and the District Court must on remand consider racial gerrymandering with respect to the individual districts challenged by appellants. Pp. 7–8.

(c) The Caucus and the Conference did not waive the right to further consideration of a district-by-district analysis. The record indicates that plaintiffs’ evidence and arguments embody the claim that individual majority-minority districts were racially gerrymandered, and those are the districts that the District Court must reconsider. Although plaintiffs relied heavily upon statewide evidence to prove that race predominated in the drawing of individual district lines, neither the use of statewide evidence nor the effort to show widespread effect can transform a racial gerrymandering claim about a set of individual districts into a separate, general claim that the leg-

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islature racially gerrymandered the State “as” an undifferentiated “whole.” Pp. 8–12.

2. The District Court also erred in deciding, *sua sponte*, that the Conference lacked standing. It believed that the “record” did “not clearly identify the districts in which the individual members of the [Conference] reside.” But the Conference’s post-trial brief and the testimony of a Conference representative support an inference that the organization has members in all of the majority-minority districts, which is sufficient to meet the Conference’s burden of establishing standing. At the very least, the Conference reasonably believed that, in the absence of a state challenge or a court request for more detailed information, it need not provide additional information such as a specific membership list. While the District Court had an independent obligation to confirm its jurisdiction, in these circumstances elementary principles of procedural fairness required the District Court, rather than acting *sua sponte*, to give the Conference an opportunity to provide evidence of member residence. On remand, the District Court should permit the Conference to file its membership list and the State to respond, as appropriate. Pp. 12–15.

3. The District Court also did not properly calculate “predominance” in its alternative holding that “[r]ace was not the predominant motivating factor” in the creation of any of the challenged districts. It reached its conclusion in part because it placed in the balance, among other nonracial factors, legislative efforts to create districts of approximately equal population. An equal population goal, however, is not one of the “traditional” factors to be weighed against the use of race to determine whether race “predominates,” see *Miller, supra*, at 916. Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator’s determination as to *how* equal population objectives will be met. Had the District Court not taken a contrary view of the law, its “predominance” conclusions, including those concerning the four districts that the Conference specifically challenged, might well have been different. For example, there is strong, perhaps overwhelming, evidence that race did predominate as a factor when the legislature drew the boundaries of Senate District 26. Pp. 15–19.

4. The District Court’s final alternative holding—that “the [challenged] Districts would satisfy strict scrutiny”—rests upon a misperception of the law. Section 5 does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority’s ability to elect a preferred candidate of choice. Pp. 19–23.

(a) The statute’s language, 52 U. S. C. §§10304(b), (d), and Department of Justice Guidelines make clear that §5 is satisfied if mi-

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nority voters retain the ability to elect their preferred candidates. The history of §5 further supports this view, as Congress adopted the language in §5 to reject this Court’s decision in *Georgia v. Ashcroft*, 539 U. S. 461, and to accept the views of Justice Souter’s dissent—that, in a §5 retrogression case, courts should ask whether a new voting provision would likely deprive minority voters of their ability to elect a candidate of their choice, and that courts should not mechanically rely upon numerical percentages but should take account of all significant circumstances, *id.*, at 493, 498, 505, 509. Here, both the District Court and the legislature relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression. Pp. 19–22.

(b) In saying this, this Court does not insist that a state legislature, when redistricting, determine *precisely* what percent minority population §5 demands. A court’s analysis of the narrow tailoring requirement insists only that the legislature have a “strong basis in evidence” in support of the (race-based) choice that it has made. Brief for United States as *Amicus Curiae* 29. Here, however, the District Court and the legislature both asked the wrong question with respect to narrow tailoring. They asked how to maintain the present minority percentages in majority-minority districts, instead of asking the extent to which they must preserve existing minority percentages in order to maintain the minority’s present ability to elect the candidate of its choice. Because asking the wrong question may well have led to the wrong answer, the Court cannot accept the District Court’s conclusion. Pp. 22–23.

989 F. Supp. 2d 1227, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion.

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Nos. 13-895 and 13-1138

ALABAMA DEMOCRATIC CONFERENCE, ET AL.,  
APPELLANTS  
13-1138  
*v.*  
ALABAMA ET AL.

[March 25, 2015]

The Alabama Legislative Black Caucus and the Alabama Democratic Conference appeal a three-judge Federal District Court decision rejecting their challenges to the lawfulness of Alabama’s 2012 redistricting of its State House of Representatives and State Senate. The appeals focus upon the appellants’ claims that new district boundaries create “racial gerrymanders” in violation of the Fourteenth Amendment’s Equal Protection Clause. See, e.g., *Shaw v. Hunt*, 517 U. S. 899, 907–908 (1996) (*Shaw II*) (Fourteenth Amendment forbids use of race as “‘predominant’” district boundary-drawing “‘factor’” unless boundaries are “narrowly tailored” to achieve a “‘compelling state interest’” (citations omitted)). We find that the

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District Court applied incorrect legal standards in evaluating the claims. We consequently vacate its decision and remand the cases for further proceedings.

## I

The Alabama Constitution requires the legislature to reapportion its State House and Senate electoral districts following each decennial census. Ala. Const., Art. IX, §§199–200. In 2012 Alabama redrew the boundaries of the State’s 105 House districts and 35 Senate districts. 2012 Ala. Acts no. 602 (House plan); *id.*, at no. 603 (Senate plan) (Acts). In doing so, Alabama sought to achieve numerous traditional districting objectives, such as compactness, not splitting counties or precincts, minimizing change, and protecting incumbents. But it placed yet greater importance on achieving two other goals. See Alabama Legislature Reapportionment Committee Guidelines in No. 12–cv–691, Doc. 30–4, pp. 3–5 (Committee Guidelines).

First, it sought to minimize the extent to which a district might deviate from the theoretical ideal of precisely equal population. In particular, it set as a goal creating a set of districts in which no district would deviate from the theoretical, precisely equal ideal by more than 1%—*i.e.*, a more rigorous deviation standard than our precedents have found necessary under the Constitution. See *Brown v. Thomson*, 462 U. S. 835, 842 (1983) (5% deviation from ideal generally permissible). No one here doubts the desirability of a State’s efforts generally to come close to a one-person, one-vote ideal.

Second, it sought to ensure compliance with federal law, and, in particular, the Voting Rights Act of 1965. 79 Stat. 439, as amended, 52 U. S. C. §10301 *et seq.* At the time of the redistricting Alabama was a covered jurisdiction under that Act. Accordingly §5 of the Act required Alabama to demonstrate that an electoral change, such as redistrict-

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ing, would not bring about retrogression in respect to racial minorities’ “ability . . . to elect their preferred candidates of choice.” 52 U.S.C. §10304(b). Specifically, Alabama believed that, to avoid retrogression under §5, it was required to maintain roughly the same black population percentage in existing majority-minority districts. See Appendix B, *infra*.

Compliance with these two goals posed particular difficulties with respect to many of the State’s 35 majority-minority districts (8 in the Senate, 27 in the House). That is because many of these districts were (compared with the average district) underpopulated. In order for Senate District 26, for example, to meet the State’s no-more-than-1% population-deviation objective, the State would have to add about 16,000 individuals to the district. And, prior to redistricting, 72.75% of District 26’s population was black. Accordingly, Alabama’s plan added 15,785 new individuals, and only 36 of those newly added individuals were white.

This suit, as it appears before us, focuses in large part upon Alabama’s efforts to achieve these two goals. The Caucus and the Conference basically claim that the State, in adding so many new minority voters to majority-minority districts (and to others), went too far. They allege the State created a constitutionally forbidden “racial gerrymander”—a gerrymander that (*e.g.*, when the State adds more minority voters than needed for a minority group to elect a candidate of its choice) might, among other things, harm the very minority voters that Acts such as the Voting Rights Act sought to help.

After a bench trial, the Federal District Court held in favor of the State, *i.e.*, against the Caucus and the Conference, with respect to their racial gerrymandering claims as well as with respect to several other legal claims that the Caucus and the Conference had made. With respect to racial gerrymandering, the District Court recognized that



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electoral districting violates the Equal Protection Clause when (1) race is the “dominant and controlling” or “predominant” consideration in deciding “to place a significant number of voters within or without a particular district,” *Miller v. Johnson*, 515 U. S. 900, 913, 916 (1995), and (2) the use of race is not “narrowly tailored to serve a compelling state interest,” *Shaw II*, 517 U. S., at 902; see also *Shaw v. Reno*, 509 U. S. 630, 649 (1993) (*Shaw I*) (Constitution forbids “separat[ion of] voters into different districts on the basis of race” when the separation “lacks sufficient justification”); *Bush v. Vera*, 517 U. S. 952, 958–959, 976 (1996) (principal opinion of O’Connor, J.) (same). But, after trial the District Court held (2 to 1) that the Caucus and the Conference had failed to prove their racial gerrymandering claims. The Caucus along with the Conference (and several other plaintiffs) appealed. We noted probable jurisdiction with respect to the racial gerrymandering claims. 572 U. S. \_\_\_\_ (2014).

We shall focus upon four critical District Court determinations underlying its ultimate “no violation” conclusion. They concern:

1. *The Geographical Nature of the Racial Gerrymandering Claims.* The District Court characterized the appellants’ claims as falling into two categories. In the District Court’s view, both appellants had argued “that the Acts *as a whole* constitute racial gerrymanders,” 989 F. Supp. 2d 1227, 1287 (MD Ala. 2013) (emphasis added), and one of the appellants (the Conference) had also argued that the State had racially gerrymandered four specific electoral districts, Senate Districts 7, 11, 22, and 26, *id.*, at 1288.
2. *Standing.* The District Court held that the Caucus had standing to argue its racial gerrymandering claim with respect to the State “as a whole.” But the Conference lacked standing to make any of its

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racial gerrymandering claims—the claim requiring consideration of the State “as a whole,” and the claims requiring consideration of four individual Senate districts. *Id.*, at 1292.

3. *Racial Predominance.* The District Court held that, in any event, the appellants’ claims must fail because race “was not the predominant motivating factor” either (a) “for the Acts as a whole” or (b) with respect to “Senate Districts 7, 11, 22, or 26.” *Id.*, at 1293.
4. *Narrow Tailoring/Compelling State Interest.* The District Court also held that, even were it wrong about standing and predominance, the appellants’ racial gerrymandering claims must fail. That is because any predominant use of race in the drawing of electoral boundaries was “narrowly tailored” to serve a “compelling state interest,” *id.*, at 1306–1307, namely the interest in avoiding retrogression with respect to racial minorities’ “ability to elect their preferred candidates of choice.” §10304(b).

In our view, each of these determinations reflects an error about relevant law. And each error likely affected the District Court’s conclusions—to the point where we must vacate the lower court’s judgment and remand the cases to allow appellants to reargue their racial gerrymandering claims. In light of our opinion, all parties remain free to introduce such further evidence as the District Court shall reasonably find appropriate.

## II

We begin by considering the geographical nature of the racial gerrymandering claims. The District Court repeatedly referred to the racial gerrymandering claims as claims that race improperly motivated the drawing of boundary lines of the State *considered as a whole*. See, e.g., 989 F. Supp. 2d, at 1293 (“Race was not the predomi-

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nant motivating factor for the Acts as a whole”); *id.*, at 1287 (construing plaintiffs’ challenge as arguing that the “Acts as a whole constitute racial gerrymanders”); *id.*, at 1292 (describing the plaintiffs’ challenge as a “claim of racial gerrymandering to the Acts as a whole”); cf. *supra*, at 4–5 (noting four exceptions).

A racial gerrymandering claim, however, applies to the boundaries of individual districts. It applies district-by-district. It does not apply to a State considered as an undifferentiated “whole.” We have consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*. See, e.g., *Shaw I*, 509 U. S., at 649 (violation consists of “separat[ing] voters *into different districts* on the basis of race” (emphasis added)); *Vera*, 517 U. S., at 965 (principal opinion) (“[Courts] must scrutinize *each challenged district . . .*” (emphasis added)). We have described the plaintiff’s evidentiary burden similarly. See *Miller, supra*, at 916 (plaintiff must show that “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without *a particular district*” (emphasis added)).

Our district-specific language makes sense in light of the nature of the harms that underlie a racial gerrymandering claim. Those harms are personal. They include being “personally . . . subjected to [a] racial classification,” *Vera, supra*, at 957 (principal opinion), as well as being represented by a legislator who believes his “primary obligation is to represent only the members” of a particular racial group, *Shaw I, supra*, at 648. They directly threaten a voter who lives in the *district* attacked. But they do not so keenly threaten a voter who lives elsewhere in the State. Indeed, the latter voter normally lacks standing to pursue a racial gerrymandering claim. *United States v. Hays*, 515 U. S. 737, 744–745 (1995).

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Voters, of course, can present statewide *evidence* in order to prove racial gerrymandering in a particular district. See *Miller, supra*, at 916. And voters might make the claim that *every* individual district in a State suffers from racial gerrymandering. But this latter claim is not the claim that the District Court, when using the phrase “as a whole,” considered here. Rather, the concept as used here suggests the existence of a legal unicorn, an animal that exists only in the legal imagination.

This is not a technical, linguistic point. Nor does it criticize what might seem, in effect, a slip of the pen. Rather, here the District Court’s terminology mattered. That is because the District Court found that racial criteria had not predominated in the drawing of some Alabama districts. And it found that fact (the fact that race did not predominate in the drawing of some, or many districts) sufficient to defeat what it saw as the basic claim before it, namely a claim of racial gerrymandering with respect to the State *as an undifferentiated whole*. See, e.g., 989 F. Supp. 2d, at 1294 (rejecting plaintiffs’ challenge because “[the legislature] followed no bright-line rule” with respect to every majority-minority district); *id.*, at 1298–1299, 1301 (citing examples of majority-minority districts in which black population percentages were reduced and examples of majority-white districts in which precincts were split).

A showing that race-based criteria did not significantly affect the drawing of *some* Alabama districts, however, would have done little to defeat a claim that race-based criteria predominantly affected the drawing of *other* Alabama districts, such as Alabama’s majority-minority districts primarily at issue here. See *id.*, at 1329 (Thompson, J., dissenting) (“[T]he drafters[] fail[ure] to achieve their sought-after percentage in one district does not detract one iota from the fact that they did achieve it in another”). Thus, the District Court’s undifferentiated

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statewide analysis is insufficient. And we must remand for consideration of racial gerrymandering with respect to the individual districts subject to the appellants' racial gerrymandering challenges.

The State and principal dissent argue that (but for four specifically mentioned districts) there were in effect no such districts. The Caucus and the Conference, the State and principal dissent say, did not seek a district-by-district analysis. And, the State and principal dissent conclude that the Caucus and the Conference have consequently waived the right to any further consideration. Brief for Appellees 14, 31; *post*, at 5–12 (opinion of SCALIA, J.).

We do not agree. We concede that the District Court's opinion suggests that it was the Caucus and the Conference that led the Court to consider racial gerrymandering of the State "as a whole." 989 F. Supp. 2d, at 1287. At least the District Court interpreted their filings to allege only that kind of claim. *Ibid.* But our review of the record indicates that the plaintiffs did not claim only that the legislature had racially gerrymandered the State "as" an undifferentiated "whole." Rather, their evidence and their arguments embody the claim that individual majority-minority districts were racially gerrymandered. And those are the districts that we believe the District Court must reconsider.

There are 35 majority-minority districts, 27 in the House and 8 in the Senate. The District Court's opinion itself refers to evidence that the legislature's redistricting committee, in order to satisfy what it believed the Voting Rights Act required, deliberately chose additional black voters to move into underpopulated majority-minority districts, *i.e.*, a specific set of individual districts. See, *e.g.*, 989 F. Supp. 2d, at 1274 (referring to Senator Dial's testimony that the Committee "could have used," but did not use, "white population within Jefferson County to repopu-

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late the majority-black districts” because “doing so would have resulted in the retrogression of the majority-black districts and potentially created a problem for [Justice Department] preclearance”); *id.*, at 1276 (stating that Representative Jim McClendon, also committee cochair, “testified consistently with Senator Dial”); *id.*, at 1277 (noting that the committee’s expert, Randolph Hinaman, testified that “he needed to add population” to majority-black districts “without significantly lowering the percentage of the population in each district that was majority-black”).

The Caucus and the Conference presented much evidence at trial to show that the legislature had deliberately moved black voters into these majority-minority districts—again, a specific set of districts—in order to prevent the percentage of minority voters in each district from declining. See, e.g., Committee Guidelines 3–5; 1 Tr. 28–29, 36–37, 55, 63, 67–68, 77, 81, 96, 115, 124, 136, 138 (testimony of Senator Dial); Deposition of Gerald Dial in No. 12–cv–691 (May 21, 2013), Doc. 123–5, pp. 17, 39–41, 62, 100 (Dial Deposition); 3 Tr. 222 (testimony of Representative McClendon); *id.*, at 118–119, 145–146, 164, 182–183, 186–187 (testimony of Hinaman); Deposition of Randolph Hinaman in No. 12–cv–691 (June 25, 2013), Doc. 134–4, pp. 23–24, 101 (Hinaman Deposition).

In their post-trial Proposed Findings of Fact and Conclusions of Law, the plaintiffs stated that the evidence showed a racial gerrymander with respect to the majority of the majority-minority districts; they referred to the specific splitting of precinct and county lines in the drawing of many majority-minority districts; and they pointed to much district-specific evidence. *E.g.*, Alabama Legislative Black Caucus Plaintiffs’ Notice of Filing Proposed Findings of Fact and Conclusions of Law in No. 12–cv–691, Doc. 194, pp. 9–10, 13–14, 30–35, 40 (Caucus Post-Trial Brief); Newton Plaintiffs’ Notice of Filing Proposed

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Findings of Fact and Conclusions of Law in No. 12-cv-691, Doc. 195, pp. 33–35, 56–61, 64–67, 69–74, 82–85, 108, 121–122 (Conference Post-Trial Brief); see also Appendix A, *infra* (organizing these citations by district).

We recognize that the plaintiffs relied heavily upon statewide evidence to prove that race predominated in the drawing of individual district lines. See generally Caucus Post-Trial Brief 1, 3–7, 48–50; Conference Post-Trial Brief 2, 44–45, 105–106. And they also sought to prove that the use of race to draw the boundaries of the majority-minority districts affected the boundaries of other districts as well. See, *e.g.*, 1 Tr. 36–37, 48, 55, 70–71, 93, 111, 124 (testimony of Dial); 3 Tr. 142, 162 (testimony of Hinaman); see generally Caucus Post-Trial Brief 8–16. Such evidence is perfectly relevant. We have said that the plaintiff’s burden in a racial gerrymandering case is “to show, either through circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.” *Miller*, 515 U. S., at 916. Cf. *Easley v. Cromartie*, 532 U. S. 234, 258 (2001) (explaining the plaintiff’s burden in cases, unlike these, in which the State argues that politics, not race, was its predominant motive). That Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts in the State. And neither the use of statewide evidence nor the effort to show widespread effect can transform a racial gerrymandering claim about a set of individual districts into a separate, general claim that the legislature racially gerrymandered the State “as” an undifferentiated “whole.”

We, like the principal dissent, recognize that the plaintiffs could have presented their district-specific claims

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more clearly, *post*, at 6–8, 10–12 (opinion of SCALIA, J.), but the dissent properly concedes that its objection would weaken had the Conference “developed such a claim in the course of discovery and trial.” *Post*, at 6. And that is just what happened.

In the past few pages and in Appendix A, we set forth the many record references that establish this fact. The Caucus helps to explain the complaint omissions when it tells us that the plaintiffs unearthed the factual basis for their racial gerrymandering claims when they deposed the committee’s redistricting expert. See Brief for Appellants in No. 13–895, pp. 12–13. The State neither disputes this procedural history nor objects that plaintiffs’ pleadings failed to conform with the proof. Indeed, throughout, the plaintiffs litigated these claims not as if they were wholly separate entities but as if they were a team. See, *e.g.*, Caucus Post-Trial Brief 1 (“[We] support the additional claims made by the [Conference] plaintiffs”); but cf. *post*, at 3–12 (SCALIA, J., dissenting) (treating separately Conference claims from Caucus claims). Thus we, like the dissenting judge below (who also lived with these cases through trial), conclude that the record as a whole shows that the plaintiffs brought, and their argument rested significantly upon, district-specific claims. See 989 F. Supp. 2d, at 1313 (Thompson, J., dissenting) (construing plaintiffs as also challenging “each majority-Black House and Senate District”).

The principal dissent adds that the Conference waived its district-specific claims on appeal. Cf. *post*, at 8. But that is not so. When asked specifically about its position at oral argument, the Conference stated that it was relying on statewide evidence to prove its district-specific challenges. Tr. of Oral Arg. 15–16. Its counsel said that “the exact same policy was applied in every black-majority district,” *id.*, at 15, and “[b]y statewide, we simply mean a common policy applied to every district in the State,” *id.*,



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at 16. We accept the Conference’s clarification, which is consistent with how it presented these claims below.

We consequently conclude that the District Court’s analysis of racial gerrymandering of the State “as a whole” was legally erroneous. We find that the appellants did not waive their right to consideration of their claims as applied to particular districts. Accordingly, we remand the cases. See *Pullman-Standard v. Swint*, 456 U. S. 273, 291 (1982) (remand is required when the District Court “failed to make a finding because of an erroneous view of the law”); *Rapanos v. United States*, 547 U. S. 715, 757 (2006) (same).

## III

We next consider the District Court’s holding with respect to standing. The District Court, *sua sponte*, held that the Conference lacked standing—either to bring racial gerrymandering claims with respect to the four individual districts that the court specifically considered (*i.e.*, Senate Districts 7, 11, 22, and 26) or to bring a racial gerrymandering claim with respect to the “State as a whole.” 989 F. Supp. 2d, at 1292.

The District Court recognized that ordinarily

“[a]n association has standing to bring suit on behalf of its members *when its members would have standing to sue in their own right*, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires individuals members’ participation in the lawsuit.” *Id.*, at 1291 (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 181 (2000); emphasis added).

It also recognized that a “member” of an association “would have standing to sue” in his or her “own right” when that member “resides in the district that he alleges

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was the product of a racial gerrymander.” 989 F. Supp. 2d, at 1291 (citing *Hays*, 515 U. S., at 744–745). But, the District Court nonetheless denied standing because it believed that the “record” did “not clearly identify the districts in which the individual members of the [Conference] reside,” and the Conference had “not proved that it has members who have standing to pursue any district-specific claims of racial gerrymandering.” 989 F. Supp. 2d, at 1292.

The District Court conceded that Dr. Joe Reed, a representative of the Conference, testified that the Conference “has members in almost every county in Alabama.” *Ibid.* But, the District Court went on to say that “the counties in Alabama are split into many districts.” *Ibid.* And the “Conference offered no testimony or evidence that it has members in all of the districts in Alabama or in any of the [four] specific districts that it challenged.” *Ibid.*

The record, however, lacks adequate support for the District Court’s conclusion. Dr. Reed’s testimony supports, and nothing in that record undermines, the Conference’s own statement, in its post-trial brief, that it is a “statewide political caucus founded in 1960.” Conference Post-Trial Brief 3. It has the “purpose” of “endors[ing] candidates for political office who will be responsible to the needs of the blacks and other minorities and poor people.” *Id.*, at 3–4. These two statements (the second of which the principal dissent ignores), taken together with Dr. Reed’s testimony, support an inference that the organization has members in all of the State’s majority-minority districts, other things being equal, which is sufficient to meet the Conference’s burden of establishing standing. That is to say, it seems highly likely that a “statewide” organization with members in “almost every county,” the purpose of which is to help “blacks and other minorities and poor people,” will have members in each majority-minority district. But cf. *post*, at 3–5 (SCALIA, J., dissenting).

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At the very least, the common sense inference is strong enough to lead the Conference reasonably to believe that, in the absence of a state challenge or a court request for more detailed information, it need not provide additional information such as a specific membership list. We have found nothing in the record, nor has the State referred us to anything in the record, that suggests the contrary. Cf. App. 204–205, 208 (State arguing lack of standing, not because of inadequate member residency but because an association “lives” nowhere and that the Conference should join individual members). The most the State argued was that “[n]one of the *individual* [p]laintiffs [who brought the case with the Conference] claims to live in” Senate District 11, *id.*, at 205 (emphasis added), but the Conference would likely not have understood that argument as a request that *it* provide a membership list. In fact, the Conference might have understood the argument as an indication that the State did *not* contest its membership in every district.

To be sure, the District Court had an independent obligation to confirm its jurisdiction, even in the absence of a state challenge. See *post*, at 4–5 (SCALIA, J., dissenting). But, in these circumstances, elementary principles of procedural fairness required that the District Court, rather than acting *sua sponte*, give the Conference an opportunity to provide evidence of member residence. Cf. *Warth v. Seldin*, 422 U. S. 490, 501–502 (1975) (explaining that a court may “allow or [r]equire” a plaintiff to supplement the record to show standing and that “[i]f, *after this opportunity*, the plaintiff’s standing does not adequately appear from all materials of record, the complaint must be dismissed” (emphasis added)). Moreover, we have no reason to believe that the Conference would have been unable to provide a list of members, at least with respect to the majority-minority districts, had it been asked. It has filed just such a list in this Court. See Affidavit of Joe L. Reed

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Pursuant to this Court’s Rule 32.3 (Lodging of Conference affidavit listing members residing in each majority-minority district in the State); see also *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U. S. 701, 718 (2007) (accepting a lodged affidavit in similar circumstances). Thus, the District Court on remand should reconsider the Conference’s standing by permitting the Conference to file its list of members and permitting the State to respond, as appropriate.

## IV

The District Court held in the alternative that the claims of racial gerrymandering must fail because “[r]ace was not the predominant motivating factor” in the creation of any of the challenged districts. 989 F. Supp. 2d, at 1293. In our view, however, the District Court did not properly calculate “predominance.” In particular, it judged race to lack “predominance” in part because it placed in the balance, among other nonracial factors, legislative efforts to create districts of approximately equal population. See, e.g., *id.*, at 1305 (the “need to bring the neighboring districts into compliance with the requirement of one person, one vote *served as the primary motivating factor* for the changes to [Senate] District 22” (emphasis added)); *id.*, at 1297 (the “constitutional requirement of one person, one vote trumped every other districting principle”); *id.*, at 1296 (the “record establishes that the drafters of the new districts, above all, had to correct [for] severe malapportionment . . .”); *id.*, at 1306 (the “inclusion of additional precincts [in Senate District 26] is a reasonable response to the underpopulation of the District”).

In our view, however, an equal population goal is not one factor among others to be weighed against the use of race to determine whether race “predominates.” Rather, it is part of the redistricting background, taken as a given,

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when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met.

To understand this conclusion, recall what “predominance” is about: A plaintiff pursuing a racial gerrymandering claim must show that “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.” *Miller*, 515 U. S., at 916. To do so, the “plaintiff must prove that the legislature subordinated *traditional race-neutral districting principles* . . . to racial considerations.” *Ibid.* (emphasis added).

Now consider the nature of those offsetting “traditional race-neutral districting principles.” We have listed several, including “compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests,” *ibid.*, incumbency protection, and political affiliation, *Vera*, 517 U. S., at 964, 968 (principal opinion).

But we have not listed equal population objectives. And there is a reason for that omission. The reason that equal population objectives do not appear on this list of “traditional” criteria is that equal population objectives play a different role in a State’s redistricting process. That role is not a minor one. Indeed, in light of the Constitution’s demands, that role may often prove “predominant” in the ordinary sense of that word. But, as the United States points out, “predominance” in the context of a racial gerrymandering claim is special. It is not about whether a legislature believes that the need for equal population takes ultimate priority. Rather, it is, as we said, whether the legislature “placed” race “above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*.” Brief for United States as *Amicus Curiae* 19 (some emphasis added). In other words, if the legislature must place 1,000 or so additional voters in a particular district

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in order to achieve an equal population goal, the “predominance” question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominately uses race as opposed to other, “traditional” factors when doing so.

Consequently, we agree with the United States that the requirement that districts have approximately equal populations is a background rule against which redistricting takes place. *Id.*, at 12. It is not a factor to be treated like other nonracial factors when a court determines whether race predominated over other, “traditional” factors in the drawing of district boundaries.

Had the District Court not taken a contrary view of the law, its “predominance” conclusions, including those concerning the four districts that the Conference specifically challenged, might well have been different. For example, once the legislature’s “equal population” objectives are put to the side—*i.e.*, seen as a background principle—then there is strong, perhaps overwhelming, evidence that race did predominate as a factor when the legislature drew the boundaries of Senate District 26, the one district that the parties have discussed here in depth.

The legislators in charge of creating the redistricting plan believed, and told their technical adviser, that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible. See *supra*, at 9–10 (compiling extensive record testimony in support of this point). There is considerable evidence that this goal had a direct and significant impact on the drawing of at least some of District 26’s boundaries. See 3 Tr. 175–180 (testimony of Hinaman); Appendix C, *infra* (change of district’s shape from rectangular to irregular). Of the 15,785 individuals that the new redistricting laws added to the population of District 26, just 36 were white—a remarkable feat given the local demographics. See, *e.g.*, 2 Tr. 127–128 (testimony of Senator Quinton

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Ross); 3 Tr. 179 (testimony of Hinaman). Transgressing their own redistricting guidelines, Committee Guidelines 3–4, the drafters split seven precincts between the majority-black District 26 and the majority-white District 25, with the population in those precincts clearly divided on racial lines. See Exh. V in Support of Newton Plaintiffs’ Opposition to Summary Judgment in No. 12–cv–691, Doc. 140–1, pp. 91–95. And the District Court conceded that race “was a factor in the drawing of District 26,” and that the legislature “preserved” “the percentage of the population that was black.” 989 F. Supp. 2d, at 1306.

We recognize that the District Court also found, with respect to District 26, that “preservi[ng] the core of the existing [d]istrict,” following “county lines,” and following “highway lines” played an important boundary-drawing role. *Ibid.* But the first of these (core preservation) is not directly relevant to the origin of the *new* district inhabitants; the second (county lines) seems of marginal importance since virtually all Senate District 26 boundaries departed from county lines; and the third (highways) was not mentioned in the legislative redistricting guidelines. Cf. Committee Guidelines 3–5.

All this is to say that, with respect to District 26 and likely others as well, had the District Court treated equal population goals as background factors, it might have concluded that race was the predominant boundary-drawing consideration. Thus, on remand, the District Court should reconsider its “no predominance” conclusions with respect to Senate District 26 and others to which our analysis is applicable.

Finally, we note that our discussion in this section is limited to correcting the District Court’s misapplication of the “predominance” test for strict scrutiny discussed in *Miller*, 515 U. S., at 916. It does not express a view on the question of whether the intentional use of race in redistricting, even in the absence of proof that traditional

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districting principles were subordinated to race, triggers strict scrutiny. See *Vera*, 517 U. S., at 996 (KENNEDY, J., concurring).

## V

The District Court, in a yet further alternative holding, found that “[e]ven if the [State] subordinated traditional districting principles to racial considerations,” the racial gerrymandering claims failed because, in any event, “the Districts would satisfy strict scrutiny.” 989 F. Supp. 2d, at 1306. In the District Court’s view, the “Acts are narrowly tailored to comply with Section 5” of the Voting Rights Act. *Id.*, at 1311. That provision “required the Legislature to maintain, where feasible, the existing number of majority-black districts and *not substantially reduce the relative percentages of black voters in those districts.*” *Ibid.* (emphasis added). And, insofar as the State’s redistricting embodied racial considerations, it did so in order to meet this §5 requirement.

In our view, however, this alternative holding rests upon a misperception of the law. Section 5, which covered particular States and certain other jurisdictions, does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority’s ability to elect a preferred candidate of choice. That is precisely what the language of the statute says. It prohibits a covered jurisdiction from adopting any change that “has the purpose of or will have the effect of diminishing the ability of [the minority group] to elect their preferred candidates of choice.” 52 U. S. C. §10304(b); see also §10304(d) (the “purpose of subsection (b) . . . is to protect the ability of such citizens to elect their preferred candidates of choice”).

That is also just what Department of Justice Guidelines say. The Guidelines state specifically that the Department’s preclearance determinations are not based



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“on any predetermined or fixed demographic percentages. . . . Rather, in the Department’s view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district. . . . [C]ensus data alone may not provide sufficient indicia of electoral behavior to make the requisite determination.” Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7471 (2011).

Consistent with this view, the United States tells us that “Section 5” does not “requir[e] the State to maintain the same percentage of black voters in each of the majority-black districts as had existed in the prior districting plans.” Brief for United States as *Amicus Curiae* 22. Rather, it “prohibits only those diminutions of a minority group’s proportionate strength that strip the group within a district of its existing ability to elect its candidates of choice.” *Id.*, at 22–23. We agree. Section 5 does not require maintaining the same population percentages in majority-minority districts as in the prior plan. Rather, §5 is satisfied if minority voters retain the ability to elect their preferred candidates.

The history of §5 further supports this view. In adopting the statutory language to which we referred above, Congress rejected this Court’s decision in *Georgia v. Ashcroft*, 539 U. S. 461, 480 (2003) (holding that it is not necessarily retrogressive for a State to replace safe majority-minority districts with crossover or influence districts), and it adopted the views of the dissent. H. R. Rep. No. 109–478, pp. 68–69, and n. 183 (2006). While the thrust of Justice Souter’s dissent was that, in a §5 retrogression case, courts should ask whether a new voting provision would likely deprive minority voters of their ability to elect a candidate of their choice—language that Congress adopted in revising §5—his dissent also made clear that

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courts should not mechanically rely upon numerical percentages but should take account of all significant circumstances. *Georgia v. Ashcroft*, *supra*, at 493, 498, 505, 509. And while the revised language of §5 may raise some interpretive questions—*e.g.*, its application to coalition, crossover, and influence districts—it is clear that Congress did not mandate that a 1% reduction in a 70% black population district would be necessarily retrogressive. See Persily, *The Promises and Pitfalls of the New Voting Rights Act*, 117 Yale L. J. 174, 218 (2007). Indeed, Alabama’s mechanical interpretation of §5 can raise serious constitutional concerns. See *Miller*, *supra*, at 926.

The record makes clear that both the District Court and the legislature relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression. See Appendix B, *infra*. And the difference between that view and the more purpose-oriented view reflected in the statute’s language can matter. Imagine a majority-minority district with a 70% black population. Assume also that voting in that district, like that in the State itself, is racially polarized. And assume that the district has long elected to office black voters’ preferred candidate. Other things being equal, it would seem highly unlikely that a redistricting plan that, while increasing the numerical size of the district, reduced the percentage of the black population from, say, 70% to 65% would have a significant impact on the black voters’ ability to elect their preferred candidate. And, for that reason, it would be difficult to explain just why a plan that uses racial criteria predominately to maintain the black population at 70% is “narrowly tailored” to achieve a “compelling state interest,” namely the interest in preventing §5 retrogression. The circumstances of this hypothetical example, we add, are close to those characterizing Senate District 26, as set forth in the District Court’s opinion and throughout the record. See, *e.g.*, 1 Tr. 131–132 (testimony of Dial); 3 Tr.

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180 (testimony of Hinaman).

In saying this, we do not insist that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive. The law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population §5 demands. The standards of §5 are complex; they often require evaluation of controverted claims about voting behavior; the evidence may be unclear; and, with respect to any particular district, judges may disagree about the proper outcome. The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under §5 should the legislature place a few too few. See *Vera*, 517 U. S., at 977 (principal opinion). Thus, we agree with the United States that a court's analysis of the narrow tailoring requirement insists only that the legislature have a "strong basis in evidence" in support of the (race-based) choice that it has made. Brief for United States as *Amicus Curiae* 29 (citing *Ricci v. DeStefano*, 557 U. S. 557, 585 (2009)). This standard, as the United States points out, "does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid." Brief for United States as *Amicus Curiae* 29. And legislators "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance." *Ibid.* (emphasis added).

Here the District Court enunciated a narrow tailoring standard close to the one we have just mentioned. It said that a plan is "narrowly tailored . . . when the race-based action taken was *reasonably necessary*" to achieve a compelling interest. 989 F. Supp. 2d, at 1307 (emphasis added).

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And it held that preventing retrogression is a compelling interest. *Id.*, at 1306–1307. While we do not here decide whether, given *Shelby County v. Holder*, 570 U. S. \_\_\_\_ (2013), continued compliance with §5 remains a compelling interest, we conclude that the District Court and the legislature asked the wrong question with respect to narrow tailoring. They asked: “How can we maintain present minority percentages in majority-minority districts?” But given §5’s language, its purpose, the Justice Department Guidelines, and the relevant precedent, they should have asked: “To what extent must we preserve existing minority percentages in order to maintain the minority’s present ability to elect the candidate of its choice?” Asking the wrong question may well have led to the wrong answer. Hence, we cannot accept the District Court’s “compelling interest/narrow tailoring” conclusion.

\* \* \*

For these reasons, the judgment of the District Court is vacated. We note that appellants have also raised additional questions in their jurisdictional statements, relating to their one-person, one-vote claims (Caucus) and vote dilution claims (Conference), which were also rejected by the District Court. We do not pass upon these claims. The District Court remains free to reconsider the claims should it find reconsideration appropriate. And the parties are free to raise them, including as modified by the District Court, on any further appeal.

The cases are remanded for further proceedings consistent with this opinion.

*It is so ordered.*

## Appendix A to opinion of the Court

Appendixes  
A

<b>Majority-minority District</b>	<b>Instances in Plaintiffs' Post-Trial Briefs Arguing that Traditional Race-Neutral Districting Principles Were Subordinated to Race</b>
HOUSE	
HD 52, 54–60	Caucus Post-Trial Brief 30; Conference Post-Trial Brief 56–57, 60, 82–83, 121–122
HD 53	Caucus Post-Trial Brief 33–35; Conference Post-Trial Brief 59–61
HD 68	Conference Post-Trial Brief 70, 84–85
HD 69	Conference Post-Trial Brief 66–67, 85
HD 70	Conference Post-Trial Brief 85
HD 71	Conference Post-Trial Brief 83–85
HD 72	Caucus Post-Trial Brief 40; Conference Post-Trial Brief 83–85
HD 76–78	Conference Post-Trial Brief 65–66
SENATE*	
SD 18–20	Conference Post-Trial Brief 56–59
SD 23–24	Caucus Post-Trial Brief 9–10, 40; Conference Post-Trial Brief 69–74
SD 33	Caucus Post-Trial Brief 13–14

\* Senate District 26 excluded from this list

## Appendix B to opinion of the Court

## B

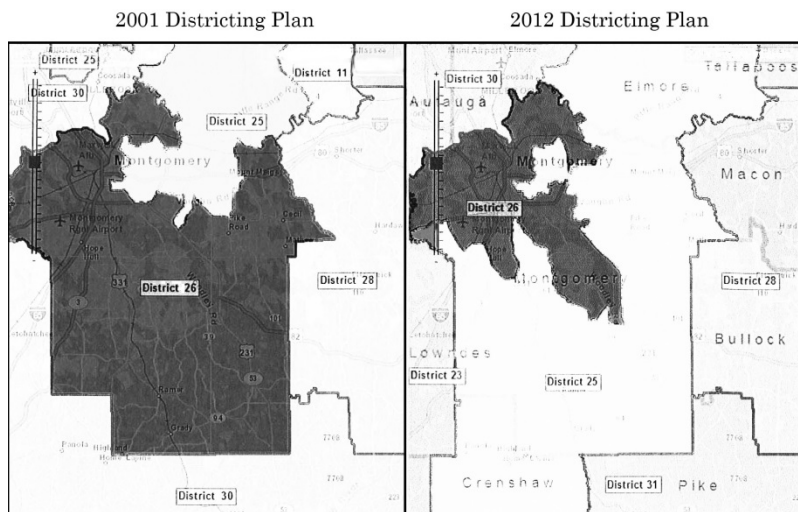
## State's Use of Incorrect Retrogression Standard

The following citations reflect instances in either the District Court opinion or in the record showing that the State believed that §5 forbids, not just *substantial* reductions, but *any* reduction in the percentage of black inhabitants of a majority-minority district.

<b>District Court Findings</b>	989 F. Supp. 2d, at 1307; <i>id.</i> , at 1273; <i>id.</i> , at 1247	
<b>Evidence in the Record</b>	Senator Gerald Dial	1 Tr. 28–29, 36–37, 55, 81, 96, 136, 138
		Dial Deposition 17, 39–41, 81, 100
	Representative Jim McClendon	3 Tr. 222
	Randolph Hinaman	3 Tr. 118–119, 145–146, 149–150, 164, 182–183, 187
		Hinaman Deposition 23–24, 101; but see <i>id.</i> , at 24–25, 101

Appendix C to opinion of the Court

C



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**SUPREME COURT OF THE UNITED STATES**

Nos. 13–895 and 13–1138

ALABAMA LEGISLATIVE BLACK CAUCUS, ET AL.,  
APPELLANTS  
13–895 *v.*  
ALABAMA ET AL.

ALABAMA DEMOCRATIC CONFERENCE, ET AL.,  
APPELLANTS  
13–1138 *v.*  
ALABAMA ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR  
THE MIDDLE DISTRICT OF ALABAMA

[March 25, 2015]

JUSTICE SCALIA, with whom THE CHIEF JUSTICE,  
JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

Today, the Court issues a sweeping holding that will have profound implications for the constitutional ideal of one person, one vote, for the future of the Voting Rights Act of 1965, and for the primacy of the State in managing its own elections. If the Court’s destination seems fantastical, just wait until you see the journey.

Two groups of plaintiffs, the Alabama Democratic Conference and the Alabama Legislative Black Caucus, brought separate challenges to the way in which Alabama drew its state legislative districts following the 2010 census. These cases were consolidated before a three-judge District Court. Even after a full trial, the District Court lamented that “[t]he filings and arguments made by the plaintiffs on these claims were mystifying at best.” 989 F. Supp. 2d 1227, 1287 (MD Ala. 2013). Nevertheless, the



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District Court understood both groups of plaintiffs to argue, as relevant here, only that “the Acts as a whole constitute racial gerrymanders.” *Id.*, at 1287. It also understood the Democratic Conference to argue that “Senate Districts 7, 11, 22, and 26 constitute racial gerrymanders,” *id.*, at 1288, but held that the Democratic Conference lacked standing to bring “*any* district-specific claims of racial gerrymandering,” *id.*, at 1292 (emphasis added). It then found for Alabama on the merits.

The Court rightly concludes that our racial gerrymandering jurisprudence does not allow for statewide claims. *Ante*, at 5–12. However, rather than holding appellants to the misguided legal theory they presented to the District Court, it allows them to take a mulligan, remanding the case with orders that the District Court consider whether some (all?) of Alabama’s 35 majority-minority districts result from impermissible racial gerrymandering. In doing this, the Court disregards the detailed findings and thoroughly reasoned conclusions of the District Court—in particular its determination, reached after watching the development of the case from complaint to trial, that no appellant proved (or even pleaded) district-specific claims with respect to the majority-minority districts. Worse still, the Court ignores the Democratic Conference’s express waiver of these claims before this Court. It does this on the basis of a few stray comments, cherry-picked from district-court filings that are more Rorschach brief than Brandeis brief, in which the vague outline of what could be district-specific racial-gerrymandering claims begins to take shape only with the careful, post-hoc nudging of appellate counsel.

Racial gerrymandering strikes at the heart of our democratic process, undermining the electorate’s confidence in its government as representative of a cohesive body politic in which all citizens are equal before the law. It is therefore understandable, if not excusable, that the Court balks

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at denying merits review simply because appellants pursued a flawed litigation strategy. But allowing appellants a second bite at the apple invites lower courts similarly to depart from the premise that ours is an adversarial system whenever they deem the stakes sufficiently high. Because I do not believe that Article III empowers this Court to act as standby counsel for sympathetic litigants, I dissent.

### I. The Alabama Democratic Conference

The District Court concluded that the Democratic Conference lacked standing to bring district-specific claims. It did so on the basis of the Conference's failure to present any evidence that it had members who voted in the challenged districts, and because the individual Conference plaintiffs did not claim to vote in them. 989 F. Supp. 2d, at 1292.

A voter has standing to bring a racial-gerrymandering claim only if he votes in a gerrymandered district, or if specific evidence demonstrates that he has suffered the special harms that attend racial gerrymandering. *United States v. Hays*, 515 U. S. 737, 744–745 (1995). However, the Democratic Conference only claimed to have “chapters and members in *almost* all counties in the state.” Newton Plaintiffs’ Proposed Findings of Fact and Conclusions of Law in No. 12–cv–691, Doc. 195–1, pp. 3–4 (Democratic Conference Post-Trial Brief) (emphasis added). Yet the Court concludes that this fact, combined with the Conference’s self-description as a “statewide political caucus” that endorses candidates for political office, “supports an inference that the organization has members in all of the State’s majority-minority districts, other things being equal.” *Ante*, at 13. The Court provides no support for this theory of jurisdiction by illogical inference, perhaps because this Court has rejected other attempts to peddle more-likely-than-not standing. See *Summers v. Earth*

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*Island Institute*, 555 U. S. 488, 497 (2009) (rejecting a test for organizational standing that asks “whether, accepting [an] organization’s self-description of the activities of its members, there is a statistical probability that some of those members are threatened with concrete injury”).

The inference to be drawn from the Conference’s statements cuts in precisely the opposite direction. What is at issue here is not just counties but voting districts within counties. If the Conference has members in *almost* every county, then there must be counties in which it does not have members; and we have no basis for concluding (or inferring) that those counties do not contain all of the majority-minority voting districts. Moreover, even in those counties in which the Conference does have members, we have no basis for concluding (or inferring) that those members vote in majority-minority districts. The Conference had plenty of opportunities, including at trial, to demonstrate that this was the case, and failed to do so. This failure lies with the Democratic Conference, and the consequences should be borne by it, not by the people of Alabama, who must now shoulder the expense of further litigation and the uncertainty that attends a resuscitated constitutional challenge to their legislative districts.

Incredibly, the Court thinks that “elementary principles of procedural fairness” *require* giving the Democratic Conference the opportunity to prove on appeal what it neglected to prove at trial. *Ante*, at 14. It observes that the Conference had no reason to believe it should provide such information because “the State did *not* contest its membership in every district,” and the opinion cites an affidavit lodged *with this Court* providing a list of the Conference’s members in each majority-minority district in Alabama. *Ibid.* I cannot imagine why the absence of a state challenge would matter. Whether or not there was such a challenge, it was the Conference’s responsibility, as “[t]he party invoking federal jurisdiction,” to establish

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standing. See *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 561 (1992). That responsibility was enforceable, challenge or no, by the court: “The federal courts are under an independent obligation to examine their own jurisdiction, and standing ‘is perhaps the most important of [the jurisdictional] doctrines.’” *FW/PBS, Inc. v. Dallas*, 493 U. S. 215, 230–231 (1990) (citations omitted). And because standing is not a “mere pleading requiremen[t] but rather an indispensable part of the plaintiff’s case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.” *Defenders of Wildlife*, *supra*, at 561.

The Court points to *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U. S. 701, 718 (2007), as support for its decision to sandbag Alabama with the Democratic Conference’s out-of-time (indeed, out-of-court) lodging in this Court. The circumstances in that case, however, are far afield. The organization of parents in that case had established organizational standing in the lower court by showing that it had members with children who would be subject to the school district’s “integration tiebreaker,” which was applied at ninth grade. Brief for Respondents, O. T. 2006, No. 05–908, p. 16. By the time the case reached this Court, however, the youngest of these children had entered high school, and so would no longer be subject to the challenged policy. *Ibid.* Accordingly, we accepted a lodging that provided names of additional, younger children in order to show that the organization had not *lost* standing as a result of the long delay that often accompanies federal litigation. Here, by contrast, the Democratic Conference’s lodging in the Supreme Court is its first attempt to show that it has members in the majority-minority districts. This is too little, too late.

But that is just the start. Even if the Democratic Con-

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ference *had standing to bring* district-specific racial-gerrymandering claims, there remains the question whether it *did* bring them. Its complaint alleged three counts: (1) Violation of §2 of the Voting Rights Act, (2) Racial gerrymandering in violation of the Equal Protection Clause, and (3) §1983 violations of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. Complaint in No. 2:12-cv-1081, Doc. 1, pp. 17–18. The racial gerrymandering count alleged that “Alabama Acts 2012-602 and 2012-603 were drawn for the purpose and effect of minimizing the opportunity of minority voters to participate effectively in the political process,” and that this “racial gerrymandering by Alabama Acts 2012-602 and 2012-603 violates the rights of Plaintiffs.” *Id.*, at 17. It made no reference to specific districts that were racially gerrymandered; indeed, the only particular jurisdictions mentioned *anywhere* in the complaint were Senate District 11, Senate District 22, Madison County Senate Districts, House District 73, and Jefferson and Montgomery County House Districts. None of the Senate Districts is majority-minority. Nor is House District 73. Jefferson County does, admittedly, contain 8 of the 27 majority-minority House Districts in Alabama, and Montgomery County contains another 4, making a total of 12. But they also contain 14 majority-white House Districts between them. In light of this, it is difficult to understand the Court’s statement that appellants’ “evidence and . . . arguments embody the claim that individual majority-minority districts were racially gerrymandered.” *Ante*, at 8.

That observation would, of course, make sense if the Democratic Conference had developed such a claim in the course of discovery and trial. But in its post-trial Proposed Findings of Fact and Conclusions of Law, the Conference hewed to its original charge of statewide racial gerrymandering—or, rather, it did so as much as it reasonably could without actually proposing that the Court

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find *any* racial gerrymandering, statewide or otherwise. Instead, the Conference chose only to pursue claims that Alabama violated §2 of the Voting Rights Act under two theories. See Democratic Conference Post-Trial Brief 91–103 (alleging a violation of the results prong of Voting Rights Act §2) and 103–124 (alleging a violation of the purpose prong of Voting Rights Act §2).

To be sure, the Conference employed language and presented factual claims at various points in its 126-page post-trial brief that are evocative of a claim of racial gerrymandering. But in clinging to these stray comments to support its conclusion that the Conference made district-specific racial-gerrymandering claims, *ante*, at 9–10, the Court ignores the context in which these comments appear—the context of a clear Voting Rights Act §2 claim. Voting Rights Act claims and racial-gerrymandering claims share some of the same elements. See *League of United Latin American Citizens v. Perry*, 548 U. S. 399, 514 (2006) (SCALIA, J., concurring in judgment in part and dissenting in part). Thus, allegations made in the course of arguing a §2 claim will often be indistinguishable from allegations that would be made in support of a racial-gerrymandering claim. The appearance of such allegations in one of the Conference’s briefs might support reversal if this case came to us on appeal from the District Court’s grant of a motion to dismiss. See *Johnson v. City of Shelby*, 574 U. S. \_\_\_, \_\_\_ (2014) (*per curiam*) (slip op., at 1) (noting that the Federal Rules of Civil Procedure “do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted”). But here the District Court held a full trial before concluding that the Conference failed to make or prove any district-specific racial-gerrymandering claims with respect to the majority-minority districts. In this posture, and on this record, I cannot agree with the Court that the Conference’s district-specific evidence, clearly made in the

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course of arguing a §2 theory, should be read to give rise to district-specific claims of racial gerrymandering with respect to Alabama’s majority-minority districts.

The Court attempts to shift responsibility for the Democratic Conference’s ill-fated statewide theory from the Conference to the District Court, implying that it was the “legally erroneous” analysis of the District Court, *ante*, at 12, rather than the arguments made by the Conference, that conjured this “legal unicorn,” *ante*, at 7, so that the Conference did not forfeit the claims that the Court now attributes to it, *ante*, at 12. I suspect this will come as a great surprise to the Conference. Whatever may have been presented to the District Court, the Conference unequivocally stated in its opening brief: “Appellants challenge Alabama’s race-based statewide redistricting policy, *not* the design of any one particular election district.” Brief for Appellants in No. 13–1138, p. 2 (emphasis added). It drove the point home in its reply brief: “[I]f the Court were to apply a predominant-motive and narrow-tailoring analysis, that analysis should be applied to the state’s *policy*, not to the design of each particular district one-by-one.” Reply Brief in No. 11–1138, p. 7. How could anything be clearer? As the Court observes, the Conference attempted to walk back this unqualified description of its case at oral argument. *Ante*, at 11–12. Its assertion that what it *really* meant to challenge was the policy as applied to every district (*not* every majority-minority district, mind you) is not “clarification,” *ante*, at 12, but an entirely new argument—indeed, the same argument it expressly disclaimed in its briefing. “We will not revive a forfeited argument simply because the petitioner gestures toward it in its reply brief.” *Republic of Argentina v. NML Capital, Ltd.*, 573 U. S. \_\_\_, \_\_\_, n. 2 (2014) (slip op., at 5, n. 2); we certainly should not do so when the issue is first presented at oral argument.

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## II. The Alabama Legislative Black Caucus

The Court does not bother to disentangle the independent claims brought by the Black Caucus from those of the Democratic Conference, but it strongly implies that both parties asserted racial-gerrymandering claims with respect to Alabama's 35 majority-minority districts. As we have described, the Democratic Conference brought no such claims; and the Black Caucus's filings provide even weaker support for the Court's conclusion.

The Black Caucus complaint contained three counts: (1) Violation of One Person, One Vote, see *Reynolds v. Sims*, 377 U. S. 533 (1964); (2) Dilution and Isolation of Black Voting Strength in violation of §2 of the Voting Rights Act; and (3) Partisan Gerrymandering. Complaint in No. 2:12-cv-691, Doc. 1, pp. 15–22. The failure to raise *any* racial-gerrymandering claim was not a mere oversight or the consequence of inartful pleading. Indeed, in its amended complaint the Black Caucus specifically cited this Court's leading racial-gerrymandering case for the proposition that “traditional or neutral districting principles may not be subordinated in a dominant fashion by *either racial or partisan interests* absent a compelling state interest for doing so.” Amended Complaint in No. 2:12-cv-691, Doc. 60, p. 23 (citing *Shaw v. Reno*, 509 U. S. 630, 642 (1993); emphasis added). This quote appears in the first paragraph under the “Partisan Gerrymandering” heading, and claims of subordination to *racial* interests are notably absent from the Black Caucus complaint.

Racial gerrymandering was not completely ignored, however. In a brief introductory paragraph to the amended complaint, before addressing jurisdiction and venue, the Black Caucus alleged that “Acts 2012-602 and 2012-603 are racial gerrymanders that unnecessarily minimize population deviations and violate the whole-county provisions of the Alabama Constitution with both the purpose and effect of minimizing black voting strength and isolat-



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ing from influence in the Alabama Legislature legislators chosen by African Americans.” Amended Complaint, at 3. This was the first and last mention of racial gerrymandering, and like the Democratic Conference’s complaint, it focused exclusively on the districting maps as a whole rather than individual districts. Moreover, even this allegation appears primarily concerned with the use of racially motivated districting as a means of violating one person, one vote (by splitting counties), and §2 of the Voting Rights Act (by minimizing and isolating black voters and legislators).

To the extent the Black Caucus cited particular districts in the body of its complaint, it did so only with respect to its enumerated one-person, one-vote, Voting Rights Act, and partisan-gerrymandering counts. See, *e.g.*, *id.*, at 13–14 (alleging that the “deviation restriction and disregard of the ‘whole county’ requirements . . . facilitated the Republican majority’s efforts to gerrymander the district boundaries in Acts 2012–602 and 2012–603 for partisan purposes. By packing the majority-black House and Senate districts, the plans remove reliable Democratic voters from adjacent majority-white districts . . .”); *id.*, at 36 (“The partisan purpose of [one] gerrymander was to remove predominately black Madison County precincts to SD 1, avoiding a potential crossover district”); *id.*, at 44–45 (asserting that “splitting Jefferson County among 11 House and Senate districts” and “increasing the size of its local legislative delegation and the number of other counties whose residents elect members” of the delegation “dilut[es] the votes of Jefferson County residents” by diminishing their ability to control county-level legislation in the state legislature). And even these claims were made with a statewide scope in mind. *Id.*, at 55 (“Viewed in their entirety, the plans in Acts 2012-602 and 2012-603 have the purpose and effect of minimizing the opportunities for black and white voters who support the Democratic

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Party to elect candidates of their choice”).

Here again, discovery and trial failed to produce any clear claims with respect to the majority-minority districts. In a curious inversion of the Democratic Conference’s practice of pleading racial gerrymandering and then effectively abandoning the claims, the Black Caucus, which failed to plead racial gerrymandering, did clearly advance the theory after the trial. See Alabama Legislative Black Caucus Plaintiffs’ Post-Trial Proposed Findings of Fact and Conclusions of Law in No. 2:12-cv-691, Doc. 194, pp. 48–51 (Black Caucus Post-Trial Brief). The Black Caucus asserted racial-gerrymandering claims in its post-trial brief, but they all had a clear statewide scope. It charged that Alabama “started their line drawing with the majority-black districts” so as to maximize the size of their black majorities, which “impacted the drawing of majority-white districts in nearly every part of the state.” *Id.*, at 48–49. “[R]ace was the predominant factor in drafting both plans,” *id.*, at 49, which “drove nearly every districting decision,” “dilut[ing] the influence of black voters in the majority-white districts,” *id.*, at 50.

The Black Caucus did present district-specific evidence in the course of developing its other legal theories. Although this included evidence that Alabama manipulated the racial composition of certain majority-minority districts, it also included evidence that Alabama manipulated racial distributions with respect to the districting maps as a whole, *id.*, at 6 (“Maintaining the same high black percentages had a predominant impact on the entire plan”), and with respect to majority-white districts, *id.*, at 10–11 (“Asked why [majority-white] SD 11 was drawn in a semi-donut-shape that splits St. Clair, Talladega, and Shelby Counties, Sen. Dial blamed that also on the need to preserve the black majorities in Jefferson County Senate districts”), and 43–44 (“Sen. Irons’ quick, ‘primitive’ [*sic*] analysis of the new [majority-white] SD 1 convinced her

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that it was designed to ‘shed’ the minority population of Sen. Sanford’s [majority-white] SD 7 to SD 1” in order to “crack a minority influence district”). The Black Caucus was attacking the legislative districts from every angle. Nothing gives rise to an inference that it ever homed in on majority-minority districts—or, for that matter, any particular set of districts. Indeed, the fair reading of the Black Caucus’s filings is that it was presenting illustrative evidence in particular districts—majority-minority, minority-influence, and majority-white—in an effort to make out a claim of statewide racial gerrymandering. The fact that the Court now concludes that this is not a valid legal theory does not justify its repackaging the claims for a second round of litigation.

### III. Conclusion

Frankly, I do not know what to make of appellants’ arguments. They are pleaded with such opacity that, squinting hard enough, one can find them to contain just about anything. This, the Court believes, justifies demanding that the District Court go back and squint harder, so that it may divine some new means of construing the filings. This disposition is based, it seems, on the implicit premise that plaintiffs only plead legally correct theories. That is a silly premise. We should not reward the practice of litigation by obfuscation, especially when we are dealing with a well-established legal claim that numerous plaintiffs have successfully brought in the past. See, *e.g.*, Amended Complaint and Motion for Preliminary and Permanent Injunction in *Cromartie v. Hunt*, No. 4:96-cv-104 (EDNC), Doc. 21, p. 9 (“Under the March 1997 redistricting plan, the Twelfth District and First District have boundaries which were drawn pursuant to a predominantly racial motivation,” which were “the fruit of [earlier] racially gerrymandered plans”). Even the complaint in *Shaw*, which established a cause of action for racial ger-

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rymandering, displayed greater lucidity than appellants', alleging that defendants "creat[ed] two amorphous districts which embody a scheme for segregation of voters by race in order to meet a racial quota" "totally unrelated to considerations of compactness, contiguous, and geographic or jurisdictional communities of interest." Complaint and Motion for Preliminary and Permanent Injunction and for Temporary Restraining Order in *Shaw v. Barr*, No. 5:92-cv-202 (EDNC), Doc. 1, pp. 11–12.

The Court seems to acknowledge that appellants never focused their racial-gerrymandering claims on Alabama's majority-minority districts. While remanding to consider whether the majority-minority districts were racially gerrymandered, it admits that plaintiffs "basically claim that the State, in adding so many new minority voters to majority-minority districts (*and to others*), went too far." *Ante*, at 3 (emphasis added). It further concedes that appellants "relied heavily upon statewide evidence," and that they "also sought to prove that the use of race to draw the boundaries of the majority-minority districts affected the boundaries of other districts as well." *Ante*, at 10.

The only reason I see for the Court's selection of the majority-minority districts as the relevant set of districts for the District Court to consider on remand is that this was the set chosen by appellants after losing on the claim they actually presented in the District Court. By playing along with appellants' choose-your-own-adventure style of litigation, willingly turning back the page every time a strategic decision leads to a dead-end, the Court discourages careful litigation and punishes defendants who are denied both notice and repose. The consequences of this unprincipled decision will reverberate far beyond the narrow circumstances presented in this case.

Accordingly, I dissent.

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**SUPREME COURT OF THE UNITED STATES**

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Nos. 13–895 and 13–1138

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ALABAMA LEGISLATIVE BLACK CAUCUS, ET AL.,  
APPELLANTS  
13–895 *v.*  
ALABAMA ET AL.

ALABAMA DEMOCRATIC CONFERENCE, ET AL.,  
APPELLANTS  
13–1138 *v.*  
ALABAMA ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR  
THE MIDDLE DISTRICT OF ALABAMA

[March 25, 2015]

JUSTICE THOMAS, dissenting.

“[F]ew devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act.” *Holder v. Hall*, 512 U. S. 874, 907 (1994) (THOMAS, J., concurring in judgment). These consolidated cases are yet another installment in the “disastrous misadventure” of this Court’s voting rights jurisprudence. *Id.*, at 893. We have somehow arrived at a place where the parties agree that Alabama’s legislative districts should be fine-tuned to achieve some “optimal” result with respect to black voting power; the only disagreement is about what *percentage* of blacks should be placed in those optimized districts. This is nothing more than a fight over the “best” racial quota.

I join JUSTICE SCALIA’s dissent. I write only to point out that, as this case painfully illustrates, our jurisprudence

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in this area continues to be infected with error.

## I

The Alabama Legislature faced a difficult situation in its 2010 redistricting efforts. It began with racially segregated district maps that were inherited from previous decades. The maps produced by the 2001 redistricting contained 27 majority-black House districts and 8 majority-black Senate districts—both at the time they were drawn, App. to Juris. Statement 47–48, and at the time of the 2010 Census, App. 103–108. Many of these majority-black districts were over 70% black when they were drawn in 2001, and even more were over 60% black. App. to Juris. Statement 47–48. Even after the 2010 Census, the population remained above 60% black in the majority of districts. App. 103–108.

Under the 2006 amendments to §5 of the Voting Rights Act of 1965, Alabama was also under a federal command to avoid drawing new districts that would “have the effect of diminishing the ability” of black voters “to elect their preferred candidates of choice.” 52 U. S. C. §10304(b). To comply with §5, the legislature adopted a policy of maintaining the same percentage of black voters within each of those districts as existed in the 2001 plans. See *ante*, at 16. This, the districting committee thought, would preserve the ability of black voters to elect the same number of preferred candidates. App. to Juris. Statement 174–175. The Department of Justice (DOJ) apparently agreed. Acting under its authority to administer §5 of the Voting Rights Act, the DOJ precleared Alabama’s plans.<sup>1</sup> *Id.*,

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<sup>1</sup>As I have previously explained, §5 of the Voting Rights Act is unconstitutional. See *Shelby County v. Holder*, 570 U. S. \_\_\_, \_\_\_ (2013) (THOMAS, J., concurring) (slip op., at 1). And §5 no longer applies to Alabama after the Court’s decision in *Shelby County*. See *id.*, at \_\_\_ (slip op., at 24) (majority opinion). Because the appellants’ claims are not properly before us, however, I express no opinion on whether

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at 9.

Appellants—including the Alabama Legislative Black Caucus and the Alabama Democratic Conference—saw matters differently. They sued Alabama, and on appeal they argue that the State’s redistricting plans are racially gerrymandered because many districts are highly packed with black voters. According to appellants, black voters would have more voting power if they were spread over more districts rather than concentrated in the same number of districts as in previous decades. The DOJ has entered the fray in support of appellants, arguing that the State’s redistricting maps fail strict scrutiny because the State focused too heavily on a single racial characteristic—the number of black voters in majority-minority districts—which potentially resulted in impermissible packing of black voters.

Like the DOJ, today’s majority sides with appellants, faulting Alabama for choosing the wrong percentage of blacks in the State’s majority-black districts, or at least for arriving at that percentage using the wrong reasoning. In doing so, the Court—along with appellants and the DOJ—exacerbates a problem many years in the making. It seems fitting, then, to trace that history here. The practice of creating highly packed—“safe”—majority-minority districts is the product of our erroneous jurisprudence, which created a system that forces States to segregate voters into districts based on the color of their skin. Alabama’s current legislative districts have their genesis in the “max-black” policy that the DOJ itself applied to §5 throughout the 1990’s and early 2000’s. The 2006 amendments to §5 then effectively locked in place Ala-

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compliance with §5 was a compelling governmental purpose at the time of Alabama’s 2012 redistricting, nor do I suggest that Alabama would necessarily prevail if appellants had properly raised district-specific claims.

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bama’s max-black districts that were established during the 1990’s and 2000’s. These three problems—a jurisprudence requiring segregated districts, the distortion created by the DOJ’s max-black policy, and the ossifying effects of the 2006 amendments—are the primary culprits in this case, not Alabama’s redistricting policy. Nor does this Court have clean hands.

## II

This Court created the current system of race-based redistricting by adopting expansive readings of §2 and §5 of the Voting Rights Act. Both §2 and §5 prohibit States from implementing voting laws that “den[y] or abridg[e] the right to vote on account of race or color.” §§10304(a), 10301(a). But both provisions extend to only certain types of voting laws: any “voting qualification or prerequisite to voting, or standard, practice, or procedure.” *Ibid.* As I have previously explained, the terms “‘standard, practice, or procedure’ . . . refer only to practices that affect minority citizens’ access to the ballot,” such as literacy tests. *Holder*, 512 U. S. at 914 (opinion concurring in judgment). They do not apply to “[d]istricting systems and electoral mechanisms that may affect the ‘weight’ given to a ballot duly cast and counted.” *Ibid.* Yet this Court has adopted far-reaching interpretations of both provisions, holding that they encompass legislative redistricting and other actions that might “dilute” the strength of minority votes. See generally *Thornburg v. Gingles*, 478 U. S. 30 (1986) (§2 “vote dilution” challenge to legislative districting plan); see also *Allen v. State Bd. of Elections*, 393 U. S. 544, 583–587 (1969) (Harlan, J., concurring in part and dissenting in part).

The Court’s interpretation of §2 and §5 have resulted in challenge after challenge to the drawing of voting districts. See, e.g., *Bartlett v. Strickland*, 556 U. S. 1 (2009); *League of United Latin American Citizens v. Perry*, 548 U. S. 399



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(2006); *Georgia v. Ashcroft*, 539 U. S. 461 (2003); *Reno v. Bossier Parish School Bd.*, 528 U. S. 320 (2000) (*Bossier II*); *Hunt v. Cromartie*, 526 U. S. 541 (1999); *Reno v. Bossier Parish School Bd.*, 520 U. S. 471 (1997) (*Bossier I*); *Bush v. Vera*, 517 U. S. 952 (1996); *Shaw v. Hunt*, 517 U. S. 899 (1996) (*Shaw II*); *Miller v. Johnson*, 515 U. S. 900 (1995); *United States v. Hays*, 515 U. S. 737 (1995); *Holder*, *supra*; *Johnson v. De Grandy*, 512 U. S. 997 (1994); *Grove v. Emison*, 507 U. S. 25 (1993); *Shaw v. Reno*, 509 U. S. 630 (1993) (*Shaw I*); *Voinovich v. Quilter*, 507 U. S. 146 (1993).

The consequences have been as predictable and as they are unfortunate. In pursuing “undiluted” or maximized minority voting power, “we have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success.” *Holder*, *supra*, at 892 (THOMAS, J., concurring in judgment). Section 5, the provision at issue here, has been applied to require States that redistrict to maintain the number of pre-existing majority-minority districts, in which minority voters make up a large enough portion of the population to be able to elect their candidate of choice. See, e.g., *Miller*, *supra*, at 923–927 (rejecting the DOJ’s policy of requiring States to increase the number of majority-black districts because maintaining the same number of majority-black districts would not violate §5).

In order to maintain these “racially ‘safe burroughs,’” States or courts must perpetually “divid[e] the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands.” *Holder*, *supra*, at 905 (opinion of THOMAS, J.) (internal quotation marks omitted). The assumptions underlying this practice of creating and maintaining “safe minority districts”—“that members of [a] racial group must think alike and that their interests are so distinct that they must be provided a separate body of representatives”—remain “re-

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pugnant to any nation that strives for the ideal of a color-blind Constitution.” *Id.*, at 905–906. And, as predicted, the States’ compliance efforts have “embroil[ed] the courts in a lengthy process of attempting to undo, or at least to minimize, the damage wrought by the system we created.” *Id.*, at 905. It is this fateful system that has produced these cases.

## III

## A

In tandem with our flawed jurisprudence, the DOJ has played a significant role in creating Alabama’s current redistricting problem. It did so by enforcing §5 in a manner that required States, including Alabama, to create supermajority-black voting districts or face denial of pre-clearance.

The details of this so-called “max-black” policy were highlighted in federal court during Georgia’s 1991 congressional redistricting. See *Johnson v. Miller*, 864 F. Supp. 1354, 1360–1361 (SD Ga. 1994). On behalf of the Black Caucus of the Georgia General Assembly, the American Civil Liberties Union (ACLU) submitted a redistricting proposal to the Georgia Legislature that became known as the “max-black plan.” *Id.*, at 1360. The ACLU’s map created two new “black” districts and “further maximized black voting strength by pushing the percentage of black voters within its majority-black districts as high as possible.” *Id.*, at 1361 (internal quotation marks omitted).

The DOJ denied several of Georgia’s proposals on the ground that they did not include enough majority-black districts. *Id.*, at 1366. The plan it finally approved was substantially similar to the ACLU’s max-black proposal, *id.*, at 1364–1366, creating three majority-black districts, with total black populations of 56.63%, 62.27%, and

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64.07%, *id.*, at 1366, and n. 12.<sup>2</sup>

Georgia was not the only State subject to the DOJ's maximization policy. North Carolina, for example, submitted a congressional redistricting plan after the 1990 Census, but the DOJ rejected it because it did not create a new majority-minority district, and thus "appear[ed] to minimize minority voting strength." *Shaw v. Barr*, 808 F. Supp. 461, 463–464 (EDNC 1992) (quoting Letter from John R. Dunne, Assistant Attorney General of N. C., Civil Rights Div., to Tiare B. Smiley, Special Deputy Attorney General of N. C. 4 (Dec. 18, 1991)). The DOJ likewise pressured Louisiana to create a new majority-black district when the State sought approval of its congressional redistricting plan following the 1990 Census. See *Hays v. Louisiana*, 839 F. Supp. 1188, 1190 (WD La. 1993), vacated on other grounds by *Louisiana v. Hays*, 512 U. S. 1230 (1994).

Although we eventually rejected the DOJ's max-black policy, see *Miller*, *supra*, at 924–927, much damage to the States' congressional and legislative district maps had already been done. In those States that had enacted districting plans in accordance with the DOJ's max-black policy, the prohibition on retrogression under §5 meant that the legislatures were effectively required to maintain those max-black plans during any subsequent redistricting. That is what happened in Alabama.

## B

Alabama's 2010 redistricting plans were modeled after max-black-inspired plans that the State put in place in the

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<sup>2</sup>The District Court found it "unclear whether DOJ's maximization policy was driven more by [the ACLU's] advocacy or DOJ's own misguided reading of the Voting Rights Act," and it concluded that the "considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment." *Johnson v. Miller*, 864 F. Supp. 1354, 1368 (SD Ga. 1994).

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1990's under the DOJ's max-black policy. See generally *Kelley v. Bennett*, 96 F. Supp. 2d 1301 (MD Ala. 2000), vacated on other grounds by *Sinkfield v. Kelley*, 531 U. S. 28 (2000) (*per curiam*).

Following the 1990 Census, the Alabama Legislature began redrawing its state legislative districts. After several proposals failed in the legislature, a group of plaintiffs sued, and the State entered into a consent decree agreeing to use the "Reed-Buskey" plan. 96 F. Supp. 2d, at 1309. The primary designer of this plan was Dr. Joe Reed, the current chairman of appellant Alabama Democratic Conference. According to Dr. Reed, the previous plan from the 1980's was not "fair" because it did not achieve the number of "black-preferred" representatives that was proportionate to the percentage of blacks in the population. *Id.*, at 1310. And because of the DOJ's max-black policy, "it was widely assumed that a state could (and, according to DOJ, had to) draw district lines with the primary intent of maximizing election of black officials." *Id.*, at 1310, n. 14. "Dr. Reed thus set out to maximize the number of black representatives and senators elected to the legislature by maximizing the number of black-majority districts." *Id.*, at 1310. Illustrating this strategy, Alabama's letter to the DOJ seeking preclearance of the Reed-Buskey plan "emphasize[d] the Plan's deliberate creation of enough majority-black districts to assure nearly proportional representation in the legislature," *ibid.*, n. 14 and boasted that the plan had created four new majority-black districts and two additional majority-black Senate districts. *Ibid.*

Dr. Reed populated these districts with a percentage of black residents that achieved an optimal middle ground—a "happy medium"—between too many and too few. *Id.*, at 1311. Twenty-three of the twenty-seven majority-black House districts were between 60% and 70% black under Reed's plan, *id.*, at 1311, and Senate District 26—one of the districts at issue today—was pushed from 65% to 70%

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black. *Id.*, at 1315.<sup>3</sup> A District Court struck down several districts created in the Reed-Buskey plan as unconstitutionally based on race. *Id.*, at 1324. This Court reversed, however, holding that the plaintiffs lacked standing because they did not live in the gerrymandered districts. *Sinkfield, supra*, at 30–31.

The Reed-Buskey plan thus went into effect and provided the template for the State’s next redistricting efforts in 2001. See *Montiel v. Davis*, 215 F. Supp. 2d 1279, 1282 (SD Ala. 2002). The 2001 maps maintained the same number of majority-black districts as the Reed-Buskey plan had created: 27 House districts and 8 Senate districts. *Ibid.* And “to maintain the same relative percentages of black voters in those districts,” the legislature “redrew the districts by shifting more black voters into the majority-black districts.” App. to Juris. Statement 4. The State’s letters requesting preclearance of the 2001 plans boasted that the maps maintained the same number of majority-black districts and the same (or higher) percentages of black voters within those districts, other than “slight reductions” that were “necessary to satisfy other legitimate, nondiscriminatory redistricting considerations.” Letter from William H. Pryor, Alabama Attorney General, to Voting Section Chief, Civil Rights Division, Department of Justice 6–7 (Aug. 14, 2001) (Senate districts); Letter from William H. Pryor, Alabama Attorney

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<sup>3</sup>In this litigation, Dr. Reed and the Alabama Democratic Conference argue that the percentage of black residents needed to maintain the ability to elect a black-preferred candidate is lower than it was in the 2000’s because black participation has increased over the last decade. Brief for Appellants in No. 13–1138, pp. 39–40. Although appellants disclaim any argument that the State must achieve an optimal percentage of black voters in majority-black districts, *id.*, at 35, it is clear that that is what they seek: a plan that maximizes voting strength by maintaining “safe” majority-minority districts while also spreading black voters into other districts where they can influence elections. *Id.*, at 17–18.

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General, to Voting Section Chief, Civil Rights Division, Department of Justice 7, 9 (Sept. 4, 2001) (House districts).

Section 5 tied the State to those districts: Under this Court’s §5 precedents, States are prohibited from enacting a redistricting plan that “would lead to a retrogression in the position of racial minorities.” *Beer v. United States*, 425 U. S. 130, 141 (1976). In other words, the State could not retrogress from the previous plan if it wished to comply with §5.

#### IV

Alabama’s quandary as it attempted to redraw its legislative districts after 2010 was exacerbated by the 2006 amendments to §5. Those amendments created an inflexible definition of “retrogression” that Alabama understandably took as requiring it to maintain the same percentages of minority voters in majority-minority districts. The amendments thus provide the last piece of the puzzle that explains why the State sought to maintain the same percentages of blacks in each majority-black district.

Congress passed the 2006 amendments in response to our attempt to define “retrogression” in *Georgia v. Ashcroft*, 539 U. S. 461. Prior to that decision, practically any reapportionment change could “be deemed ‘retrogressive’ under our vote dilution jurisprudence by a court inclined to find it so.” *Bossier I*, 520 U. S., at 490–491 (THOMAS, J., concurring). “[A] court could strike down *any* reapportionment plan, either because it did not include enough majority-minority districts or because it did (and thereby diluted the minority vote in the remaining districts).” *Id.*, at 491. Our §5 jurisprudence thus “inevitably force[d] the courts to make political judgments regarding which type of apportionment best serves supposed minority interests—judgments courts are ill equipped to make.” *Id.*, at 492.

We tried to pull the courts and the DOJ away from

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making these sorts of judgments in *Georgia v. Ashcroft*, *supra*. Insofar as §5 applies to the drawing of voting districts, we held that a District Court had wrongly rejected Georgia’s reapportionment plan, and we adopted a retrogression standard that gave States flexibility in determining the percentage of black voters in each district. *Id.*, at 479–481. As we explained, “a State may choose to create a certain number of ‘safe’ districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice.” *Id.*, at 480. Alternatively, “a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.” *Ibid.* We noted that “spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice,” even if success is not guaranteed, and even if it diminished the chance of electing a representative in some districts. *Id.*, at 481. Thus, States would be permitted to make judgments about how best to prevent retrogression in a minority group’s voting power, including assessing the range of appropriate minority population percentages within each district. *Id.*, at 480–481.

In response, Congress amended §5 and effectively overruled *Georgia v. Ashcroft*. See 120 Stat. 577. The 2006 amendments added subsection (b), which provides:

“Any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting that has the purpose or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of . . . this section.” 52 U. S. C. §10304(b). See §5, 120 Stat. 577.

THOMAS, J., dissenting

Thus, any change that has the effect of “diminishing the ability” of a minority group to “elect their preferred candidate of choice” is retrogressive.

Some were rightly worried that the 2006 amendments would impose too much inflexibility on the States as they sought to comply with §5. Richard Pildes, who argued on behalf of the Alabama Democratic Conference in these cases, testified in congressional hearings on the 2006 amendments. He explained that *Georgia v. Ashcroft* “recognizes room . . . for some modest flexibility in Section 5,” and warned that if “Congress overturns *Georgia v. Ashcroft*, it will make even this limited amount of flexibility illegal.” Hearing on the Continuing Need for Section 5 Pre-Clearance before the Senate Committee on the Judiciary, 109th Congress, 2d Sess., pp. 11–12 (2006). Pildes also observed that the proposed standard of “no ‘diminished ability to elect’ . . . has a rigidity and a mechanical quality that can lock into place minority districts in the south at populations that do not serve minority voters’ interests.” *Id.*, at 12. Although this testimony says nothing about how §5 ought to be interpreted, it tells us that the Alabama Democratic Conference’s own attorney believes that the State was subject to a “rigi[d]” and “mechanical” standard in determining the number of black voters that must be maintained in a majority-black district.

## V

All of this history explains Alabama’s circumstances when it attempted to redistrict after the 2010 Census. The legislature began with the max-black district maps that it inherited from the days of Reed-Buskey. Using these inherited maps, combined with population data from the 2010 Census, many of the State’s majority-black House and Senate districts were between 60% and 70% black, and some were over 70%. App. to Juris. Statement



THOMAS, J., dissenting

103–108. And the State was prohibited from drawing new districts that would “have the effect of diminishing the ability” of blacks “to elect their preferred candidates of choice.” §10304(b). The legislature thus adopted a policy of maintaining the same number of majority-black districts and roughly the same percentage of blacks within each of those districts. See *ante*, at 16.

The majority faults the State for taking this approach. I do not pretend that Alabama is blameless when it comes to its sordid history of racial politics. But, today the State is not the one that is culpable. Its redistricting effort was indeed tainted, but it was tainted by our voting rights jurisprudence and the uses to which the Voting Rights Act has been put. Long ago, the DOJ and special-interest groups like the ACLU hijacked the Act, and they have been using it ever since to achieve their vision of maximized black electoral strength, often at the expense of the voters they purport to help. States covered by §5 have been whipsawed, first required to create “safe” majority-black districts, then told not to “diminis[h]” the ability to elect, and now told they have been too rigid in preventing any “diminishing” of the ability to elect. *Ante*, at 17–18.

Worse, the majority’s solution to the appellants’ gerrymandering claims requires States to analyze race even *more* exhaustively, not less, by accounting for black voter registration and turnout statistics. *Ante*, at 18–19. The majority’s command to analyze black voting patterns en route to adopting the “correct” racial quota does nothing to ease the conflict between our color-blind Constitution and the “consciously segregated districting system” the Court has required in the name of equality. *Holder*, 512 U. S., at 907. Although I dissent today on procedural grounds, I also continue to disagree with the Court’s misguided and damaging jurisprudence.

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

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CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
BY                       
DEPUTY

SUE EVENWEL AND  
EDWARD PFENNINGER  
PLAINTIFFS,

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§  
§

V.

§ CAUSE NO. A-14-CV-335-LY-CH-MHS

§  
§

RICK PERRY, IN HIS OFFICIAL  
CAPACITY AS GOVERNOR OF  
TEXAS, AND NANDITA BERRY,  
IN HER OFFICIAL CAPACITY AS  
TEXAS SECRETARY OF STATE,  
DEFENDANTS.

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**MEMORANDUM OPINION AND ORDER**

After this case was filed raising allegations implicating a statewide redistricting scheme, Fifth Circuit Chief Judge Carl Stewart appointed this three-judge panel to preside over the case. 28 U.S.C. § 2284. This court has federal-question jurisdiction. 28 U.S.C. §§ 1331, 1343(a)(3)–(4); 42 U.S.C. § 1983. Before the court are the Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted (Clerk's Doc. No. 15). The court heard oral argument on the motion on June 25, 2014. Also pending are Plaintiffs' motion for summary judgment (Clerk's Doc. No. 12) and a motion to intervene filed by the Texas Senate Hispanic Caucus, and others (Clerk's Doc. No. 25). For the following reasons, we GRANT Defendants' Motion to Dismiss. Accordingly, we DISMISS Plaintiffs' motion for summary judgment and the motion to intervene.

## I. Background

The Texas Legislature is required by the Texas Constitution to reapportion its senate districts during the first regular session after the federal decennial census. Tex. Const. art. III, § 28. It is undisputed that, after publication of the 2010 census, the Texas Legislature created redistricting PLANS148<sup>1</sup> and passed it as part of Senate Bill 31, which Texas Governor Rick Perry signed into law June 17, 2011. *See* Act of May 21, 2011, 82nd Leg., R.S., ch.1315, 2011 Tex. Sess. Law Serv. 3748. A separate three-judge panel of the United States District Court for the Western District of Texas found that there was a not insubstantial claim that PLANS148 violated the federal Voting Rights Act, and issued an interim plan, PLANS172, for the 2012 primary elections. *See Davis v. Perry*, Nos. 5:11-CV-788, 5:11-CV-855, 2014 WL 106990, at \*3 (W.D. Tex. Jan. 8, 2014). Thereafter, the Texas Legislature adopted and Governor Perry signed into law PLANS172, as the official Texas Senate districting plan. *See* Act of June 21, 2013, 83rd Leg., 1st C.S. ch.1, 2013 Tex. Sess. Law Serv. 4677.

On April 21, 2014, Plaintiffs Sue Evenwel and Edward Pfenninger filed this suit against Governor Perry and Texas Secretary of State Nandita Berry in their official capacities. Plaintiffs allege that they are registered voters who actively vote in Texas Senate elections. Evenwel lives in Titus County, part of Texas Senate District 1, and Pfenninger lives in Montgomery County, part of Texas Senate District 4.

Plaintiffs allege that, in enacting PLANS172, the Texas Legislature apportioned senatorial districts to achieve a relatively equal number of

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1. The Legislature identifies the redistricting plans referred to in this opinion as the plans are identified “on the redistricting computer system operated by the Texas Legislative Council.” This court will do the same. *See* Act of May 21, 2011, 82nd Leg., R.S., ch.1315, 2011 Tex. Sess. Law Serv. 3748 (“PLANS148”); Act of June 21, 2013, 83rd Leg., 1st C.S. ch.1, 2013 Tex. Sess. Law Serv. 4677 (“PLANS172”).

individuals based on total population alone. Plaintiffs concede that PLANS172's total deviation from ideal, using total population, is 8.04%. The crux of the dispute is Plaintiffs' allegation that the districts vary widely in population when measured using various voter-population metrics.<sup>2</sup> They further allege that it is possible to create districts that contain both relatively equal numbers of voter population and relatively equal numbers of total population. They conclude that PLANS172 violates the one-person, one-vote principle of the Equal Protection Clause by not apportioning districts to equalize *both* total population and voter population. *See* 42 U.S.C. § 1983.

Defendants' motion to dismiss argues that there is no legal basis for Plaintiffs' claim that PLANS172 is unconstitutional for not apportioning districts pursuant to Plaintiffs' proffered scheme.

## II. Standard of Review

Rule 12(b)(6) allows a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). The inquiry under Rule 12(b)(6) is whether, accepting all facts alleged in the complaint as true, the complaint states a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). Importantly, legal conclusions need not be accepted as true. *Id.* Under Rule 12(b)(6), dismissal is proper if a claim is based on an ultimately unavailing legal theory. *See Neitzke v. Williams*, 490 U.S. 319, 326–27 (1989).

## III. Discussion

A state's congressional-apportionment plan may be challenged under the Equal Protection Clause in either of two ways: (1) that the plan does not achieve substantial equality of population among districts when measured

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2. Plaintiffs use the following metrics: citizen voting age population ("CVAP") from 2005–2009, 2006–2010, and 2007–2011; total voter registration from 2008 and 2010; and non-suspense voter registration from 2008 and 2010.

using a permissible population base, *see Gaffney v. Cummings*, 412 U.S. 735, 744 (1973); or (2) that the plan is created in a manner that is otherwise invidiously discriminatory against a protected group, *see id.* at 751–52. Plaintiffs’ challenge falls only in the first category, so we address that theory.<sup>3</sup>

Here Plaintiffs must prove that the districting plan violates the Equal Protection Clause by demonstrating that the plan fails to achieve “substantial equality of population”—what Plaintiffs refer to as the “one-person, one-vote” principle. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964) (“[T]he overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.”); *id.* at 577 (“[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.”); *see also Brown v. Thomson*, 462 U.S. 835, 842 (1983); *Gaffney*, 412 U.S. at 744. Under this approach, absolute mathematical equality is not necessary, as some deviation is permissible in order to achieve other legitimate state interests. *See Brown*, 462 U.S. at 842; *Reynolds*, 377 U.S. at 577–79. Furthermore, minor deviations, defined as “a maximum population deviation under 10%,” fail to make out a *prima facie* case under this theory. *Brown*, 462 U.S. at 842–43.

In applying this framework, the Supreme Court has generally used total population as the metric of comparison. *E.g.*, *Brown*, 462 U.S. at 837–40; *Gaffney*, 412 U.S. at 745–50; *Reynolds*, 377 U.S. at 568–69. However, the Court has never held that a certain metric (including total population) *must* be employed as the appropriate metric. *See Burns v. Richardson*, 384 U.S.

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3. To the extent Plaintiffs intended to allege the second theory, they have failed to do so plausibly.

73, 91–92 (1966) (“[T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured.”). Instead, the Court has explained that the limit on the metric employed is that it must not itself be the result of a discriminatory choice and that, so long as the legislature’s choice is not constitutionally forbidden, the federal courts must respect the legislature’s prerogative. *Id.* at 92 (citation omitted).

Plaintiffs do not allege that the apportionment base employed by Texas involves a choice the Constitution forbids. Accordingly, Texas’s “compliance with the rule established in *Reynolds v. Sims* is to be measured thereby.” *Id.* Measuring it in this manner, the Plaintiffs fail to allege facts that demonstrate a prima facie case against Texas under *Reynolds v. Sims*. The Plaintiffs do not allege that PLANS172 fails to achieve substantial population equality employing Texas’s metric of total population; to the contrary, they admit that Texas redrew its senate districts to equalize total population, and they present facts showing that PLANS172’s total deviation from ideal, using total population, is 8.04%. Given that this falls below 10%, the Plaintiffs’ own pleading shows that they cannot make out a prima facie case of a violation of the one-person, one-vote principle. *See Brown*, 462 U.S. at 842–43. Accordingly, they fail to state a claim upon which relief can be granted.

Plaintiffs attempt to avoid this result by relying upon a theory never before accepted by the Supreme Court or any circuit court: that the metric of apportionment employed by Texas (total population) results in an unconstitutional apportionment because it does not achieve equality as measured by Plaintiffs’ chosen metric—voter population. *See Chen v. City of Houston*, 206 F.3d 502, 522 (5th Cir. 2000) (rejecting argument that City of

Houston violated Equal Protection Clause by “improperly craft[ing] its districts to equalize total population rather than [CVAP]”), *cert. denied*, 532 U.S. 1046 (2001); *Daly v. Hunt*, 93 F.3d 1212, 1222 (4th Cir. 1996) (rejecting argument that “voting-age population is the more appropriate apportionment base because it provides a better indication of actual voting strength than does total population”); *Garza v. Cnty. of L.A.*, 918 F.2d 763, 773–74 (9th Cir. 1990) (rejecting argument that decision to “employ[] statistics based upon the total population of the County, rather than the voting population, . . . is erroneous as a matter of law”), *cert. denied*, 498 U.S. 1028 (1991); *see also Lepak v. City of Irving, Texas*, 453 F. App’x 522 (5th Cir. 2011) (unpublished) (relying on *Chen* to reject argument that Equal Protection Clause requires equalizing districts based on CVAP as opposed to total population), *cert. denied*, 133 S. Ct. 1725 (2013).<sup>4</sup>

Plaintiffs argue that their theory is consonant with *Burns*, in which the Supreme Court faced a related argument. 384 U.S. at 81, 90. *Burns* involved a challenge to Hawaii’s apportionment on the basis of registered-voter data. *Id.* Although Hawaii achieved substantial equality using its chosen metric, there were large disparities between districts when measured using total population. *Id.* at 90. The Court began by explaining that Equal Protection

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4. Plaintiffs argue that circuit precedent, such as *Chen*, is not binding on a three-judge panel such as this one because, Plaintiffs assert, appeal is direct from the panel to the United States Supreme Court. Because we reach the same result as *Chen* regardless of whether it is binding precedent, we need not decide this question.

Plaintiffs also contend that the circuit court cases are distinguishable because, in this case, they do not ask the court to decide on behalf of the legislature which source of equality—electoral or representational—is supreme; rather they claim that substantial equality of population on both fronts is a constitutionally required choice where both can be achieved. This is a distinction without meaning. Regardless of whether both apportionment bases can be employed simultaneously, Plaintiffs ask us to find PLANS172 unconstitutional based on Plaintiffs’ chosen apportionment base, even though the state employed a permissible apportionment base and achieved substantial equality of population doing so. This is the same request denied by the circuit courts that have reached the issue.

Clause jurisprudence has “*carefully left open* the question what population” base was to be used in achieving substantial equality of population. *Id.* at 91 (emphasis added). The Court then stated that a state’s choice of apportionment base is not restrained beyond the requirement that it not involve an unconstitutional inclusion or exclusion of a protected group. *Id.* at 92 (“Unless a choice is one the Constitution forbids, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby.” (citation omitted)). The Court explained that this amount of flexibility is left to state legislatures because the decision whether to exclude or include individuals who are ineligible to vote from an apportionment base “*involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.*” *Id.* (emphasis added). In other words, it is not the role of the federal courts to impose a “better” apportionment method on a state legislature if that state’s chosen method does not itself violate the Constitution.<sup>5</sup> See also *Perry v. Perez*, 132 S. Ct. 934, 942 (2012) (addressing requirement that federal courts respect legislative choices even when redrawing lines to address constitutional concerns: “In the absence of any legal flaw . . . in the State’s plan, the District Court had no basis to modify that plan.”)

Working from this starting point, the Supreme Court highlighted the concerns raised by using registered voters as the apportionment base as

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5. In addition to the statements in *Burns*, the Supreme Court has repeatedly emphasized that apportionment of legislative districts is a decision primarily entrusted to state legislatures, with which a federal court is to interfere only when the Constitution demands it. See *Reynolds*, 377 U.S. at 586 (acknowledging that reapportionment is first and foremost a matter for the legislature and judicial interference is appropriate “only when a legislature fails to reapportion according to federal constitutional requisites”); see also *Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993); *Grove v. Emison*, 507 U.S. 25, 34 (1993); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Gaffney*, 412 U.S. at 749–50.



opposed to state citizenship or another permissible population base.<sup>6</sup> It then held that Hawaii’s “apportionment satisfies the Equal Protection Clause *only because* on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis.” 384 U.S. at 93 (emphasis added). The permissible population base the Supreme Court considered in *Burns* was state citizenship. *Id.* 93–95. The Court was careful to note that its holding was limited to the specific facts before it and should not be seen as an endorsement of using registered voters as an apportionment base. *Id.* at 96 (“We are not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere.”).

Plaintiffs characterize *Burns* as the Court “ma[king] clear that the right of voters to an equally weighted vote is the relevant constitutional principle and that any interest in proportional representation must be subordinated to that right.” Quite the contrary, the Supreme Court recognized that the precise question presented here—whether to “include or exclude” groups of individuals ineligible to vote from an apportionment

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6. The Court described the additional problems presented by using registered voters or actual voters as an apportionment base:

Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a ghost of prior malapportionment. Moreover, fluctuations in the number of registered voters in a given election may be sudden and substantial, caused by such fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather conditions. Such effects must be particularly a matter of concern where, as in the case of Hawaii apportionment, registration figures derived from a single election are made controlling for as long as 10 years.

*Burns*, 384 U.S. at 92–93 (citations and internal quotation marks omitted).

base—“involves choices about the nature of representation” which the Court has “been shown no constitutionally founded reason to interfere.” 384 U.S. at 92. Furthermore, the Supreme Court indicated problems in using one of the Plaintiffs’ proposed metrics—registered voters—and ultimately measured the constitutionality of Hawaii’s apportionment using the permissible population base of state citizenship. *See id.* at 92–93. We conclude that Plaintiffs are asking us to “interfere” with a choice that the Supreme Court has unambiguously left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals. We decline the invitation to do so. *See, e.g., Chen*, 206 F.3d 502; *Daly*, 93 F.3d 1212.

#### IV. Conclusion

The Plaintiffs have failed to plead facts that state an Equal Protection Clause violation under the recognized means for showing unconstitutionality under that clause. Further, Plaintiffs’ proposed theory for proving an Equal Protection Clause violation is contrary to the reasoning in *Burns* and has never gained acceptance in the law. For these reasons, we conclude that Plaintiffs’ complaint fails to state a claim upon which relief can be granted. *See Neitzke*, 490 U.S. at 327 (noting that court may dismiss claim that “is based on a close but ultimately unavailing [legal theory]”).

Accordingly, it is **ORDERED** that Defendants’ Motion to Dismiss (Clerk’s Doc. No. 15) is **GRANTED** and Plaintiffs’ claims against the Defendants are **DISMISSED WITH PREJUDICE**.

It is further **ORDERED** that Plaintiffs' motion for summary judgment (Clerk's Doc. No. 12) and the motion to intervene (Clerk's Doc. No. 25) are **DISMISSED**.

All other requests for relief are denied.

A final judgment will be rendered by separate order.

SIGNED this 5th day of November, 2014.

/s/ Lee Yeakel

LEE YEAKEL

UNITED STATES DISTRICT JUDGE

/s/ Catharina Haynes

CATHARINA HAYNES

UNITED STATES CIRCUIT JUDGE

/s/ Michael H. Schneider

MICHAEL H. SCHNEIDER

UNITED STATES DISTRICT JUDGE

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

## Syllabus

OBERGEFELL ET AL. *v.* HODGES, DIRECTOR, OHIO  
DEPARTMENT OF HEALTH, ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT

No. 14–556. Argued April 28, 2015—Decided June 26, 2015\*

Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners’ favor, but the Sixth Circuit consolidated the cases and reversed.

*Held:* The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. Pp. 3–28.

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court. Pp. 3–10.

(1) The history of marriage as a union between two persons of the opposite sex marks the beginning of these cases. To the respondents, it would demean a timeless institution if marriage were extended to same-sex couples. But the petitioners, far from seeking to devalue marriage, seek it for themselves because of their respect—and need—for its privileges and responsibilities, as illustrated by the pe-

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

## Syllabus

tioners’ own experiences. Pp. 3–6.

(2) The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.

This dynamic can be seen in the Nation’s experience with gay and lesbian rights. Well into the 20th century, many States condemned same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2003, this Court overruled its 1986 decision in *Bowers v. Hardwick*, 478 U. S. 186, which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime “demea[n] the lives of homosexual persons.” *Lawrence v. Texas*, 539 U. S. 558, 575. In 2012, the federal Defense of Marriage Act was also struck down. *United States v. Windsor*, 570 U. S. \_\_\_\_\_. Numerous same-sex marriage cases reaching the federal courts and state supreme courts have added to the dialogue. Pp. 6–10.

(b) The Fourteenth Amendment requires a State to license a marriage between two people of the same sex. Pp. 10–27.

(1) The fundamental liberties protected by the Fourteenth Amendment’s Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. See, e.g., *Eisenstadt v. Baird*, 405 U. S. 438, 453; *Griswold v. Connecticut*, 381 U. S. 479, 484–486. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, *Loving v. Virginia*, 388 U. S. 1, 12, invalidated bans on interracial unions, and *Turner v. Safley*, 482 U. S. 78, 95, held that prisoners could not be denied the right to marry. To be sure, these cases presumed a relationship in-

## Syllabus

volving opposite-sex partners, as did *Baker v. Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding that the exclusion of same-sex couples from marriage did not present a substantial federal question. But other, more instructive precedents have expressed broader principles. See, e.g., *Lawrence*, *supra*, at 574. In assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, e.g., *Eisenstadt*, *supra*, at 453–454. This analysis compels the conclusion that same-sex couples may exercise the right to marry. Pp. 10–12.

(2) Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise of this Court’s relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12. Decisions about marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. This is true for all persons, whatever their sexual orientation.

A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate association protected by this right was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception, 381 U. S., at 485, and was acknowledged in *Turner*, *supra*, at 95. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. See *Lawrence*, *supra*, at 567.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, e.g., *Pierce v. Society of Sisters*, 268 U. S. 510. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. See *Windsor*, *supra*, at \_\_\_\_\_. This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.

## Syllabus

Finally, this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of the Nation’s social order. See *Maynard v. Hill*, 125 U. S. 190, 211. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation’s society, for they too may aspire to the transcendent purposes of marriage.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. Pp. 12–18.

(3) The right of same-sex couples to marry is also derived from the Fourteenth Amendment’s guarantee of equal protection. The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet each may be instructive as to the meaning and reach of the other. This dynamic is reflected in *Loving*, where the Court invoked both the Equal Protection Clause and the Due Process Clause; and in *Zablocki v. Redhail*, 434 U. S. 374, where the Court invalidated a law barring fathers delinquent on child-support payments from marrying. Indeed, recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged, this Court has invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage, see, e.g., *Kirchberg v. Feenstra*, 450 U. S. 455, 460–461, and confirmed the relation between liberty and equality, see, e.g., *M. L. B. v. S. L. J.*, 519 U. S. 102, 120–121.

The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See *Lawrence*, 539 U. S., at 575. This dynamic also applies to same-sex marriage. The challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality. The marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians. Pp. 18–22.

(4) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protec-

## Syllabus

tion Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. *Baker v. Nelson* is overruled. The State laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. Pp. 22–23.

(5) There may be an initial inclination to await further legislation, litigation, and debate, but referenda, legislative debates, and grassroots campaigns; studies and other writings; and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right. *Bowers*, in effect, upheld state action that denied gays and lesbians a fundamental right. Though it was eventually repudiated, men and women suffered pain and humiliation in the interim, and the effects of these injuries no doubt lingered long after *Bowers* was overruled. A ruling against same-sex couples would have the same effect and would be unjustified under the Fourteenth Amendment. The petitioners' stories show the urgency of the issue they present to the Court, which has a duty to address these claims and answer these questions. Respondents' argument that allowing same-sex couples to wed will harm marriage as an institution rests on a counterintuitive view of opposite-sex couples' decisions about marriage and parenthood. Finally, the First Amendment ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. Pp. 23–27.

(c) The Fourteenth Amendment requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. Pp. 27–28.

772 F. 3d 388, reversed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.



Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

**SUPREME COURT OF THE UNITED STATES**

Nos. 14–556, 14–562, 14–571 and 14–574

JAMES OBERGEFELL, ET AL., PETITIONERS  
14–556 *v.*  
RICHARD HODGES, DIRECTOR, OHIO  
DEPARTMENT OF HEALTH, ET AL.;

VALERIA TANCO, ET AL., PETITIONERS  
14–562 *v.*  
BILL HASLAM, GOVERNOR OF  
TENNESSEE, ET AL.;

APRIL DEBOER, ET AL., PETITIONERS  
14–571 *v.*  
RICK SNYDER, GOVERNOR OF MICHIGAN,  
ET AL.; AND

GREGORY BOURKE, ET AL., PETITIONERS  
14–574 *v.*  
STEVE BESHEAR, GOVERNOR OF  
KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach,  
a liberty that includes certain specific rights that allow

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persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

## I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. See, e.g., Mich. Const., Art. I, §25; Ky. Const. §233A; Ohio Rev. Code Ann. §3101.01 (Lexis 2008); Tenn. Const., Art. XI, §18. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. Citations to those cases are in Appendix A, *infra*. The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. *DeBoer v. Snyder*, 772 F. 3d 388 (2014). The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. 574 U.S. \_\_\_\_ (2015). The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio,

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Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

## II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

## A

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, “The first bond of society is marriage; next, children; and then the family.” See *De Officiis* 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures,

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and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from

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Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for the rest of time." App. in No. 14–556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two

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settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

## B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. See N. Cott, *Public Vows: A History of Marriage and the Nation* 9–17 (2000); S. Coontz, *Marriage, A History* 15–16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, *Commentaries on the Laws of England* 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as *Amici Curiae* 16–19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes.

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Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally N. Cott, *Public Vows*; S. Coontz, *Marriage*; H. Hartog, *Man & Wife in America: A History* (2000).

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as *Amicus Curiae* 5–28.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See Position Statement on Homosexuality and Civil

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Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. See Brief for American Psychological Association et al. as *Amici Curiae* 7–17.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick*, 478 U. S. 186 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans*, 517 U. S. 620 (1996), the Court invalidated an amendment to Colorado’s Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime “demea[n] the lives of homosexual persons.” *Lawrence v. Texas*, 539 U. S. 558, 575.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii’s law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is



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defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as “only a legal union between one man and one woman as husband and wife.” 1 U. S. C. §7.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State’s Constitution guaranteed same-sex couples the right to marry. See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, *infra*. Two Terms ago, in *United States v. Windsor*, 570 U. S. \_\_\_\_ (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples “who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.” *Id.*, at \_\_\_\_ (slip op., at 14).

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, see *Citizens for Equal Protection v. Bruning*, 455 F. 3d 859, 864–868 (CA8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many

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thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A, *infra*.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage. See Office of the Atty. Gen. of Maryland, *The State of Marriage Equality in America, State-by-State Supp.* (2015).

## III

Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law.” The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan v. Louisiana*, 391 U. S. 145, 147–149 (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, e.g., *Eisenstadt v. Baird*, 405 U. S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U. S. 479, 484–486 (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, “has not been reduced to any formula.” *Poe v. Ullman*, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See *ibid.* That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradi-

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tion guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence, supra*, at 572. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, 388 U. S. 1, 12 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.” The Court reaffirmed that holding in *Zablocki v. Redhail*, 434 U. S. 374, 384 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner v. Safley*, 482 U. S. 78, 95 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. See, e.g., *M. L. B. v. S. L. J.*, 519 U. S. 102, 116 (1996); *Cleveland Bd. of Ed. v. LaFleur*, 414 U. S. 632, 639–640 (1974); *Griswold, supra*, at 486; *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U. S. 390, 399 (1923).

It cannot be denied that this Court’s cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions,

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has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, e.g., *Lawrence*, 539 U. S., at 574; *Turner*, *supra*, at 95; *Zablocki*, *supra*, at 384; *Loving*, *supra*, at 12; *Griswold*, *supra*, at 486. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, e.g., *Eisenstadt*, *supra*, at 453–454; *Poe*, *supra*, at 542–553 (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12; see also *Zablocki*, *supra*, at 384 (observing *Loving* held “the right to marry is of fundamental importance for all individuals”). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. Indeed, the Court has noted it would

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be contradictory “to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.” *Zablocki*, *supra*, at 386.

Choices about marriage shape an individual’s destiny. As the Supreme Judicial Court of Massachusetts has explained, because “it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.” *Goodridge*, 440 Mass., at 322, 798 N. E. 2d, at 955.

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See *Windsor*, 570 U. S., at \_\_\_\_– \_\_\_\_ (slip op., at 22–23). There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. *Loving*, *supra*, at 12 (“[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State”).

A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception. 381 U. S., at 485. Suggesting that marriage is a right “older than the Bill of Rights,” *Griswold* described marriage this way:

“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

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projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.” *Id.*, at 486.

And in *Turner*, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. See 482 U. S., at 95–96. The right to marry thus dignifies couples who “wish to define themselves by their commitment to each other.” *Windsor*, *supra*, at \_\_\_\_ (slip op., at 14). Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.” 539 U. S., at 567. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce v. Society of Sisters*, 268 U. S. 510 (1925); *Meyer*, 262 U. S., at 399. The Court has recognized these connections by describing the varied rights as a unified whole: “[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.” *Zablocki*, 434 U. S., at 384

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(quoting *Meyer, supra*, at 399). Under the laws of the several States, some of marriage’s protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents’ relationship, marriage allows children “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” *Windsor, supra*, at \_\_\_\_ (slip op., at 23). Marriage also affords the permanency and stability important to children’s best interests. See Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22–27.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. See Brief for Gary J. Gates as *Amicus Curiae* 4. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents, see *id.*, at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. See *Windsor, supra*, at \_\_\_\_ (slip op., at 23).

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of

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precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

"There is certainly no country in the world where the tie of marriage is so much respected as in America . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace . . . . [H]e afterwards carries [that image] with him into public affairs." 1 *Democracy in America* 309 (H. Reeve transl., rev. ed. 1990).

In *Maynard v. Hill*, 125 U. S. 190, 211 (1888), the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been "a great public institution, giving character to our whole civil polity." *Id.*, at 213. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. See generally N. Cott, *Public Vows*. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the



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basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as *Amicus Curiae* 6–9; Brief for American Bar Association as *Amicus Curiae* 8–29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor*, 570 U. S., at \_\_\_\_ – \_\_\_\_ (slip op., at 15–16). The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come

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the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997), which called for a “careful description” of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent “right to same-sex marriage.” Brief for Respondent in No. 14–556, p. 8. *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a “right to interracial marriage”; *Turner* did not ask about a “right of inmates to marry”; and *Zablocki* did not ask about a “right of fathers with unpaid child support duties to marry.” Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. See also *Glucksberg*, 521 U. S., at 752–773 (Souter, J., concurring in judgment); *id.*, at 789–792 (BREYER, J., concurring in judgments).

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See *Loving* 388 U. S., at 12; *Lawrence*, 539 U. S., at 566–567.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources

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alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. See *M. L. B.*, 519 U. S., at 120–121; *id.*, at 128–129 (KENNEDY, J., concurring in judgment); *Bearden v. Georgia*, 461 U. S. 660, 665 (1983). This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court

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first declared the prohibition invalid because of its unequal treatment of interracial couples. It stated: “There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” 388 U. S., at 12. With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: “To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.” *Ibid.* The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court’s holding that the law burdened a right “of fundamental importance.” 434 U. S., at 383. It was the essential nature of the marriage right, discussed at length in *Zablocki*, see *id.*, at 383–387, that made apparent the law’s incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970’s and 1980’s. Notwithstanding the gradual erosion of the doctrine of cover-

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ture, see *supra*, at 6, invidious sex-based classifications in marriage remained common through the mid-20th century. See App. to Brief for Appellant in *Reed v. Reed*, O. T. 1971, No. 70–4, pp. 69–88 (an extensive reference to laws extant as of 1971 treating women as unequal to men in marriage). These classifications denied the equal dignity of men and women. One State’s law, for example, provided in 1971 that “the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit.” Ga. Code Ann. §53–501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. See, e.g., *Kirchberg v. Feenstra*, 450 U. S. 455 (1981); *Wengler v. Druggists Mut. Ins. Co.*, 446 U. S. 142 (1980); *Califano v. Westcott*, 443 U. S. 76 (1979); *Orr v. Orr*, 440 U. S. 268 (1979); *Califano v. Goldfarb*, 430 U. S. 199 (1977) (plurality opinion); *Weinberger v. Wiesenfeld*, 420 U. S. 636 (1975); *Frontiero v. Richardson*, 411 U. S. 677 (1973). Like *Loving* and *Zablocki*, these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In *M. L. B. v. S. L. J.*, the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. See 519 U. S., at 119–124. In *Eisenstadt v. Baird*, the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. See 405 U. S., at 446–454. And in *Skinner v. Oklahoma ex rel. Williamson*, the Court invalidated under both principles a law that allowed steriliza-

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tion of habitual criminals. See 316 U. S., at 538–543.

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See 539 U. S., at 575. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. See *ibid.* *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State “cannot demean their existence or control their destiny by making their private sexual conduct a crime.” *Id.*, at 578.

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. See, e.g., *Zablocki*, *supra*, at 383–388; *Skinner*, 316 U. S., at 541.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No

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longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

## IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents' States to await further public discussion and political measures before licensing same-sex marriages. See *DeBoer*, 772 F. 3d, at 409.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. See Appendix A, *infra*. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented

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for resolution as a matter of constitutional law.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette v. BAMN*, 572 U. S. \_\_\_\_ (2014), noting the “right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.” *Id.*, at \_\_\_\_ – \_\_\_\_ (slip op., at 15–16). Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, “[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power.” *Id.*, at \_\_\_\_ (slip op., at 15). Thus, when the rights of persons are violated, “the Constitution requires redress by the courts,” notwithstanding the more general value of democratic decisionmaking. *Id.*, at \_\_\_\_ (slip op., at 17). This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 638 (1943). This is why “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.” *Ibid.*



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It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law criminalizing same-sex intimacy. See 478 U. S., at 186, 190–195. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. See *id.*, at 199 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); *id.*, at 214 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). That is why *Lawrence* held *Bowers* was “not correct when it was decided.” 539 U. S., at 578. Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like *Bowers*, would be unjustified under the Fourteenth Amendment. The petitioners’ stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and

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Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage. Properly presented with the petitioners' cases, the Court has a duty to address these claims and answer these questions.

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See *Kitchen v. Herbert*, 755 F. 3d 1193, 1223 (CA10 2014) (“[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples”). The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they

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describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

## V

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of *Obergefell and Arthur*, and by that of *DeKoe and Kostura*, the recognition bans inflict substantial and continuing harm on same-sex couples.

Being married in one State but having that valid marriage denied in another is one of “the most perplexing and distressing complication[s]” in the law of domestic relations. *Williams v. North Carolina*, 317 U. S. 287, 299 (1942) (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and pro-

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mote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. See Tr. of Oral Arg. on Question 2, p. 44. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

\* \* \*

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

*It is so ordered.*

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APPENDICES

A

State and Federal Judicial Decisions  
Addressing Same-Sex Marriage

**United States Courts of Appeals Decisions**

*Adams v. Howerton*, 673 F. 2d 1036 (CA9 1982)  
*Smelt v. County of Orange*, 447 F. 3d 673 (CA9 2006)  
*Citizens for Equal Protection v. Bruning*, 455 F. 3d 859  
(CA8 2006)  
*Windsor v. United States*, 699 F. 3d 169 (CA2 2012)  
*Massachusetts v. Department of Health and Human  
Services*, 682 F. 3d 1 (CA1 2012)  
*Perry v. Brown*, 671 F. 3d 1052 (CA9 2012)  
*Latta v. Otter*, 771 F. 3d 456 (CA9 2014)  
*Baskin v. Bogan*, 766 F. 3d 648 (CA7 2014)  
*Bishop v. Smith*, 760 F. 3d 1070 (CA10 2014)  
*Bostic v. Schaefer*, 760 F. 3d 352 (CA4 2014)  
*Kitchen v. Herbert*, 755 F. 3d 1193 (CA10 2014)  
*DeBoer v. Snyder*, 772 F. 3d 388 (CA6 2014)  
*Latta v. Otter*, 779 F. 3d 902 (CA9 2015) (O’Scannlain,  
J., dissenting from the denial of rehearing en banc)

**United States District Court Decisions**

*Adams v. Howerton*, 486 F. Supp. 1119 (CD Cal. 1980)  
*Citizens for Equal Protection, Inc. v. Bruning*, 290  
F. Supp. 2d 1004 (Neb. 2003)  
*Citizens for Equal Protection v. Bruning*, 368 F. Supp.  
2d 980 (Neb. 2005)  
*Wilson v. Ake*, 354 F. Supp. 2d 1298 (MD Fla. 2005)  
*Smelt v. County of Orange*, 374 F. Supp. 2d 861 (CD Cal.  
2005)  
*Bishop v. Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d  
1239 (ND Okla. 2006)

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*Massachusetts v. Department of Health and Human Services*, 698 F. Supp. 2d 234 (Mass. 2010)

*Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (Mass. 2010)

*Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (ND Cal. 2010)

*Dragovich v. Department of Treasury*, 764 F. Supp. 2d 1178 (ND Cal. 2011)

*Golinski v. Office of Personnel Management*, 824 F. Supp. 2d 968 (ND Cal. 2012)

*Dragovich v. Department of Treasury*, 872 F. Supp. 2d 944 (ND Cal. 2012)

*Windsor v. United States*, 833 F. Supp. 2d 394 (SDNY 2012)

*Pedersen v. Office of Personnel Management*, 881 F. Supp. 2d 294 (Conn. 2012)

*Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (Haw. 2012)

*Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (Nev. 2012)

*Merritt v. Attorney General*, 2013 WL 6044329 (MD La., Nov. 14, 2013)

*Gray v. Orr*, 4 F. Supp. 3d 984 (ND Ill. 2013)

*Lee v. Orr*, 2013 WL 6490577 (ND Ill., Dec. 10, 2013)

*Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (Utah 2013)

*Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (SD Ohio 2013)

*Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (ND Okla. 2014)

*Bourke v. Beshear*, 996 F. Supp. 2d 542 (WD Ky. 2014)

*Lee v. Orr*, 2014 WL 683680 (ND Ill., Feb. 21, 2014)

*Bostic v. Rainey*, 970 F. Supp. 2d 456 (ED Va. 2014)

*De Leon v. Perry*, 975 F. Supp. 2d 632 (WD Tex. 2014)

*Tanco v. Haslam*, 7 F. Supp. 3d 759 (MD Tenn. 2014)

*DeBoer v. Snyder*, 973 F. Supp. 2d 757 (ED Mich. 2014)

*Henry v. Himes*, 14 F. Supp. 3d 1036 (SD Ohio 2014)

*Latta v. Otter*, 19 F. Supp. 3d 1054 (Idaho 2014)

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*Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (Ore. 2014)  
*Evans v. Utah*, 21 F. Supp. 3d 1192 (Utah 2014)  
*Whitewood v. Wolf*, 992 F. Supp. 2d 410 (MD Pa. 2014)  
*Wolf v. Walker*, 986 F. Supp. 2d 982 (WD Wis. 2014)  
*Baskin v. Bogan*, 12 F. Supp. 3d 1144 (SD Ind. 2014)  
*Love v. Beshear*, 989 F. Supp. 2d 536 (WD Ky. 2014)  
*Burns v. Hickenlooper*, 2014 WL 3634834 (Colo., July 23, 2014)  
*Bowling v. Pence*, 39 F. Supp. 3d 1025 (SD Ind. 2014)  
*Brenner v. Scott*, 999 F. Supp. 2d 1278 (ND Fla. 2014)  
*Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (ED La. 2014)  
*General Synod of the United Church of Christ v. Resinger*, 12 F. Supp. 3d 790 (WDNC 2014)  
*Hamby v. Parnell*, 56 F. Supp. 3d 1056 (Alaska 2014)  
*Fisher-Borne v. Smith*, 14 F. Supp. 3d 695 (MDNC 2014)  
*Majors v. Horne*, 14 F. Supp. 3d 1313 (Ariz. 2014)  
*Connolly v. Jeanes*, \_\_\_\_ F. Supp. 3d \_\_\_\_, 2014 WL 5320642 (Ariz., Oct. 17, 2014)  
*Guzzo v. Mead*, 2014 WL 5317797 (Wyo., Oct. 17, 2014)  
*Conde-Vidal v. Garcia-Padilla*, 54 F. Supp. 3d 157 (PR 2014)  
*Marie v. Moser*, \_\_\_\_ F. Supp. 3d \_\_\_\_, 2014 WL 5598128 (Kan., Nov. 4, 2014)  
*Lawson v. Kelly*, 58 F. Supp. 3d 923 (WD Mo. 2014)  
*McGee v. Cole*, \_\_\_\_ F. Supp. 3d \_\_\_\_, 2014 WL 5802665 (SD W. Va., Nov. 7, 2014)  
*Condon v. Haley*, 21 F. Supp. 3d 572 (S.C. 2014)  
*Bradacs v. Haley*, 58 F. Supp. 3d 514 (S.C. 2014)  
*Rolando v. Fox*, 23 F. Supp. 3d 1227 (Mont. 2014)  
*Jernigan v. Crane*, \_\_\_\_ F. Supp. 3d \_\_\_\_, 2014 WL 6685391 (ED Ark., Nov. 25, 2014)  
*Campaign for Southern Equality v. Bryant*, \_\_\_\_ F. Supp. 3d \_\_\_\_, 2014 WL 6680570 (SD Miss., Nov. 25, 2014)  
*Inniss v. Aderhold*, \_\_\_\_ F. Supp. 3d \_\_\_\_, 2015 WL 300593 (ND Ga., Jan. 8, 2015)

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*Rosenbrahn v. Daugaard*, 61 F. Supp. 3d 862 (S. D., 2015)

*Caspar v. Snyder*, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 224741 (ED Mich., Jan. 15, 2015)

*Searcey v. Strange*, 2015 U. S. Dist. LEXIS 7776 (SD Ala., Jan. 23, 2015)

*Strawser v. Strange*, 44 F. Supp. 3d 1206 (SD Ala. 2015)

*Waters v. Ricketts*, 48 F. Supp. 3d 1271 (Neb. 2015)

**State Highest Court Decisions**

*Baker v. Nelson*, 291 Minn. 310, 191 N. W. 2d 185 (1971)

*Jones v. Hallahan*, 501 S. W. 2d 588 (Ky. 1973)

*Baehr v. Lewin*, 74 Haw. 530, 852 P. 2d 44 (1993)

*Dean v. District of Columbia*, 653 A. 2d 307 (D. C. 1995)

*Baker v. State*, 170 Vt. 194, 744 A. 2d 864 (1999)

*Brause v. State*, 21 P. 3d 357 (Alaska 2001) (ripeness)

*Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003)

*In re Opinions of the Justices to the Senate*, 440 Mass. 1201, 802 N. E. 2d 565 (2004)

*Li v. State*, 338 Or. 376, 110 P. 3d 91 (2005)

*Cote-Whitacre v. Department of Public Health*, 446 Mass. 350, 844 N. E. 2d 623 (2006)

*Lewis v. Harris*, 188 N. J. 415, 908 A. 2d 196 (2006)

*Andersen v. King County*, 158 Wash. 2d 1, 138 P. 3d 963 (2006)

*Hernandez v. Robles*, 7 N. Y. 3d 338, 855 N. E. 2d 1 (2006)

*Conaway v. Deane*, 401 Md. 219, 932 A. 2d 571 (2007)

*In re Marriage Cases*, 43 Cal. 4th 757, 183 P. 3d 384 (2008)

*Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 957 A. 2d 407 (2008)

*Strauss v. Horton*, 46 Cal. 4th 364, 207 P. 3d 48 (2009)



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*Varnum v. Brien*, 763 N. W. 2d 862 (Iowa 2009)

*Griego v. Oliver*, 2014–NMSC–003, \_\_\_\_ N. M. \_\_\_\_, 316 P. 3d 865 (2013)

*Garden State Equality v. Dow*, 216 N. J. 314, 79 A. 3d 1036 (2013)

*Ex parte State ex rel. Alabama Policy Institute*, \_\_\_\_ So. 3d \_\_\_\_, 2015 WL 892752 (Ala., Mar. 3, 2015)

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## B

State Legislation and Judicial Decisions  
Legalizing Same-Sex Marriage**Legislation**

Del. Code Ann., Tit. 13, §129 (Cum. Supp. 2014)  
D. C. Act No. 18–248, 57 D. C. Reg. 27 (2010)  
Haw. Rev. Stat. §572 –1 (2006) and 2013 Cum. Supp.)  
Ill. Pub. Act No. 98–597  
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**SUPREME COURT OF THE UNITED STATES**

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

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14–556 JAMES OBERGEFELL, ET AL., PETITIONERS  
*v.*  
RICHARD HODGES, DIRECTOR, OHIO  
DEPARTMENT OF HEALTH, ET AL.;

14–562 VALERIA TANCO, ET AL., PETITIONERS  
*v.*  
BILL HASLAM, GOVERNOR OF  
TENNESSEE, ET AL.;

14–571 APRIL DEBOER, ET AL., PETITIONERS  
*v.*  
RICK SNYDER, GOVERNOR OF MICHIGAN,  
ET AL.; AND

14–574 GREGORY BOURKE, ET AL., PETITIONERS  
*v.*  
STEVE BESHEAR, GOVERNOR OF  
KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA  
and JUSTICE THOMAS join, dissenting.

Petitioners make strong arguments rooted in social  
policy and considerations of fairness. They contend that  
same-sex couples should be allowed to affirm their love  
and commitment through marriage, just like opposite-sex  
couples. That position has undeniable appeal; over the

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past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise “neither force nor will but merely judgment.” The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered).

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State’s decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority’s approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

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The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." *Ante*, at 11, 23. As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally differing views." *Lochner v. New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." *Id.*, at 69 (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." *Ante*, at 19. I have no choice but to dissent.

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.

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## I

Petitioners and their *amici* base their arguments on the “right to marry” and the imperative of “marriage equality.” There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes “marriage,” or—more precisely—*who decides* what constitutes “marriage”?

The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. Even if history and precedent are not “the end” of these cases, *ante*, at 4, I would not “sweep away what has so long been settled” without showing greater respect for all that preceded us. *Town of Greece v. Galloway*, 572 U. S. \_\_\_, \_\_\_ (2014) (slip op., at 8).

## A

As the majority acknowledges, marriage “has existed for millennia and across civilizations.” *Ante*, at 3. For all those millennia, across all those civilizations, “marriage” referred to only one relationship: the union of a man and a woman. See *ante*, at 4; Tr. of Oral Arg. on Question 1, p. 12 (petitioners conceding that they are not aware of any society that permitted same-sex marriage before 2001). As the Court explained two Terms ago, “until recent years, . . . marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.” *United States v. Windsor*, 570 U. S. \_\_\_, \_\_\_ (2013) (slip op., at 13).

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbi-

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ans. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. See G. Quale, *A History of Marriage Systems* 2 (1988); cf. M. Cicero, *De Officiis* 57 (W. Miller transl. 1913) (“For since the reproductive instinct is by nature’s gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common.”).

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child’s prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage. And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without. As one prominent scholar put it, “Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve.” J. Q. Wilson, *The Marriage Problem* 41 (2002).

This singular understanding of marriage has prevailed in the United States throughout our history. The majority accepts that at “the time of the Nation’s founding [marriage] was understood to be a voluntary contract between

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a man and a woman.” *Ante*, at 6. Early Americans drew heavily on legal scholars like William Blackstone, who regarded marriage between “husband and wife” as one of the “great relations in private life,” and philosophers like John Locke, who described marriage as “a voluntary compact between man and woman” centered on “its chief end, procreation” and the “nourishment and support” of children. 1 W. Blackstone, *Commentaries* \*410; J. Locke, *Second Treatise of Civil Government* §§78–79, p. 39 (J. Gough ed. 1947). To those who drafted and ratified the Constitution, this conception of marriage and family “was a given: its structure, its stability, roles, and values accepted by all.” Forte, *The Framers’ Idea of Marriage and Family*, in *The Meaning of Marriage* 100, 102 (R. George & J. Elshtain eds. 2006).

The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with “[t]he whole subject of the domestic relations of husband and wife.” *Windsor*, 570 U. S., at \_\_\_ (slip op., at 17) (quoting *In re Burrus*, 136 U. S. 586, 593–594 (1890)). There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. The four States in these cases are typical. Their laws, before and after statehood, have treated marriage as the union of a man and a woman. See *DeBoer v. Snyder*, 772 F. 3d 388, 396–399 (CA6 2014). Even when state laws did not specify this definition expressly, no one doubted what they meant. See *Jones v. Hallahan*, 501 S. W. 2d 588, 589 (Ky. App. 1973). The meaning of “marriage” went without saying.

Of course, many did say it. In his first American dictionary, Noah Webster defined marriage as “the legal union of a man and woman for life,” which served the purposes of “preventing the promiscuous intercourse of the sexes, . . . promoting domestic felicity, and . . . securing the



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maintenance and education of children.” 1 An American Dictionary of the English Language (1828). An influential 19th-century treatise defined marriage as “a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction of sex.” J. Bishop, Commentaries on the Law of Marriage and Divorce 25 (1852). The first edition of Black’s Law Dictionary defined marriage as “the civil status of one man and one woman united in law for life.” Black’s Law Dictionary 756 (1891) (emphasis deleted). The dictionary maintained essentially that same definition for the next century.

This Court’s precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. Early cases on the subject referred to marriage as “the union for life of one man and one woman,” *Murphy v. Ramsey*, 114 U. S. 15, 45 (1885), which forms “the foundation of the family and of society, without which there would be neither civilization nor progress,” *Maynard v. Hill*, 125 U. S. 190, 211 (1888). We later described marriage as “fundamental to our very existence and survival,” an understanding that necessarily implies a procreative component. *Loving v. Virginia*, 388 U. S. 1, 12 (1967); see *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942). More recent cases have directly connected the right to marry with the “right to procreate.” *Zablocki v. Redhail*, 434 U. S. 374, 386 (1978).

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given way to pairings based on romantic love. States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, with laws that respect each participant’s separate status. Racial restrictions on marriage, which “arose as an incident to slavery” to promote “White Supremacy,” were repealed by many States and ultimately struck down by this Court.

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*Loving*, 388 U. S., at 6–7.

The majority observes that these developments “were not mere superficial changes” in marriage, but rather “worked deep transformations in its structure.” *Ante*, at 6–7. They did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, “Marriage is the union of a man and a woman, where the woman is subject to coverture.” The majority may be right that the “history of marriage is one of both continuity and change,” but the core meaning of marriage has endured. *Ante*, at 6.

## B

Shortly after this Court struck down racial restrictions on marriage in *Loving*, a gay couple in Minnesota sought a marriage license. They argued that the Constitution required States to allow marriage between people of the same sex for the same reasons that it requires States to allow marriage between people of different races. The Minnesota Supreme Court rejected their analogy to *Loving*, and this Court summarily dismissed an appeal. *Baker v. Nelson*, 409 U. S. 810 (1972).

In the decades after *Baker*, greater numbers of gays and lesbians began living openly, and many expressed a desire to have their relationships recognized as marriages. Over time, more people came to see marriage in a way that could be extended to such couples. Until recently, this new view of marriage remained a minority position. After the Massachusetts Supreme Judicial Court in 2003 interpreted its State Constitution to require recognition of same-sex marriage, many States—including the four at issue here—enacted constitutional amendments formally adopting the longstanding definition of marriage.

Over the last few years, public opinion on marriage has

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shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional definition of marriage.

In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.

Petitioners brought lawsuits contending that the Due Process and Equal Protection Clauses of the Fourteenth Amendment compel their States to license and recognize marriages between same-sex couples. In a carefully reasoned decision, the Court of Appeals acknowledged the democratic “momentum” in favor of “expand[ing] the definition of marriage to include gay couples,” but concluded that petitioners had not made “the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters.” 772 F. 3d, at 396, 403. That decision interpreted the Constitution correctly, and I would affirm.

## II

Petitioners first contend that the marriage laws of their States violate the Due Process Clause. The Solicitor General of the United States, appearing in support of petitioners, expressly disowned that position before this Court. See Tr. of Oral Arg. on Question 1, at 38–39. The majority nevertheless resolves these cases for petitioners based

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almost entirely on the Due Process Clause.

The majority purports to identify four “principles and traditions” in this Court’s due process precedents that support a fundamental right for same-sex couples to marry. *Ante*, at 12. In reality, however, the majority’s approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York*, 198 U. S. 45. Stripped of its shiny rhetorical gloss, the majority’s argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority’s position indefensible as a matter of constitutional law.

A

Petitioners’ “fundamental right” claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States’ marriage laws violate an *enumerated* constitutional right, such as the freedom of speech protected by the First Amendment. There is, after all, no “Companionship and Understanding” or “Nobility and Dignity” Clause in the Constitution. See *ante*, at 3, 14. They argue instead that the laws violate a right *implied* by the Fourteenth Amendment’s requirement that “liberty” may not be deprived without “due process of law.”

This Court has interpreted the Due Process Clause to include a “substantive” component that protects certain liberty interests against state deprivation “no matter what process is provided.” *Reno v. Flores*, 507 U. S. 292, 302 (1993). The theory is that some liberties are “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” and therefore cannot be deprived without compelling justification. *Snyder v. Massachusetts*, 291

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U. S. 97, 105 (1934).

Allowing unelected federal judges to select which unenumerated rights rank as “fundamental”—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges “exercise the utmost care” in identifying implied fundamental rights, “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” *Washington v. Glucksberg*, 521 U. S. 702, 720 (1997) (internal quotation marks omitted); see Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint 13 (1986) (Address at Stanford) (“One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.”).

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in *Dred Scott v. Sandford*, 19 How. 393 (1857). There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so. It asserted that “an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law.” *Id.*, at 450. In a dissent that has outlasted the majority opinion, Justice Curtis explained that when the “fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical

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opinions of individuals are allowed to control” the Constitution’s meaning, “we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.” *Id.*, at 621.

*Dred Scott*’s holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the Due Process Clause reappeared. In a series of early 20th-century cases, most prominently *Lochner v. New York*, this Court invalidated state statutes that presented “meddlesome interferences with the rights of the individual,” and “undue interference with liberty of person and freedom of contract.” 198 U. S., at 60, 61. In *Lochner* itself, the Court struck down a New York law setting maximum hours for bakery employees, because there was “in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law.” *Id.*, at 58.

The dissenting Justices in *Lochner* explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at least “room for debate and for an honest difference of opinion.” *Id.*, at 72 (opinion of Harlan, J.). The majority’s contrary conclusion required adopting as constitutional law “an economic theory which a large part of the country does not entertain.” *Id.*, at 75 (opinion of Holmes, J.). As Justice Holmes memorably put it, “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics,” a leading work on the philosophy of Social Darwinism. *Ibid.* The Constitution “is not intended to embody a particular economic theory . . . . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embody-

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ing them conflict with the Constitution.” *Id.*, at 75–76.

In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that “[t]he criterion of constitutionality is not whether we believe the law to be for the public good.” *Adkins v. Children’s Hospital of D. C.*, 261 U. S. 525, 570 (1923) (opinion of Holmes, J.). By empowering judges to elevate their own policy judgments to the status of constitutionally protected “liberty,” the *Lochner* line of cases left “no alternative to regarding the court as a . . . legislative chamber.” L. Hand, *The Bill of Rights* 42 (1958).

Eventually, the Court recognized its error and vowed not to repeat it. “The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely,” we later explained, “has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.” *Ferguson v. Skrupa*, 372 U. S. 726, 730 (1963); see *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421, 423 (1952) (“we do not sit as a super-legislature to weigh the wisdom of legislation”). Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them “unwise, improvident, or out of harmony with a particular school of thought.” *Williamson v. Lee Optical of Okla., Inc.*, 348 U. S. 483, 488 (1955).

Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner*’s error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for “judicial self-restraint.” *Collins v. Harker Heights*, 503 U. S. 115, 125 (1992). Our precedents have required that implied fundamental rights be “objec-

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tively, deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Glucksberg*, 521 U. S., at 720–721 (internal quotation marks omitted).

Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in *Glucksberg*, many other cases both before and after have adopted the same approach. See, e.g., *District Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U. S. 52, 72 (2009); *Flores*, 507 U. S., at 303; *United States v. Salerno*, 481 U. S. 739, 751 (1987); *Moore v. East Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion); see also *id.*, at 544 (White, J., dissenting) (“The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution.”); *Troxel v. Granville*, 530 U. S. 57, 96–101 (2000) (KENNEDY, J., dissenting) (consulting “[o]ur Nation’s history, legal traditions, and practices” and concluding that “[w]e owe it to the Nation’s domestic relations legal structure . . . to proceed with caution” (quoting *Glucksberg*, 521 U. S., at 721)).

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. *Ante*, at 18. But given the few “guideposts for responsible decisionmaking in this unchartered area,” *Collins*, 503 U. S., at 125, “an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula,” *Moore*, 431 U. S., at 504, n. 12 (plurality opinion). Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of “discipline” in identify-



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ing fundamental rights, *ante*, at 10–11, does not provide a meaningful constraint on a judge, for “what he is really likely to be ‘discovering,’ whether or not he is fully aware of it, are his own values,” J. Ely, *Democracy and Distrust* 44 (1980). The only way to ensure restraint in this delicate enterprise is “continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers.” *Griswold v. Connecticut*, 381 U. S. 479, 501 (1965) (Harlan, J., concurring in judgment).

## B

The majority acknowledges none of this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*.

## 1

The majority’s driving themes are that marriage is desirable and petitioners desire it. The opinion describes the “transcendent importance” of marriage and repeatedly insists that petitioners do not seek to “demean,” “devalue,” “denigrate,” or “disrespect” the institution. *Ante*, at 3, 4, 6, 28. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners’ wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental “right to marry.” *Turner v. Safley*, 482 U. S. 78, 95 (1987); *Zablocki*, 434 U. S., at 383; see *Loving*, 388 U. S., at 12. These cases

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do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In *Loving*, the Court held that racial restrictions on the right to marry lacked a compelling justification. In *Zablocki*, restrictions based on child support debts did not suffice. In *Turner*, restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. The laws challenged in *Zablocki* and *Turner* did not define marriage as “the union of a man and a woman, *where neither party owes child support or is in prison*.” Nor did the interracial marriage ban at issue in *Loving* define marriage as “the union of a man and a woman *of the same race*.” See Tragen, Comment, Statutory Prohibitions Against Interracial Marriage, 32 Cal. L. Rev. 269 (1944) (“at common law there was no ban on interracial marriage”); *post*, at 11–12, n. 5 (THOMAS, J., dissenting). Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of “marriage” discussed in every one of these cases “presumed a relationship involving opposite-sex partners.” *Ante*, at 11.

In short, the “right to marry” cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. See *Windsor*, 570 U. S., at \_\_\_\_ (ALITO, J., dissenting) (slip op., at 8) (“What *Windsor* and the United States seek . . . is not the protection of a deeply rooted right but the recognition of a very new right.”). Neither petitioners nor the majority cites a

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single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

## 2

The majority suggests that “there are other, more instructive precedents” informing the right to marry. *Ante*, at 12. Although not entirely clear, this reference seems to correspond to a line of cases discussing an implied fundamental “right of privacy.” *Griswold*, 381 U. S., at 486. In the first of those cases, the Court invalidated a criminal law that banned the use of contraceptives. *Id.*, at 485–486. The Court stressed the invasive nature of the ban, which threatened the intrusion of “the police to search the sacred precincts of marital bedrooms.” *Id.*, at 485. In the Court’s view, such laws infringed the right to privacy in its most basic sense: the “right to be let alone.” *Eisenstadt v. Baird*, 405 U. S. 438, 453–454, n. 10 (1972) (internal quotation marks omitted); see *Olmstead v. United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

The Court also invoked the right to privacy in *Lawrence v. Texas*, 539 U. S. 558 (2003), which struck down a Texas statute criminalizing homosexual sodomy. *Lawrence* relied on the position that criminal sodomy laws, like bans on contraceptives, invaded privacy by inviting “unwarranted government intrusions” that “touc[h] upon the most private human conduct, sexual behavior . . . in the most private of places, the home.” *Id.*, at 562, 567.

Neither *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is “condemned to live in loneli-

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ness” by the laws challenged in these cases—no one. *Ante*, at 28. At the same time, the laws in no way interfere with the “right to be let alone.”

The majority also relies on Justice Harlan’s influential dissenting opinion in *Poe v. Ullman*, 367 U. S. 497 (1961). As the majority recounts, that opinion states that “[d]ue process has not been reduced to any formula.” *Id.*, at 542. But far from conferring the broad interpretive discretion that the majority discerns, Justice Harlan’s opinion makes clear that courts implying fundamental rights are not “free to roam where unguided speculation might take them.” *Ibid.* They must instead have “regard to what history teaches” and exercise not only “judgment” but “restraint.” *Ibid.* Of particular relevance, Justice Harlan explained that “laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.” *Id.*, at 546.

In sum, the privacy cases provide no support for the majority’s position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U. S. 189, 196 (1989); *San Antonio Independent School Dist. v. Rodriguez*, 411 U. S. 1, 35–37 (1973); *post*, at 9–13 (THOMAS, J., dissenting). Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

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Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the “careful” approach to implied fundamental rights taken by this Court in *Glucksberg*. *Ante*, at 18 (quoting 521 U. S., at 721). It is revealing that the majority’s position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority’s methodology: *Lochner v. New York*, 198 U. S. 45. The majority opens its opinion by announcing petitioners’ right to “define and express their identity.” *Ante*, at 1–2. The majority later explains that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.” *Ante*, at 12. This free-wheeling notion of individual autonomy echoes nothing so much as “the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor.” *Lochner*, 198 U. S., at 58 (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own “reasoned judgment,” informed by its “new insight” into the “nature of injustice,” which was invisible to all who came before but has become clear “as we learn [the] meaning” of liberty. *Ante*, at 10, 11. The truth is that today’s decision rests on nothing more than the majority’s own conviction that same-sex couples should be allowed to marry because they want to, and that “it would disparage their choices and diminish their personhood to deny them this right.” *Ante*, at 19. Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences

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adopted in *Lochner*. See 198 U. S., at 61 (“We do not believe in the soundness of the views which uphold this law,” which “is an illegal interference with the rights of individuals . . . to make contracts regarding labor upon such terms as they may think best”).

The majority recognizes that today’s cases do not mark “the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights.” *Ante*, at 25. On that much, we agree. The Court was “asked”—and it agreed—to “adopt a cautious approach” to implying fundamental rights after the debacle of the *Lochner* era. Today, the majority casts caution aside and revives the grave errors of that period.

One immediate question invited by the majority’s position is whether States may retain the definition of marriage as a union of two people. Cf. *Brown v. Buhman*, 947 F. Supp. 2d 1170 (Utah 2013), appeal pending, No. 14-4117 (CA10). Although the majority randomly inserts the adjective “two” in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If “[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,” *ante*, at 13, why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their

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children would otherwise “suffer the stigma of knowing their families are somehow lesser,” *ante*, at 15, why wouldn’t the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry “serves to disrespect and subordinate” gay and lesbian couples, why wouldn’t the same “imposition of this disability,” *ante*, at 22, serve to disrespect and subordinate people who find fulfillment in polyamorous relationships? See Bennett, Polyamory: The Next Sexual Revolution? *Newsweek*, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married Lesbian “Throuple” Expecting First Child, *N. Y. Post*, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 *Emory L. J.* 1977 (2015).

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State “doesn’t have such an institution.” *Tr. of Oral Arg. on Question 2*, p. 6. But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either.

4

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to include same-sex couples, the majority insists, would “pose no risk of harm to themselves or third parties.” *Ante*, at 27. This argument again echoes *Lochner*, which relied on its assessment that “we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act.” 198 U. S., at 57.

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Then and now, this assertion of the “harm principle” sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice’s commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of “due process.” There is indeed a process due the people on issues of this sort—the democratic process. Respecting that understanding requires the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Justice Holmes’s dissent in *Lochner*, the Fourteenth Amendment does not enact John Stuart Mill’s *On Liberty* any more than it enacts Herbert Spencer’s *Social Statics*. See Randolph, Before *Roe v. Wade*: Judge Friendly’s Draft Abortion Opinion, 29 Harv. J. L. & Pub. Pol’y 1035, 1036–1037, 1058 (2006). And it certainly does not enact any one concept of marriage.

The majority’s understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country’s entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the “nature of injustice is that we may not always see it in our own times.” *Ante*, at 11. As petitioners put it, “times can blind.” Tr. of Oral Arg. on Question 1, at 9, 10. But to blind yourself to history is both prideful and unwise. “The



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past is never dead. It's not even past." W. Faulkner, *Requiem for a Nun* 92 (1951).

## III

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. *Ante*, at 20. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. It is case-book doctrine that the "modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing." G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & P. Karlan, *Constitutional Law* 453 (7th ed. 2013). The majority's approach today is different:

"Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." *Ante*, at 19.

The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. *Ante*, at 22. Yet the majority fails to provide even a single sentence explaining how the Equal

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Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. See *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U. S. 193, 197 (2009). In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States’ “legitimate state interest” in “preserving the traditional institution of marriage.” *Lawrence*, 539 U. S., at 585 (O’Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners have challenged. Although they discuss some of the ancillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents, petitioners’ lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples.

#### IV

The legitimacy of this Court ultimately rests “upon the respect accorded to its judgments.” *Republican Party of Minn. v. White*, 536 U. S. 765, 793 (2002) (KENNEDY, J., concurring). That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority’s telling, it is the courts, not the

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people, who are responsible for making “new dimensions of freedom . . . apparent to new generations,” for providing “formal discourse” on social issues, and for ensuring “neutral discussions, without scornful or disparaging commentary.” *Ante*, at 7–9.

Nowhere is the majority’s extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side, there has been “extensive litigation,” “many thoughtful District Court decisions,” “countless studies, papers, books, and other popular and scholarly writings,” and “more than 100” *amicus* briefs in these cases alone. *Ante*, at 9, 10, 23. What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers’ “better informed understanding” of “a liberty that remains urgent in our own era.” *Ante*, at 19. The answer is surely there in one of those *amicus* briefs or studies.

Those who founded our country would not recognize the majority’s conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after “a quite extensive discussion.” *Ante*, at 8. In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will. “Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unre-

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solved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution.” Rehnquist, *The Notion of a Living Constitution*, 54 *Texas L. Rev.* 693, 700 (1976). As a plurality of this Court explained just last year, “It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.” *Schuette v. BAMN*, 572 U. S. \_\_\_, \_\_\_ — \_\_\_ (2014) (slip op., at 16–17).

The Court’s accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage. They see voters carefully considering same-sex marriage, casting ballots in favor or opposed, and sometimes changing their minds. They see political leaders similarly reexamining their positions, and either reversing course or explaining adherence to old convictions confirmed anew. They see governments and businesses modifying policies and practices with respect to same-sex couples, and participating actively in the civic discourse. They see countries overseas democratically accepting profound social change, or declining to do so. This deliberative process is making people take seriously questions that they may not have even regarded as questions before.

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. “That is exactly how our system of government is supposed to work.” *Post*, at 2–3 (SCALIA, J., dissenting).

But today the Court puts a stop to all that. By deciding

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this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, “The political process was moving . . . , not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.” Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N. C. L. Rev. 375, 385–386 (1985) (footnote omitted). Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today’s decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Amdt. 1.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for

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religious practice. The majority’s decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to “advocate” and “teach” their views of marriage. *Ante*, at 27. The First Amendment guarantees, however, the freedom to “*exercise*” religion. Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. See Tr. of Oral Arg. on Question 1, at 36–38. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Perhaps the most discouraging aspect of today’s decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. *Ante*, at 19. That disclaimer is hard to square with the very next sentence, in which the majority explains that “the necessary consequence” of laws codifying the traditional definition of marriage is to “demea[n] or stigmatiz[e]” same-sex couples. *Ante*, at 19. The majority reiterates such characterizations over and over. By the majority’s account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States’ enduring defini-

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tion of marriage—have acted to “lock . . . out,” “disparage,” “disrespect and subordinate,” and inflict “[d]ignitary wounds” upon their gay and lesbian neighbors. *Ante*, at 17, 19, 22, 25. These apparent assaults on the character of fairminded people will have an effect, in society and in court. See *post*, at 6–7 (ALITO, J., dissenting). Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority’s “better informed understanding” as bigoted. *Ante*, at 19.

In the face of all this, a much different view of the Court’s role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.

\* \* \*

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today’s decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent.

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**SUPREME COURT OF THE UNITED STATES**

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Nos. 14–556, 14–562, 14–571 and 14–574

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14–556 JAMES OBERGEFELL, ET AL., PETITIONERS  
v.  
RICHARD HODGES, DIRECTOR, OHIO  
DEPARTMENT OF HEALTH, ET AL.;  
14–562 VALERIA TANCO, ET AL., PETITIONERS  
v.  
BILL HASLAM, GOVERNOR OF  
TENNESSEE, ET AL.;  
14–571 APRIL DEBOER, ET AL., PETITIONERS  
v.  
RICK SNYDER, GOVERNOR OF MICHIGAN,  
ET AL.; AND  
14–574 GREGORY BOURKE, ET AL., PETITIONERS  
v.  
STEVE BESHEAR, GOVERNOR OF  
KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins,  
dissenting.

I join THE CHIEF JUSTICE’s opinion in full. I write separately to call attention to this Court’s threat to American democracy.

The substance of today’s decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance.



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Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court’s claimed power to create “liberties” that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

## I

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to.<sup>1</sup> Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of govern-

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<sup>1</sup> Brief for Respondents in No. 14–571, p. 14.

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ment is supposed to work.<sup>2</sup>

The Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments. Forbidden are laws “impairing the Obligation of Contracts,”<sup>3</sup> denying “Full Faith and Credit” to the “public Acts” of other States,<sup>4</sup> prohibiting the free exercise of religion,<sup>5</sup> abridging the freedom of speech,<sup>6</sup> infringing the right to keep and bear arms,<sup>7</sup> authorizing unreasonable searches and seizures,<sup>8</sup> and so forth. Aside from these limitations, those powers “reserved to the States respectively, or to the people”<sup>9</sup> can be exercised as the States or the People desire. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove *that* issue from the political process?

Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author of today’s opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today):

“[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States.”<sup>10</sup>

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<sup>2</sup> Accord, *Schuette v. BAMN*, 572 U. S. \_\_\_, \_\_\_–\_\_\_ (2014) (plurality opinion) (slip op., at 15–17).

<sup>3</sup> U. S. Const., Art. I, §10.

<sup>4</sup> Art. IV, §1.

<sup>5</sup> Amdt. 1.

<sup>6</sup> *Ibid.*

<sup>7</sup> Amdt. 2.

<sup>8</sup> Amdt. 4.

<sup>9</sup> Amdt. 10.

<sup>10</sup> *United States v. Windsor*, 570 U. S. \_\_\_, \_\_\_ (2013) (slip op., at 16) (internal quotation marks and citation omitted).

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“[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.”<sup>11</sup>

But we need not speculate. When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as “due process of law” or “equal protection of the laws”—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.<sup>12</sup> We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment’s text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment’s ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter *what* it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its “reasoned judgment,” thinks the Fourteenth Amendment ought to protect.<sup>13</sup> That is so because “[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its

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<sup>11</sup> *Id.*, at \_\_\_\_ (slip op., at 17).

<sup>12</sup> See *Town of Greece v. Galloway*, 572 U. S. \_\_\_, \_\_\_–\_\_\_ (2014) (slip op., at 7–8).

<sup>13</sup> *Ante*, at 10.

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dimensions . . . .”<sup>14</sup> One would think that sentence would continue: “. . . and therefore they provided for a means by which the People could amend the Constitution,” or perhaps “. . . and therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation.” But no. What logically follows, in the majority’s judge-empowering estimation, is: “and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”<sup>15</sup> The “we,” needless to say, is the nine of us. “History and tradition guide and discipline [our] inquiry but do not set its outer boundaries.”<sup>16</sup> Thus, rather than focusing on *the People’s* understanding of “liberty”—at the time of ratification or even today—the majority focuses on four “principles and traditions” that, *in the majority’s view*, prohibit States from defining marriage as an institution consisting of one man and one woman.<sup>17</sup>

This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices’ “reasoned judgment.” A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section

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<sup>14</sup> *Ante*, at 11.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ante*, at 10–11.

<sup>17</sup> *Ante*, at 12–18.

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of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers<sup>18</sup> who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southerner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans<sup>19</sup>), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; *they say they are not*. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

## II

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that

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<sup>18</sup>The predominant attitude of tall-building lawyers with respect to the questions presented in these cases is suggested by the fact that the American Bar Association deemed it in accord with the wishes of its members to file a brief in support of the petitioners. See Brief for American Bar Association as *Amicus Curiae* in Nos. 14–571 and 14–574, pp. 1–5.

<sup>19</sup>See Pew Research Center, *America's Changing Religious Landscape* 4 (May 12, 2015).

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every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003.<sup>20</sup> They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their "reasoned judgment." These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago,<sup>21</sup> cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so.<sup>22</sup> Of course the opinion's showy profundities are often

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<sup>20</sup> *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003).

<sup>21</sup> *Windsor*, 570 U. S., at \_\_\_\_ (ALITO, J., dissenting) (slip op., at 7).

<sup>22</sup> If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that

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profoundly incoherent. “The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality.”<sup>23</sup> (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, *is* a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can “rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”<sup>24</sup> (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) And we are told that, “[i]n any particular case,” either the Equal Protection or Due Process Clause “may be thought to capture the essence of [a] right in a more accurate and comprehensive way,” than the other, “even as the two Clauses may converge in the identification and definition of the right.”<sup>25</sup> (What say? What possible “essence” does substantive due process “capture” in an “accurate and comprehensive way”? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court

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allow persons, within a lawful realm, to define and express their identity,” I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

<sup>23</sup> *Ante*, at 13.

<sup>24</sup> *Ante*, at 19.

<sup>25</sup> *Ibid.*

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*really* dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses “converge in the identification and definition of [a] right,” that is only because the majority’s likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today’s opinion has to diminish this Court’s reputation for clear thinking and sober analysis.

\* \* \*

Hubris is sometimes defined as o’erweening pride; and pride, we know, goeth before a fall. The Judiciary is the “least dangerous” of the federal branches because it has “neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm” and the States, “even for the efficacy of its judgments.”<sup>26</sup> With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the “reasoned judgment” of a bare majority of this Court—we move one step closer to being reminded of our impotence.

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<sup>26</sup>The Federalist No. 78, pp. 522, 523 (J. Cooke ed. 1961) (A. Hamilton).



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**SUPREME COURT OF THE UNITED STATES**

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

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14–556 JAMES OBERGEFELL, ET AL., PETITIONERS  
*v.*  
RICHARD HODGES, DIRECTOR, OHIO  
DEPARTMENT OF HEALTH, ET AL.;

14–562 VALERIA TANCO, ET AL., PETITIONERS  
*v.*  
BILL HASLAM, GOVERNOR OF  
TENNESSEE, ET AL.;

14–571 APRIL DEBOER, ET AL., PETITIONERS  
*v.*  
RICK SNYDER, GOVERNOR OF MICHIGAN,  
ET AL.; AND

14–574 GREGORY BOURKE, ET AL., PETITIONERS  
*v.*  
STEVE BESHEAR, GOVERNOR OF  
KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins,  
dissenting.

The Court’s decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our

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Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the name of a “liberty” that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic. I cannot agree with it.

## I

The majority’s decision today will require States to issue marriage licenses to same-sex couples and to recognize same-sex marriages entered in other States largely based on a constitutional provision guaranteeing “due process” before a person is deprived of his “life, liberty, or property.” I have elsewhere explained the dangerous fiction of treating the Due Process Clause as a font of substantive rights. *McDonald v. Chicago*, 561 U. S. 742, 811–812 (2010) (THOMAS, J., concurring in part and concurring in judgment). It distorts the constitutional text, which guarantees only whatever “process” is “due” before a person is deprived of life, liberty, and property. U. S. Const., Amdt. 14, §1. Worse, it invites judges to do exactly what the majority has done here—“roa[m] at large in the constitutional field’ guided only by their personal views” as to the “‘fundamental rights’” protected by that document. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 953, 965 (1992) (Rehnquist, C. J., concurring in judgment in part and dissenting in part) (quoting *Griswold v. Connecticut*, 381 U. S. 479, 502 (1965) (Harlan, J., concurring in judgment)).

By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority. Petitioners argue

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that by enshrining the traditional definition of marriage in their State Constitutions through voter-approved amendments, the States have put the issue “beyond the reach of the normal democratic process.” Brief for Petitioners in No. 14–562, p. 54. But the result petitioners seek is far less democratic. They ask nine judges on this Court to enshrine their definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation. That a “bare majority” of this Court, *ante*, at 25, is able to grant this wish, wiping out with a stroke of the keyboard the results of the political process in over 30 States, based on a provision that guarantees only “due process” is but further evidence of the danger of substantive due process.<sup>1</sup>

## II

Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would not have a claim. To invoke the protection of the Due Process Clause at all—whether under a theory of “substantive” or “procedural” due process—a party must first identify a deprivation of “life, liberty, or property.” The majority claims these state laws deprive petitioners of “liberty,” but the concept of “liberty” it conjures up bears no resemblance to any plausible meaning of that word as it is used in the Due Process Clauses.

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<sup>1</sup>The majority states that the right it believes is “part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws.” *Ante*, at 19. Despite the “synergy” it finds “between th[ese] two protections,” *ante*, at 20, the majority clearly uses equal protection only to shore up its substantive due process analysis, an analysis both based on an imaginary constitutional protection and revisionist view of our history and tradition.

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A

1

As used in the Due Process Clauses, “liberty” most likely refers to “the power of loco-motion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint, unless by due course of law.” 1 W. Blackstone, *Commentaries on the Laws of England* 130 (1769) (Blackstone). That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution’s text and structure.

Both of the Constitution’s Due Process Clauses reach back to Magna Carta. See *Davidson v. New Orleans*, 96 U. S. 97, 101–102 (1878). Chapter 39 of the original Magna Carta provided, “No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.” Magna Carta, ch. 39, in A. Howard, *Magna Carta: Text and Commentary* 43 (1964). Although the 1215 version of Magna Carta was in effect for only a few weeks, this provision was later reissued in 1225 with modest changes to its wording as follows: “No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land.” 1 E. Coke, *The Second Part of the Institutes of the Laws of England* 45 (1797). In his influential commentary on the provision many years later, Sir Edward Coke interpreted the words “by the law of the land” to mean the same thing as “by due proces of the common law.” *Id.*, at 50.

After Magna Carta became subject to renewed interest in the 17th century, see, e.g., *ibid.*, William Blackstone referred to this provision as protecting the “absolute rights

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of every Englishman.” 1 Blackstone 123. And he formulated those absolute rights as “the right of personal security,” which included the right to life; “the right of personal liberty”; and “the right of private property.” *Id.*, at 125. He defined “the right of personal liberty” as “the power of loco-motion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint, unless by due course of law.” *Id.*, at 125, 130.<sup>2</sup>

The Framers drew heavily upon Blackstone’s formulation, adopting provisions in early State Constitutions that replicated Magna Carta’s language, but were modified to refer specifically to “life, liberty, or property.”<sup>3</sup> State

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<sup>2</sup>The seeds of this articulation can also be found in Henry Care’s influential treatise, *English Liberties*. First published in America in 1721, it described the “three things, which the Law of *England* . . . principally regards and taketh Care of,” as “*Life, Liberty and Estate*,” and described habeas corpus as the means by which one could procure one’s “Liberty” from imprisonment. The Habeas Corpus Act, comment., in *English Liberties, or the Free-born Subject’s Inheritance* 185 (H. Care comp. 5th ed. 1721). Though he used the word “Liberties” by itself more broadly, see, e.g., *id.*, at 7, 34, 56, 58, 60, he used “Liberty” in a narrow sense when placed alongside the words “Life” or “Estate,” see, e.g., *id.*, at 185, 200.

<sup>3</sup>Maryland, North Carolina, and South Carolina adopted the phrase “life, liberty, or property” in provisions otherwise tracking Magna Carta: “That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land.” Md. Const., Declaration of Rights, Art. XXI (1776), in 3 *Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 1688 (F. Thorpe ed. 1909); see also S. C. Const., Art. XLI (1778), in 6 *id.*, at 3257; N. C. Const., Declaration of Rights, Art. XII (1776), in 5 *id.*, at 2788. Massachusetts and New Hampshire did the same, albeit with some alterations to Magna Carta’s framework: “[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.” Mass. Const., pt. I, Art. XII (1780), in 3 *id.*, at 1891; see also

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decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word “liberty” to refer only to freedom from physical restraint. See Warren, *The New “Liberty” Under the Fourteenth Amendment*, 39 Harv. L. Rev. 431, 441–445 (1926). Even one case that has been identified as a possible exception to that view merely used broad language about liberty in the context of a habeas corpus proceeding—a proceeding classically associated with obtaining freedom from physical restraint. Cf. *id.*, at 444–445.

In enacting the Fifth Amendment’s Due Process Clause, the Framers similarly chose to employ the “life, liberty, or property” formulation, though they otherwise deviated substantially from the States’ use of Magna Carta’s language in the Clause. See Shattuck, *The True Meaning of the Term “Liberty” in Those Clauses in the Federal and State Constitutions Which Protect “Life, Liberty, and Property,”* 4 Harv. L. Rev. 365, 382 (1890). When read in light of the history of that formulation, it is hard to see how the “liberty” protected by the Clause could be interpreted to include anything broader than freedom from physical restraint. That was the consistent usage of the time when “liberty” was paired with “life” and “property.” See *id.*, at 375. And that usage avoids rendering superfluous those protections for “life” and “property.”

If the Fifth Amendment uses “liberty” in this narrow sense, then the Fourteenth Amendment likely does as well. See *Hurtado v. California*, 110 U. S. 516, 534–535 (1884). Indeed, this Court has previously commented, “The conclusion is . . . irresistible, that when the same phrase was employed in the Fourteenth Amendment [as was used in the Fifth Amendment], it was used in the same sense and with no greater extent.” *Ibid.* And this

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N. H. Const., pt. I, Art. XV (1784), in 4 *id.*, at 2455.

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Court's earliest Fourteenth Amendment decisions appear to interpret the Clause as using "liberty" to mean freedom from physical restraint. In *Munn v. Illinois*, 94 U. S. 113 (1877), for example, the Court recognized the relationship between the two Due Process Clauses and Magna Carta, see *id.*, at 123–124, and implicitly rejected the dissent's argument that "liberty" encompassed "something more . . . than mere freedom from physical restraint or the bounds of a prison," *id.*, at 142 (Field, J., dissenting). That the Court appears to have lost its way in more recent years does not justify deviating from the original meaning of the Clauses.

## 2

Even assuming that the "liberty" in those Clauses encompasses something more than freedom from physical restraint, it would not include the types of rights claimed by the majority. In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.

The founding-era understanding of liberty was heavily influenced by John Locke, whose writings "on natural rights and on the social and governmental contract" were cited "[i]n pamphlet after pamphlet" by American writers. B. Bailyn, *The Ideological Origins of the American Revolution* 27 (1967). Locke described men as existing in a state of nature, possessed of the "perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man." J. Locke, *Second Treatise of Civil Government*, §4, p. 4 (J. Gough ed. 1947) (Locke). Because that state of nature left men insecure in their persons and property, they entered civil society, trading a portion of their natural liberty for an increase in their security. See

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*id.*, §97, at 49. Upon consenting to that order, men obtained civil liberty, or the freedom “to be under no other legislative power but that established by consent in the commonwealth; nor under the dominion of any will or restraint of any law, but what that legislative shall enact according to the trust put in it.” *Id.*, §22, at 13.<sup>4</sup>

This philosophy permeated the 18th-century political scene in America. A 1756 editorial in the Boston Gazette, for example, declared that “Liberty in the *State of Nature*” was the “inherent natural Right” “of each Man” “to make a free Use of his Reason and Understanding, and to chuse that Action which he thinks he can give the best Account of,” but that, “in Society, every Man parts with a Small Share of his *natural* Liberty, or lodges it in the publick Stock, that he may possess the Remainder without Controul.” Boston Gazette and Country Journal, No. 58, May 10, 1756, p. 1. Similar sentiments were expressed in public speeches, sermons, and letters of the time. See 1 C.

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<sup>4</sup>Locke’s theories heavily influenced other prominent writers of the 17th and 18th centuries. Blackstone, for one, agreed that “natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature” and described civil liberty as that “which leaves the subject entire master of his own conduct,” except as “restrained by human laws.” 1 Blackstone 121–122. And in a “treatise routinely cited by the Founders,” *Zivotofsky v. Kerry*, *ante*, at 5 (THOMAS, J., concurring in judgment in part and dissenting in part), Thomas Rutherford wrote, “By liberty we mean the power, which a man has to act as he thinks fit, where no law restrains him; it may therefore be called a mans right over his own actions.” 1 T. Rutherford, *Institutes of Natural Law* 146 (1754). Rutherford explained that “[t]he only restraint, which a mans right over his own actions is originally under, is the obligation of governing himself by the law of nature, and the law of God,” and that “[w]hatever right those of our own species may have . . . to restrain [those actions] within certain bounds, beyond what the law of nature has prescribed, arises from some after-act of our own, from some consent either express or tacit, by which we have alienated our liberty, or transferred the right of directing our actions from ourselves to them.” *Id.*, at 147–148.



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Hyneman & D. Lutz, *American Political Writing During the Founding Era 1760–1805*, pp. 100, 308, 385 (1983).

The founding-era idea of civil liberty as natural liberty constrained by human law necessarily involved only those freedoms that existed *outside of* government. See Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *Yale L. J.* 907, 918–919 (1993). As one later commentator observed, “[L]iberty in the eighteenth century was thought of much more in relation to ‘negative liberty’; that is, freedom *from*, not freedom *to*, freedom from a number of social and political evils, including arbitrary government power.” J. Reid, *The Concept of Liberty in the Age of the American Revolution* 56 (1988). Or as one scholar put it in 1776, “[T]he common idea of liberty is merely negative, and is only the *absence of restraint*.” R. Hey, *Observations on the Nature of Civil Liberty and the Principles of Government* §13, p. 8 (1776) (Hey). When the colonists described laws that would infringe their liberties, they discussed laws that would prohibit individuals “from walking in the streets and highways on certain saints days, or from being abroad after a certain time in the evening, or . . . restrain [them] from working up and manufacturing materials of [their] own growth.” Downer, *A Discourse at the Dedication of the Tree of Liberty*, in 1 Hyneman, *supra*, at 101. Each of those examples involved freedoms that existed outside of government.

## B

Whether we define “liberty” as locomotion or freedom from governmental action more broadly, petitioners have in no way been deprived of it.

Petitioners cannot claim, under the most plausible definition of “liberty,” that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabitate and raise their children in peace. They

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have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor, under the broader definition, can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. Petitioners claim that as a matter of “liberty,” they are entitled to access privileges and benefits that exist solely *because of* the government. They want, for example, to receive the State’s *imprimatur* on their marriages—on state issued marriage licenses, death certificates, or other official forms. And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of “liberty” that the Framers would have recognized.

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader

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definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one’s spouse—without governmental interference. At the founding, such conduct was understood to predate government, not to flow from it. As Locke had explained many years earlier, “The first society was between man and wife, which gave beginning to that between parents and children.” Locke §77, at 39; see also J. Wilson, *Lectures on Law*, in 2 *Collected Works of James Wilson* 1068 (K. Hall and M. Hall eds. 2007) (concluding “that to the institution of marriage the true origin of society must be traced”). Petitioners misunderstand the institution of marriage when they say that it would “mean little” absent governmental recognition. Brief for Petitioners in No. 14–556, p. 33.

Petitioners’ misconception of liberty carries over into their discussion of our precedents identifying a right to marry, not one of which has expanded the concept of “liberty” beyond the concept of negative liberty. Those precedents all involved absolute prohibitions on private actions associated with marriage. *Loving v. Virginia*, 388 U. S. 1 (1967), for example, involved a couple who was criminally prosecuted for marrying in the District of Columbia and cohabiting in Virginia, *id.*, at 2–3.<sup>5</sup> They were each sen-

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<sup>5</sup>The suggestion of petitioners and their *amici* that antimiscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive and inaccurate. “America’s earliest laws against interracial sex and marriage were spawned by slavery.” P. Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* 19 (2009). For instance, Maryland’s 1664 law prohibiting marriages between “freeborne English women” and “Negro Sla[v]es” was passed as part of the very act that authorized lifelong

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tenced to a year of imprisonment, suspended for a term of 25 years on the condition that they not reenter the Commonwealth together during that time. *Id.*, at 3.<sup>6</sup> In a similar vein, *Zablocki v. Redhail*, 434 U. S. 374 (1978), involved a man who was prohibited, on pain of criminal penalty, from “marry[ing] in Wisconsin or elsewhere” because of his outstanding child-support obligations, *id.*, at 387; see *id.*, at 377–378. And *Turner v. Safley*, 482 U. S. 78 (1987), involved state inmates who were prohibited from entering marriages without the permission of the superintendent of the prison, permission that could not be granted absent compelling reasons, *id.*, at 82. In *none* of those cases were individuals denied solely governmental

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slavery in the colony. *Id.*, at 19–20. Virginia’s antimiscegenation laws likewise were passed in a 1691 resolution entitled “An act for suppressing outlying Slaves.” Act of Apr. 1691, Ch. XVI, 3 Va. Stat. 86 (W. Hening ed. 1823) (reprint 1969) (*italics deleted*). “It was not until the Civil War threw the future of slavery into doubt that lawyers, legislators, and judges began to develop the elaborate justifications that signified the emergence of miscegenation law and made restrictions on interracial marriage the foundation of post-Civil War white supremacy.” Pascoe, *supra*, at 27–28.

Laws defining marriage as between one man and one woman do not share this sordid history. The traditional definition of marriage has prevailed in every society that has recognized marriage throughout history. Brief for Scholars of History and Related Disciplines as *Amici Curiae* 1. It arose not out of a desire to shore up an invidious institution like slavery, but out of a desire “to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world.” *Id.*, at 8. And it has existed in civilizations containing all manner of views on homosexuality. See Brief for Ryan T. Anderson as *Amicus Curiae* 11–12 (explaining that several famous ancient Greeks wrote approvingly of the traditional definition of marriage, though same-sex sexual relations were common in Greece at the time).

<sup>6</sup>The prohibition extended so far as to forbid even religious ceremonies, thus raising a serious question under the First Amendment’s Free Exercise Clause, as at least one *amicus* brief at the time pointed out. Brief for John J. Russell et al. as *Amici Curiae* in *Loving v. Virginia*, O.T. 1966, No. 395, pp. 12–16.

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recognition and benefits associated with marriage.

In a concession to petitioners' misconception of liberty, the majority characterizes petitioners' suit as a quest to "find . . . liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex." *Ante*, at 2. But "liberty" is not lost, nor can it be found in the way petitioners seek. As a philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits. And as a constitutional matter, it is likely even narrower than that, encompassing only freedom from physical restraint and imprisonment. The majority's "better informed understanding of how constitutional imperatives define . . . liberty," *ante*, at 19,—better informed, we must assume, than that of the people who ratified the Fourteenth Amendment—runs headlong into the reality that our Constitution is a "collection of 'Thou shalt nots,'" *Reid v. Covert*, 354 U. S. 1, 9 (1957) (plurality opinion), not "Thou shalt provides."

### III

The majority's inversion of the original meaning of liberty will likely cause collateral damage to other aspects of our constitutional order that protect liberty.

#### A

The majority apparently disregards the political process as a protection for liberty. Although men, in forming a civil society, "give up all the power necessary to the ends for which they unite into society, to the majority of the community," Locke §99, at 49, they reserve the authority to exercise natural liberty within the bounds of laws established by that society, *id.*, §22, at 13; see also Hey §§52, 54, at 30–32. To protect that liberty from arbitrary interference, they establish a process by which that society can

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adopt and enforce its laws. In our country, that process is primarily representative government at the state level, with the Federal Constitution serving as a backstop for that process. As a general matter, when the States act through their representative governments or by popular vote, the liberty of their residents is fully vindicated. This is no less true when some residents disagree with the result; indeed, it seems difficult to imagine *any* law on which all residents of a State would agree. See Locke §98, at 49 (suggesting that society would cease to function if it required unanimous consent to laws). What matters is that the process established by those who created the society has been honored.

That process has been honored here. The definition of marriage has been the subject of heated debate in the States. Legislatures have repeatedly taken up the matter on behalf of the People, and 35 States have put the question to the People themselves. In 32 of those 35 States, the People have opted to retain the traditional definition of marriage. Brief for Respondents in No. 14–571, pp. 1a–7a. That petitioners disagree with the result of that process does not make it any less legitimate. Their civil liberty has been vindicated.

## B

Aside from undermining the political processes that protect our liberty, the majority’s decision threatens the religious liberty our Nation has long sought to protect.

The history of religious liberty in our country is familiar: Many of the earliest immigrants to America came seeking freedom to practice their religion without restraint. See McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1422–1425 (1990). When they arrived, they created their own havens for religious practice. *Ibid.* Many of these havens were initially homogenous communities with established

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religions. *Ibid.* By the 1780’s, however, “America was in the wake of a great religious revival” marked by a move toward free exercise of religion. *Id.*, at 1437. Every State save Connecticut adopted protections for religious freedom in their State Constitutions by 1789, *id.*, at 1455, and, of course, the First Amendment enshrined protection for the free exercise of religion in the U. S. Constitution. But that protection was far from the last word on religious liberty in this country, as the Federal Government and the States have reaffirmed their commitment to religious liberty by codifying protections for religious practice. See, e.g., Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.*; Conn. Gen. Stat. §52–571b (2015).

Numerous *amici*—even some not supporting the States—have cautioned the Court that its decision here will “have unavoidable and wide-ranging implications for religious liberty.” Brief for General Conference of Seventh-Day Adventists et al. as *Amici Curiae* 5. In our society, marriage is not simply a governmental institution; it is a religious institution as well. *Id.*, at 7. Today’s decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty in a single paragraph, *ante*, at 27. And even that gesture indicates a misunderstanding of religious liberty in our Nation’s tradition. Religious liberty is about more than just the protection for “religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.” *Ibid.* Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious

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practice.<sup>7</sup>

Although our Constitution provides some protection against such governmental restrictions on religious practices, the People have long elected to afford broader protections than this Court’s constitutional precedents mandate. Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority’s decision short-circuits that process, with potentially ruinous consequences for religious liberty.

#### IV

Perhaps recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the “dignity” of same-sex couples. *Ante*, at 3, 13, 26, 28.<sup>8</sup> The flaw in that reasoning, of course, is that the Constitution contains no “dignity” Clause, and even if it did, the government would be incapable of bestowing dignity.

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that “all men are created equal”

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<sup>7</sup>Concerns about threats to religious liberty in this context are not unfounded. During the hey-day of antimiscegenation laws in this country, for instance, Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies. Va. Code Ann. §20–60 (1960).

<sup>8</sup>The majority also suggests that marriage confers “nobility” on individuals. *Ante*, at 3. I am unsure what that means. People may choose to marry or not to marry. The decision to do so does not make one person more “noble” than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.



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and “endowed by their Creator with certain unalienable Rights,” they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.

The majority’s musings are thus deeply misguided, but at least those musings can have no effect on the dignity of the persons the majority demeans. Its mischaracterization of the arguments presented by the States and their *amici* can have no effect on the dignity of those litigants. Its rejection of laws preserving the traditional definition of marriage can have no effect on the dignity of the people who voted for them. Its invalidation of those laws can have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage. And its disdain for the understandings of liberty and dignity upon which this Nation was founded can have no effect on the dignity of Americans who continue to believe in them.

\* \* \*

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One’s liberty, not to mention one’s dignity, was something to be shielded from—not provided by—the State. Today’s decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on “due process” to afford substantive rights, disregards the most plausible

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understanding of the “liberty” protected by that clause, and distorts the principles on which this Nation was founded. Its decision will have inestimable consequences for our Constitution and our society. I respectfully dissent.

ALITO, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

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

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14–556 JAMES OBERGEFELL, ET AL., PETITIONERS  
v.  
RICHARD HODGES, DIRECTOR, OHIO  
DEPARTMENT OF HEALTH, ET AL.;

14–562 VALERIA TANGO, ET AL., PETITIONERS  
v.  
BILL HASLAM, GOVERNOR OF  
TENNESSEE, ET AL.;

14–571 APRIL DEBOER, ET AL., PETITIONERS  
v.  
RICK SNYDER, GOVERNOR OF MICHIGAN,  
ET AL.; AND

14–574 GREGORY BOURKE, ET AL., PETITIONERS  
v.  
STEVE BESHEAR, GOVERNOR OF  
KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE  
THOMAS join, dissenting.

Until the federal courts intervened, the American people  
were engaged in a debate about whether their States  
should recognize same-sex marriage.<sup>1</sup> The question in

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<sup>1</sup>I use the phrase “recognize marriage” as shorthand for issuing mar-

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these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.

## I

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term “liberty” in the Due Process Clause of the Fourteenth Amendment encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today’s majority, it has a distinctively postmodern meaning.

To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that “liberty” under the Due Process Clause should be understood to protect only those rights that are “‘deeply rooted in this Nation’s history and tradition.’” *Washington v. Glucksberg*, 521 U. S. 701, 720–721 (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights. See *United States v. Windsor*, 570 U. S. \_\_\_, \_\_\_ (2013) (ALITO, J., dissenting) (slip op., at 7). Indeed:

“In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge v. Department of Public Health*, 440 Mass.

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riage licenses and conferring those special benefits and obligations provided under state law for married persons.

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309, 798 N. E. 2d 941. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.

“What [those arguing in favor of a constitutional right to same sex marriage] seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility.” *Id.*, at \_\_\_\_ (slip op., at 7–8) (footnote omitted).

For today’s majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

## II

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to same-sex couples. This reasoning is dependent upon a particular understanding of the purpose of civil marriage. Although the Court expresses the point in loftier terms, its argument is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides emotional fulfillment and the promise of support in times of need. And by benefiting persons who choose to wed, marriage indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens. It is for these reasons, the argument goes, that States

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encourage and formalize marriage, confer special benefits on married persons, and also impose some special obligations. This understanding of the States' reasons for recognizing marriage enables the majority to argue that same-sex marriage serves the States' objectives in the same way as opposite-sex marriage.

This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.

Adherents to different schools of philosophy use different terms to explain why society should formalize marriage and attach special benefits and obligations to persons who marry. Here, the States defending their adherence to the traditional understanding of marriage have explained their position using the pragmatic vocabulary that characterizes most American political discourse. Their basic argument is that States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children. They thus argue that there are reasonable secular grounds for restricting marriage to opposite-sex couples.

If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed. Today, for instance, more than 40% of all children in this country are born to unmarried women.<sup>2</sup> This de-

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<sup>2</sup>See, *e.g.*, Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, D. Martin, B. Hamilton, M. Osterman, S. Curtin, & T. Matthews, Births: Final Data for 2013, 64 National Vital Statistics Reports, No. 1, p. 2 (Jan. 15, 2015), online at <http://www.cdc.gov/nchs/data/nvsr/nvsr64/>

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velopment undoubtedly is both a cause and a result of changes in our society's understanding of marriage.

While, for many, the attributes of marriage in 21st-century America have changed, those States that do not want to recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to marriage's further decay. It is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and others with similar cultural roots, but also in a great variety of countries and cultures all around the globe.

As I wrote in *Windsor*:

“The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.

“We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some

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nvsr64\_01.pdf (all Internet materials as visited June 24, 2015, and available in Clerk of Court's case file); cf. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics (NCHS), S. Ventura, Changing Patterns of Non-marital Childbearing in the United States, NCHS Data Brief, No. 18 (May 2009), online at <http://www.cdc.gov/nchs/data/databrief/db18.pdf>.

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time to come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. Others think that recognition of same-sex marriage will fortify a now-shaky institution.

“At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials.” 570 U. S., at \_\_\_ (dissenting opinion) (slip op., at 8–10) (citations and footnotes omitted).

### III

Today’s decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. *E.g., ante*, at 11–13. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.



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Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. *Ante*, at 26–27. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection for conscience rights. The majority today makes that impossible. By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turn-about is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.

Today's decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. Even enthusiastic supporters of same-sex marriage should worry about the scope of the power that today's majority claims.

Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that

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preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.

Most Americans—understandably—will cheer or lament today's decision because of their views on the issue of same-sex marriage. But all Americans, whatever their thinking on that issue, should worry about what the majority's claim of power portends.

Opinion of ROBERTS, C. J.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

Nos. 05–908 and 05–915

PARENTS INVOLVED IN COMMUNITY  
SCHOOLS, PETITIONER  
05–908 *v.*  
SEATTLE SCHOOL DISTRICT NO. 1 ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT  
FRIEND OF JOSHUA RYAN McDONALD, PETITIONER  
05–915 *v.*  
JEFFERSON COUNTY BOARD OF EDUCATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[June 28, 2007]

CHIEF JUSTICE ROBERTS announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III–A, and III–C, and an opinion with respect to Parts III–B and IV, in which JUSTICES SCALIA, THOMAS, and ALITO join.

The school districts in these cases voluntarily adopted student assignment plans that rely upon race to determine which public schools certain children may attend. The Seattle school district classifies children as white or non-white; the Jefferson County school district as black or “other.” In Seattle, this racial classification is used to

allocate slots in oversubscribed high schools. In Jefferson County, it is used to make certain elementary school assignments and to rule on transfer requests. In each case, the school district relies upon an individual student's race in assigning that student to a particular school, so that the racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole. Parents of students denied assignment to particular schools under these plans solely because of their race brought suit, contending that allocating children to different public schools on the basis of race violated the Fourteenth Amendment guarantee of equal protection. The Courts of Appeals below upheld the plans. We granted certiorari, and now reverse.

I

Both cases present the same underlying legal question—whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments. Although we examine the plans under the same legal framework, the specifics of the two plans, and the circumstances surrounding their adoption, are in some respects quite different.

A

Seattle School District No. 1 operates 10 regular public high schools. In 1998, it adopted the plan at issue in this case for assigning students to these schools. App. in No. 05–908, pp. 90a–92a.<sup>1</sup> The plan allows incoming ninth

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<sup>1</sup>The plan was in effect from 1999–2002, for three school years. This litigation was commenced in July 2000, and the record in the District Court was closed before assignments for the 2001–2002 school year were made. See Brief for Respondents in No. 05–908, p. 9, n. 9. We rely, as did the lower courts, largely on data from the 2000–2001 school

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graders to choose from among any of the district's high schools, ranking however many schools they wish in order of preference.

Some schools are more popular than others. If too many students list the same school as their first choice, the district employs a series of "tiebreakers" to determine who will fill the open slots at the oversubscribed school. The first tiebreaker selects for admission students who have a sibling currently enrolled in the chosen school. The next tiebreaker depends upon the racial composition of the particular school and the race of the individual student. In the district's public schools approximately 41 percent of enrolled students are white; the remaining 59 percent, comprising all other racial groups, are classified by Seattle for assignment purposes as nonwhite. *Id.*, at 38a, 103a.<sup>2</sup> If an oversubscribed school is not within 10 percentage points of the district's overall white/nonwhite racial balance, it is what the district calls "integration positive," and the district employs a tiebreaker that selects for assignment students whose race "will serve to bring the school into balance." *Id.*, at 38a. See *Parents Involved VII*, 426 F. 3d 1162, 1169–1170 (CA9 2005) (en banc).<sup>3</sup> If it is still necessary to select students for the school after using the racial tiebreaker, the next tiebreaker is the geographic proximity of the school to the student's residence. App. in No. 05–908, at 38a.

Seattle has never operated segregated schools—legally

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year in evaluating the plan. See 426 F. 3d 1162, 1169–1171 (CA9 2005) (en banc) (*Parents Involved VII*).

<sup>2</sup>The racial breakdown of this nonwhite group is approximately 23.8 percent Asian-American, 23.1 percent African-American, 10.3 percent Latino, and 2.8 percent Native-American. See 377 F. 3d 949, 1005–1006 (CA9 2004) (*Parents Involved VI*) (Graber, J., dissenting).

<sup>3</sup>For the 2001–2002 school year, the deviation permitted from the desired racial composition was increased from 10 to 15 percent. App. in No. 05–908, p. 38a. The bulk of the data in the record was collected using the 10 percent band, see n. 1, *supra*.

separate schools for students of different races—nor has it ever been subject to court-ordered desegregation. It nonetheless employs the racial tiebreaker in an attempt to address the effects of racially identifiable housing patterns on school assignments. Most white students live in the northern part of Seattle, most students of other racial backgrounds in the southern part. *Parents Involved VII, supra*, at 1166. Four of Seattle’s high schools are located in the north—Ballard, Nathan Hale, Ingraham, and Roosevelt—and five in the south—Rainier Beach, Cleveland, West Seattle, Chief Sealth, and Franklin. One school—Garfield—is more or less in the center of Seattle. App. in No. 05–908, at 38a–39a, 45a.

For the 2000–2001 school year, five of these schools were oversubscribed—Ballard, Nathan Hale, Roosevelt, Garfield, and Franklin—so much so that 82 percent of incoming ninth graders ranked one of these schools as their first choice. *Id.*, at 38a. Three of the oversubscribed schools were “integration positive” because the school’s white enrollment the previous school year was greater than 51 percent—Ballard, Nathan Hale, and Roosevelt. Thus, more nonwhite students (107, 27, and 82, respectively) who selected one of these three schools as a top choice received placement at the school than would have been the case had race not been considered, and proximity been the next tiebreaker. *Id.*, at 39a–40a. Franklin was “integration positive” because its nonwhite enrollment the previous school year was greater than 69 percent; 89 more white students were assigned to Franklin by operation of the racial tiebreaker in the 2000–2001 school year than otherwise would have been. *Ibid.* Garfield was the only oversubscribed school whose composition during the 1999–2000 school year was within the racial guidelines, although in previous years Garfield’s enrollment had been predominantly nonwhite, and the racial tiebreaker had been used to give preference to white students. *Id.*, at 39a.

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Petitioner Parents Involved in Community Schools (Parents Involved) is a nonprofit corporation comprising the parents of children who have been or may be denied assignment to their chosen high school in the district because of their race. The concerns of Parents Involved are illustrated by Jill Kurfirst, who sought to enroll her ninth-grade son, Andy Meeks, in Ballard High School's special Biotechnology Career Academy. Andy suffered from attention deficit hyperactivity disorder and dyslexia, but had made good progress with hands-on instruction, and his mother and middle school teachers thought that the smaller biotechnology program held the most promise for his continued success. Andy was accepted into this selective program but, because of the racial tiebreaker, was denied assignment to Ballard High School. *Id.*, at 143a–146a, 152a–160a. Parents Involved commenced this suit in the Western District of Washington, alleging that Seattle's use of race in assignments violated the Equal Protection Clause of the Fourteenth Amendment,<sup>4</sup> Title VI of the Civil Rights Act of 1964,<sup>5</sup> and the Washington Civil Rights Act.<sup>6</sup> *Id.*, at 28a–35a.

The District Court granted summary judgment to the school district, finding that state law did not bar the district's use of the racial tiebreaker and that the plan survived strict scrutiny on the federal constitutional claim because it was narrowly tailored to serve a compelling

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<sup>4</sup>“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U. S. Const., Amdt. 14, §1.

<sup>5</sup>“No person in the United States shall, on the ground of race . . . be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 78 Stat. 252, 42 U. S. C. §2000d.

<sup>6</sup>“The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” Wash. Rev. Code §49.60.400(1) (2006).

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government interest. 137 F. Supp. 2d 1224, 1240 (WD Wash. 2001) (*Parents Involved I*). The Ninth Circuit initially reversed based on its interpretation of the Washington Civil Rights Act, 285 F. 3d 1236, 1253 (2002) (*Parents Involved II*), and enjoined the district's use of the integration tiebreaker, *id.*, at 1257. Upon realizing that the litigation would not be resolved in time for assignment decisions for the 2002–2003 school year, the Ninth Circuit withdrew its opinion, 294 F. 3d 1084 (2002) (*Parents Involved III*), vacated the injunction, and, pursuant to Wash. Rev. Code §2.60.020 (2006), certified the state-law question to the Washington Supreme Court, 294 F. 3d 1085, 1087 (2002) (*Parents Involved IV*).

The Washington Supreme Court determined that the State Civil Rights Act bars only preferential treatment programs “where race or gender is used by government to select a less qualified applicant over a more qualified applicant,” and not “[p]rograms which are racially neutral, such as the [district's] open choice plan.” *Parents Involved in Community Schools v. Seattle School Dist., No. 1*, 149 Wash. 2d 660, 689–690, 663, 72 P. 3d 151, 166, 153 (2003) (en banc) (*Parents Involved V*). The state court returned the case to the Ninth Circuit for further proceedings. *Id.*, at 690, 72 P. 3d, at 167.

A panel of the Ninth Circuit then again reversed the District Court, this time ruling on the federal constitutional question. *Parents Involved VI*, 377 F. 3d 949 (2004). The panel determined that while achieving racial diversity and avoiding racial isolation are compelling government interests, *id.*, at 964, Seattle's use of the racial tiebreaker was not narrowly tailored to achieve these interests, *id.*, at 980. The Ninth Circuit granted rehearing en banc, 395 F. 3d 1168 (2005), and overruled the panel decision, affirming the District Court's determination that Seattle's plan was narrowly tailored to serve a compelling government interest, *Parents Involved VII*, 426 F. 3d, at 1192–



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1193. We granted certiorari. 547 U. S. \_\_ (2006).

## B

Jefferson County Public Schools operates the public school system in metropolitan Louisville, Kentucky. In 1973 a federal court found that Jefferson County had maintained a segregated school system, *Newburg Area Council, Inc. v. Board of Ed. of Jefferson Cty.*, 489 F. 2d 925, 932 (CA6), vacated and remanded, 418 U. S. 918, reinstated with modifications, 510 F. 2d 1358, 1359 (CA6 1974), and in 1975 the District Court entered a desegregation decree. See *Hampton v. Jefferson Cty. Bd. of Ed.*, 72 F. Supp. 2d 753, 762–764 (WD Ky. 1999). Jefferson County operated under this decree until 2000, when the District Court dissolved the decree after finding that the district had achieved unitary status by eliminating “[t]o the greatest extent practicable” the vestiges of its prior policy of segregation. *Hampton v. Jefferson Cty. Bd. of Ed.*, 102 F. Supp. 2d 358, 360 (2000). See *Board of Ed. of Oklahoma City Public Schools v. Dowell*, 498 U. S. 237, 249–250 (1991); *Green v. School Bd. of New Kent Cty.*, 391 U. S. 430, 435–436 (1968).

In 2001, after the decree had been dissolved, Jefferson County adopted the voluntary student assignment plan at issue in this case. App. in No. 05–915, p. 77. Approximately 34 percent of the district’s 97,000 students are black; most of the remaining 66 percent are white. *McFarland v. Jefferson Cty. Public Schools*, 330 F. Supp. 2d 834, 839–840, and n. 6 (WD Ky. 2004) (*McFarland I*). The plan requires all nonmagnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent. App. in No. 05–915, at 81; *McFarland I*, *supra*, at 842.

At the elementary school level, based on his or her address, each student is designated a “resides” school to which students within a specific geographic area are

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assigned; elementary resides schools are “grouped into clusters in order to facilitate integration.” App. in No. 05–915, at 82. The district assigns students to nonmagnet schools in one of two ways: Parents of kindergartners, first-graders, and students new to the district may submit an application indicating a first and second choice among the schools within their cluster; students who do not submit such an application are assigned within the cluster by the district. “Decisions to assign students to schools within each cluster are based on available space within the schools and the racial guidelines in the District’s current student assignment plan.” *Id.*, at 38. If a school has reached the “extremes of the racial guidelines,” a student whose race would contribute to the school’s racial imbalance will not be assigned there. *Id.*, at 38–39, 82. After assignment, students at all grade levels are permitted to apply to transfer between nonmagnet schools in the district. Transfers may be requested for any number of reasons, and may be denied because of lack of available space or on the basis of the racial guidelines. *Id.*, at 43.<sup>7</sup>

When petitioner Crystal Meredith moved into the school district in August 2002, she sought to enroll her son, Joshua McDonald, in kindergarten for the 2002–2003 school year. His resides school was only a mile from his new home, but it had no available space—assignments had been made in May, and the class was full. Jefferson County assigned Joshua to another elementary school in his cluster, Young Elementary. This school was 10 miles from home, and Meredith sought to transfer Joshua to a school in a different cluster, Bloom Elementary, which—

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<sup>7</sup>Middle and high school students are designated a single resides school and assigned to that school unless it is at the extremes of the racial guidelines. Students may also apply to a magnet school or program, or, at the high school level, take advantage of an open enrollment plan that allows ninth-grade students to apply for admission to any nonmagnet high school. App. in No. 05–915, pp. 39–41, 82–83.

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like his resides school—was only a mile from home. See Tr. in *McFarland I*, pp. 1–49 through 1–54 (Dec. 8, 2003). Space was available at Bloom, and intercluster transfers are allowed, but Joshua’s transfer was nonetheless denied because, in the words of Jefferson County, “[t]he transfer would have an adverse effect on desegregation compliance” of Young. App. in No. 05–915, at 97.<sup>8</sup>

Meredith brought suit in the Western District of Kentucky, alleging violations of the Equal Protection Clause of the Fourteenth Amendment. The District Court found that Jefferson County had asserted a compelling interest in maintaining racially diverse schools, and that the assignment plan was (in all relevant respects) narrowly tailored to serve that compelling interest. *McFarland I*, *supra*, at 837.<sup>9</sup> The Sixth Circuit affirmed in a *per curiam* opinion relying upon the reasoning of the District Court, concluding that a written opinion “would serve no useful purpose.” *McFarland v. Jefferson Cty. Public Schools*, 416 F. 3d 513, 514 (2005) (*McFarland II*). We granted certiorari. 547 U. S. \_\_ (2006).

## II

As a threshold matter, we must assure ourselves of our jurisdiction. Seattle argues that Parents Involved lacks standing because none of its current members can claim an imminent injury. Even if the district maintains the

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<sup>8</sup>It is not clear why the racial guidelines were even applied to Joshua’s transfer application—the guidelines supposedly do not apply at the kindergarten level. *Id.*, at 43. Neither party disputes, however, that Joshua’s transfer application was denied under the racial guidelines, and Meredith’s objection is not that the guidelines were misapplied but rather that race was used at all.

<sup>9</sup>Meredith joined a pending lawsuit filed by several other plaintiffs. See *id.*, at 7–11. The other plaintiffs all challenged assignments to certain specialized schools, and the District Court found these assignments, which are no longer at issue in this case, unconstitutional. *McFarland I*, 330 F. Supp. 2d 834, 837, 864 (WD Ky. 2004).

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current plan and reinstitutes the racial tiebreaker, Seattle argues, Parents Involved members will only be affected if their children seek to enroll in a Seattle public high school and choose an oversubscribed school that is integration positive—too speculative a harm to maintain standing. Brief for Respondents in No. 05–908, pp. 16–17.

This argument is unavailing. The group’s members have children in the district’s elementary, middle, and high schools, App. in No. 05–908, at 299a–301a; Affidavit of Kathleen Brose Pursuant to this Court’s Rule 32.3 (Lodging of Petitioner Parents Involved), and the complaint sought declaratory and injunctive relief on behalf of Parents Involved members whose elementary and middle school children may be “denied admission to the high schools of their choice when they apply for those schools in the future,” App. in No. 05–908, at 30a. The fact that it is possible that children of group members will not be denied admission to a school based on their race—because they choose an undersubscribed school or an oversubscribed school in which their race is an advantage—does not eliminate the injury claimed. Moreover, Parents Involved also asserted an interest in not being “forced to compete for seats at certain high schools in a system that uses race as a deciding factor in many of its admissions decisions.” *Ibid.* As we have held, one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995); *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666 (1993), an injury that the members of Parents Involved can validly claim on behalf of their children.

In challenging standing, Seattle also notes that it has ceased using the racial tiebreaker pending the outcome of this litigation. Brief for Respondents in No. 05–908, at 16–17. But the district vigorously defends the constitu-

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tionality of its race-based program, and nowhere suggests that if this litigation is resolved in its favor it will not resume using race to assign students. Voluntary cessation does not moot a case or controversy unless “subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,” *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U. S. 199, 203 (1968) (internal quotation marks omitted)), a heavy burden that Seattle has clearly not met.

Jefferson County does not challenge our jurisdiction, Tr. of Oral Arg. in No. 05–915, p. 48, but we are nonetheless obliged to ensure that it exists, *Arbaugh v. Y & H Corp.*, 546 U. S. 500, 514 (2006). Although apparently Joshua has now been granted a transfer to Bloom, the school to which transfer was denied under the racial guidelines, Tr. of Oral Arg. in No. 05–915, at 45, the racial guidelines apply at all grade levels. Upon Joshua’s enrollment in middle school, he may again be subject to assignment based on his race. In addition, Meredith sought damages in her complaint, which is sufficient to preserve our ability to consider the question. *Los Angeles v. Lyons*, 461 U. S. 95, 109 (1983).

III  
A

It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny. *Johnson v. California*, 543 U. S. 499, 505–506 (2005); *Grutter v. Bollinger*, 539 U. S. 306, 326 (2003); *Adarand, supra*, at 224. As the Court recently reaffirmed, “‘racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.’” *Gratz v. Bollinger*, 539 U. S. 244, 270

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(2003) (quoting *Fullilove v. Klutznick*, 448 U. S. 448, 537 (1980) (STEVENS, J., dissenting); brackets omitted). In order to satisfy this searching standard of review, the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is “narrowly tailored” to achieve a “compelling” government interest. *Adarand*, *supra*, at 227.

Without attempting in these cases to set forth all the interests a school district might assert, it suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination. See *Freeman v. Pitts*, 503 U. S. 467, 494 (1992). Yet the Seattle public schools have not shown that they were ever segregated by law, and were not subject to court-ordered desegregation decrees. The Jefferson County public schools were previously segregated by law and were subject to a desegregation decree entered in 1975. In 2000, the District Court that entered that decree dissolved it, finding that Jefferson County had “eliminated the vestiges associated with the former policy of segregation and its pernicious effects,” and thus had achieved “unitary” status. *Hampton*, 102 F. Supp. 2d, at 360. Jefferson County accordingly does not rely upon an interest in remedying the effects of past intentional discrimination in defending its present use of race in assigning students. See Tr. of Oral Arg. in No. 05–915, at 38.

Nor could it. We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that “the Constitution is not violated by racial imbalance in the schools, without more.” *Milliken v. Bradley*, 433 U. S. 267, 280, n. 14 (1977). See also *Freeman*, *supra*, at 495–496; *Dowell*, 498 U. S., at 248; *Milliken v. Bradley*, 418 U. S. 717, 746 (1974). Once Jefferson County achieved unitary status, it

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had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.<sup>10</sup>

The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter*, 539 U. S., at 328. The specific interest found compelling in *Grutter* was student body diversity “in the context of higher education.” *Ibid.* The diversity interest was not focused on race alone but encompassed “all factors that may contribute to student body diversity.” *Id.*, at 337. We described the various types of diversity that the law school sought:

“[The law school’s] policy makes clear there are many possible bases for diversity admissions, and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have

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<sup>10</sup>The districts point to dicta in a prior opinion in which the Court suggested that, while not constitutionally mandated, it would be constitutionally permissible for a school district to seek racially balanced schools as a matter of “educational policy.” See *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 16 (1971). The districts also quote with approval an in-chambers opinion in which then-Justice Rehnquist made a suggestion to the same effect. See *Bustop, Inc. v. Los Angeles Bd. of Ed.*, 439 U. S. 1380, 1383 (1978). The citations do not carry the significance the districts would ascribe to them. *Swann*, evaluating a school district engaged in court-ordered desegregation, had no occasion to consider whether a district’s voluntary adoption of race-based assignments in the absence of a finding of prior *de jure* segregation was constitutionally permissible, an issue that was again expressly reserved in *Washington v. Seattle School Dist. No. 1*, 458 U. S. 457, 472, n. 15 (1982). *Bustop*, addressing in the context of an emergency injunction application a busing plan imposed by the Superior Court of Los Angeles County, is similarly unavailing. Then-Justice Rehnquist, in denying emergency relief, stressed that “equitable consideration[s]” counseled against preliminary relief. 439 U. S., at 1383. The propriety of preliminary relief and resolution of the merits are of course “significantly different” issues. *University of Texas v. Camenisch*, 451 U. S. 390, 393 (1981).

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overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.” *Id.*, at 338 (brackets and internal quotation marks omitted).

The Court quoted the articulation of diversity from Justice Powell’s opinion in *Regents of the University of California v. Bakke*, 438 U. S. 265 (1978), noting that “it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, that can justify the use of race.” *Grutter*, *supra*, at 324–325 (citing and quoting *Bakke*, *supra*, at 314–315 (opinion of Powell, J.); brackets and internal quotation marks omitted). Instead, what was upheld in *Grutter* was consideration of “a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.” 539 U. S., at 325 (quoting *Bakke*, *supra*, at 315 (opinion of Powell, J.); internal quotation marks omitted).

The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group. The classification of applicants by race upheld in *Grutter* was only as part of a “highly individualized, holistic review,” 539 U. S., at 337. As the Court explained, “[t]he importance of this individualized consideration in the context of a race-conscious admissions program is paramount.” *Ibid.* The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be “patently unconstitutional.” *Id.*, at 330.

In the present cases, by contrast, race is not considered



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as part of a broader effort to achieve “exposure to widely diverse people, cultures, ideas, and viewpoints,” *ibid.*; race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter*; it is *the* factor. Like the University of Michigan undergraduate plan struck down in *Gratz*, 539 U. S., at 275, the plans here “do not provide for a meaningful individualized review of applicants” but instead rely on racial classifications in a “nonindividualized, mechanical” way. *Id.*, at 276, 280 (O’Connor, J., concurring).

Even when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/“other” terms in Jefferson County.<sup>11</sup> But see *Metro Broadcasting, Inc. v. FCC*, 497 U. S. 547, 610 (1990) (“We are a Nation not of black and white alone, but one teeming with divergent communities knitted together with various traditions and carried forth, above all, by individuals”) (O’Connor, J., dissenting). The Seattle “Board Statement Reaffirming Diversity Rationale” speaks of the “inherent educational value” in “[p]roviding students the opportunity to attend schools with diverse student enrollment,” App. in No. 05–908, at 128a, 129a. But under the Seattle plan, a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced,

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<sup>11</sup>The way Seattle classifies its students bears this out. Upon enrolling their child with the district, parents are required to identify their child as a member of a particular racial group. If a parent identifies more than one race on the form, “[t]he application will not be accepted and, if necessary, the enrollment service person taking the application will indicate one box.” App. in No. 05–908, at 303a.

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while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not. It is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is “broadly diverse,” *Grutter, supra*, at 329.

Prior to *Grutter*, the courts of appeals rejected as unconstitutional attempts to implement race-based assignment plans—such as the plans at issue here—in primary and secondary schools. See, e.g., *Eisenberg v. Montgomery Cty. Public Schools*, 197 F. 3d 123, 133 (CA4 1999); *Tuttle v. Arlington Cty. School Bd.*, 195 F. 3d 698, 701 (CA4 1999); *Wessman v. Gittens*, 160 F. 3d 790, 809 (CA1 1998). See also *Ho v. San Francisco Unified School Dist.*, 147 F. 3d 854, 865 (CA9 1998). After *Grutter*, however, the two Courts of Appeals in these cases, and one other, found that race-based assignments were permissible at the elementary and secondary level, largely in reliance on that case. See *Parents Involved VII*, 426 F. 3d, at 1166; *McFarland II*, 416 F. 3d, at 514; *Comfort v. Lynn School Comm.*, 418 F. 3d 1, 13 (CA1 2005).

In upholding the admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education, noting that in light of “the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” 539 U. S., at 329. See also *Bakke, supra*, at 312, 313 (opinion of Powell, J.). The Court explained that “[c]ontext matters” in applying strict scrutiny, and repeatedly noted that it was addressing the use of race “in the context of higher education.” *Grutter, supra*, at 327, 328, 334. The Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in

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extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*.

## B

Perhaps recognizing that reliance on *Grutter* cannot sustain their plans, both school districts assert additional interests, distinct from the interest upheld in *Grutter*, to justify their race-based assignments. In briefing and argument before this Court, Seattle contends that its use of race helps to reduce racial concentration in schools and to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools. Brief for Respondents in No. 05–908, at 19. Jefferson County has articulated a similar goal, phrasing its interest in terms of educating its students “in a racially integrated environment.” App. in No. 05–915, at 22.<sup>12</sup> Each school district argues that educational and broader socialization benefits flow from a racially diverse learning environment, and each contends that because the diversity they seek is racial diversity—not the broader diversity at issue in *Grutter*—it makes sense to promote that interest directly by relying on race alone.

The parties and their *amici* dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to

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<sup>12</sup>Jefferson County also argues that it would be incongruous to hold that what was constitutionally required of it one day—race-based assignments pursuant to the desegregation decree—can be constitutionally prohibited the next. But what was constitutionally required of the district prior to 2000 was the elimination of the vestiges of prior segregation—not racial proportionality in its own right. See *Freeman v. Pitts*, 503 U. S. 467, 494–496 (1992). Once those vestiges were eliminated, Jefferson County was on the same footing as any other school district, and its use of race must be justified on other grounds.

resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.

The plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits. In Seattle, the district seeks white enrollment of between 31 and 51 percent (within 10 percent of "the district white average" of 41 percent), and nonwhite enrollment of between 49 and 69 percent (within 10 percent of "the district minority average" of 59 percent). App. in No. 05-908, at 103a. In Jefferson County, by contrast, the district seeks black enrollment of no less than 15 or more than 50 percent, a range designed to be "equally above and below Black student enrollment systemwide," *McFarland I*, 330 F. Supp. 2d, at 842, based on the objective of achieving at "all schools . . . an African-American enrollment equivalent to the average district-wide African-American enrollment" of 34 percent. App. in No. 05-915, at 81. In Seattle, then, the benefits of racial diversity require enrollment of at least 31 percent white students; in Jefferson County, at least 50 percent. There must be at least 15 percent nonwhite students under Jefferson County's plan; in Seattle, more than three times that figure. This comparison makes clear that the racial demographics in each district—whatever they happen to be—drive the required "diversity" numbers. The plans here are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits; instead the plans are tailored, in the words of Seattle's Manager of Enrollment Planning, Technical Support, and Demographics, to "the goal established by the school board of attain-

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ing a level of diversity within the schools that approximates the district's overall demographics." App. in No. 05–908, at 42a.

The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts—or rather the white/nonwhite or black/“other” balance of the districts, since that is the only diversity addressed by the plans. Indeed, in its brief Seattle simply assumes that the educational benefits track the racial breakdown of the district. See Brief for Respondents in No. 05–908, at 36 (“For Seattle, ‘racial balance’ is clearly not an end in itself but rather a measure of the extent to which the educational goals the plan was designed to foster are likely to be achieved”). When asked for “a range of percentage that would be diverse,” however, Seattle’s expert said it was important to have “sufficient numbers so as to avoid students feeling any kind of specter of exceptionality.” App. in No. 05–908, at 276a. The district did not attempt to defend the proposition that anything outside its range posed the “specter of exceptionality.” Nor did it demonstrate in any way how the educational and social benefits of racial diversity or avoidance of racial isolation are more likely to be achieved at a school that is 50 percent white and 50 percent Asian-American, which would qualify as diverse under Seattle’s plan, than at a school that is 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white, which under Seattle’s definition would be racially concentrated.

Similarly, Jefferson County’s expert referred to the importance of having “at least 20 percent” minority group representation for the group “to be visible enough to make a difference,” and noted that “small isolated minority groups in a school are not likely to have a strong effect on the overall school.” App. in No. 05–915, at 159, 147. The

Jefferson County plan, however, is based on a goal of replicating at each school “an African-American enrollment equivalent to the average district-wide African-American enrollment.” *Id.*, at 81. Joshua McDonald’s requested transfer was denied because his race was listed as “other” rather than black, and allowing the transfer would have had an adverse effect on the racial guideline compliance of Young Elementary, the school he sought to leave. *Id.*, at 21. At the time, however, Young Elementary was 46.8 percent black. *Id.*, at 73. The transfer might have had an adverse effect on the effort to approach district-wide racial proportionality at Young, but it had nothing to do with preventing either the black or “other” group from becoming “small” or “isolated” at Young.

In fact, in each case the extreme measure of relying on race in assignments is unnecessary to achieve the stated goals, even as defined by the districts. For example, at Franklin High School in Seattle, the racial tiebreaker was applied because nonwhite enrollment exceeded 69 percent, and resulted in an incoming ninth-grade class in 2000–2001 that was 30.3 percent Asian-American, 21.9 percent African-American, 6.8 percent Latino, 0.5 percent Native-American, and 40.5 percent Caucasian. Without the racial tiebreaker, the class would have been 39.6 percent Asian-American, 30.2 percent African-American, 8.3 percent Latino, 1.1 percent Native-American, and 20.8 percent Caucasian. See App. in No. 05–908, at 308a. When the actual racial breakdown is considered, enrolling students without regard to their race yields a substantially diverse student body under any definition of diversity.<sup>13</sup>

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<sup>13</sup>Data for the Seattle schools in the several years since this litigation was commenced further demonstrate the minimal role that the racial tiebreaker in fact played. At Ballard, in 2005–2006—when no class at the school was subject to the racial tiebreaker—the student body was 14.2 percent Asian-American, 9 percent African-American, 11.7 percent Latino, 62.3 percent Caucasian, and 2.8 percent Native-American.

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In *Grutter*, the number of minority students the school sought to admit was an undefined “meaningful number” necessary to achieve a genuinely diverse student body. 539 U. S., at 316, 335–336. Although the matter was the subject of disagreement on the Court, see *id.*, at 346–347 (SCALIA, J., concurring in part and dissenting in part); *id.*, at 382–383 (Rehnquist, C. J., dissenting); *id.*, at 388–392 (KENNEDY, J., dissenting), the majority concluded that the law school did not count back from its applicant pool to arrive at the “meaningful number” it regarded as necessary to diversify its student body. *Id.*, at 335–336. Here the racial balance the districts seek is a defined range set solely by reference to the demographics of the respective school districts.

This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent. We have many times over reaffirmed that “[r]acial balance is not to be achieved for its own sake.”

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Reply Brief for Petitioner in No. 05–908, p. 7. In 2000–2001, when the racial tiebreaker was last used, Ballard’s total enrollment was 17.5 percent Asian-American, 10.8 percent African-American, 10.7 percent Latino, 56.4 percent Caucasian, and 4.6 percent Native-American. App. in No. 05–908, at 283a. Franklin in 2005–2006 was 48.9 percent Asian-American, 33.5 percent African-American, 6.6 percent Latino, 10.2 percent Caucasian, and 0.8 percent Native-American. Reply Brief for Petitioner in No. 05–908, at 7. With the racial tiebreaker in 2000–2001, total enrollment was 36.8 percent Asian-American, 32.2 percent African-American, 5.2 percent Latino, 25.1 percent Caucasian, and 0.7 percent Native-American. App. in No. 05–908, at 284a. Nathan Hale’s 2005–2006 enrollment was 17.3 percent Asian-American, 10.7 percent African-American, 8 percent Latino, 61.5 percent Caucasian, and 2.5 percent Native-American. Reply Brief for Petitioner in No. 05–908, at 7. In 2000–2001, with the racial tiebreaker, it was 17.9 percent Asian-American, 13.3 percent African-American, 7 percent Latino, 58.4 percent Caucasian, and 3.4 percent Native-American. App. in No. 05–908, at 286a.

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*Freeman*, 503 U. S., at 494. See also *Richmond v. J. A. Croson Co.*, 488 U. S. 469, 507 (1989); *Bakke*, 438 U. S., at 307 (opinion of Powell, J.) (“If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected . . . as facially invalid”). *Grutter* itself reiterated that “outright racial balancing” is “patently unconstitutional.” 539 U. S., at 330.

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.” *Miller v. Johnson*, 515 U. S. 900, 911 (1995) (quoting *Metro Broadcasting*, 497 U. S., at 602 (O’Connor, J., dissenting); internal quotation marks omitted).<sup>14</sup> Allowing racial balancing as a compelling end in itself would “effectively assur[e] that race will always be relevant in American life, and that the ‘ultimate goal’ of ‘eliminating entirely from governmental decisionmaking such irrelevant factors as a human being’s race’ will never be achieved.” *Croson*, *supra*, at 495 (plurality opinion of O’Connor, J.) (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U. S. 267, 320 (1986) (STEVENS, J., dissenting), in turn quoting *Fullilove*,

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<sup>14</sup>In contrast, Seattle’s website formerly described “emphasizing individualism as opposed to a more collective ideology” as a form of “cultural racism,” and currently states that the district has no intention “to hold onto unsuccessful concepts such as [a] . . . colorblind mentality.” Harrell, School Web Site Removed: Examples of Racism Sparked Controversy, *Seattle Post-Intelligencer*, June 2, 2006, pp. B1, B5. Compare *Plessy v. Ferguson*, 163 U. S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law”).



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448 U. S., at 547 (STEVENS, J., dissenting); brackets and citation omitted). An interest “linked to nothing other than proportional representation of various races . . . would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture.” *Metro Broadcasting, supra*, at 614 (O’Connor, J., dissenting).

The validity of our concern that racial balancing has “no logical stopping point,” *Croson, supra*, at 498 (quoting *Wygant, supra*, at 275 (plurality opinion); internal quotation marks omitted); see also *Grutter, supra*, at 343, is demonstrated here by the degree to which the districts tie their racial guidelines to their demographics. As the districts’ demographics shift, so too will their definition of racial diversity. See App. in No. 05–908, at 103a (describing application of racial tiebreaker based on “*current* white percentage” of 41 percent and “*current* minority percentage” of 59 percent (emphasis added)).

The Ninth Circuit below stated that it “share[d] in the hope” expressed in *Grutter* that in 25 years racial preferences would no longer be necessary to further the interest identified in that case. *Parents Involved VII*, 426 F. 3d, at 1192. But in Seattle the plans are defended as necessary to address the consequences of racially identifiable housing patterns. The sweep of the mandate claimed by the district is contrary to our rulings that remedying past societal discrimination does not justify race-conscious government action. See, e.g., *Shaw v. Hunt*, 517 U. S. 899, 909–910 (1996) (“[A]n effort to alleviate the effects of societal discrimination is not a compelling interest”); *Croson, supra*, at 498–499; *Wygant*, 476 U. S., at 276 (plurality opinion) (“Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy”); *id.*, at 288 (O’Connor, J., concurring in part and concurring in judgment) (“[A] governmental agency’s

interest in remedying ‘societal’ discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster”).

The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from “patently unconstitutional” to a compelling state interest simply by relabeling it “racial diversity.” While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance. See, *e.g.*, App. in No. 05–908, at 257a (“Q. What’s your understanding of when a school suffers from racial isolation? A. I don’t have a definition for that”); *id.*, at 228a–229a (“I don’t think we’ve ever sat down and said, ‘Define racially concentrated school exactly on point in quantitative terms.’ I don’t think we’ve ever had that conversation”); Tr. in *McFarland I*, at 1–90 (Dec. 8, 2003) (“Q. How does the Jefferson County School Board define diversity . . . ?” “A. Well, we want to have the schools that make up the percentage of students of the population”).

Jefferson County phrases its interest as “racial integration,” but integration certainly does not require the sort of racial proportionality reflected in its plan. Even in the context of mandatory desegregation, we have stressed that racial proportionality is not required, see *Milliken*, 433 U. S., at 280, n. 14 (“[A desegregation] order contemplating the substantive constitutional right [to a] particular degree of racial balance or mixing is . . . infirm as a matter of law” (internal quotation marks omitted)); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 24 (1971) (“The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system

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as a whole”), and here Jefferson County has already been found to have eliminated the vestiges of its prior segregated school system.

The en banc Ninth Circuit declared that “when a racially diverse school system is the goal (or racial concentration or isolation is the problem), there is no more effective means than a consideration of race to achieve the solution.” *Parents Involved VII, supra*, at 1191. For the foregoing reasons, this conclusory argument cannot sustain the plans. However closely related race-based assignments may be to achieving racial balance, that itself cannot be the goal, whether labeled “racial diversity” or anything else. To the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end.

## C

The districts assert, as they must, that the way in which they have employed individual racial classifications is necessary to achieve their stated ends. The minimal effect these classifications have on student assignments, however, suggests that other means would be effective. Seattle’s racial tiebreaker results, in the end, only in shifting a small number of students between schools. Approximately 307 student assignments were affected by the racial tiebreaker in 2000–2001; the district was able to track the enrollment status of 293 of these students. App. in No. 05–908, at 162a. Of these, 209 were assigned to a school that was one of their choices, 87 of whom were assigned to the same school to which they would have been assigned without the racial tiebreaker. Eighty-four students were assigned to schools that they did not list as a choice, but 29 of those students would have been assigned to their respective school without the racial tiebreaker, and 3 were

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able to attend one of the oversubscribed schools due to waitlist and capacity adjustments. *Id.*, at 162a–163a. In over one-third of the assignments affected by the racial tiebreaker, then, the use of race in the end made no difference, and the district could identify only 52 students who were ultimately affected adversely by the racial tiebreaker in that it resulted in assignment to a school they had not listed as a preference and to which they would not otherwise have been assigned.

As the panel majority in *Parents Involved VI* concluded:

“[T]he tiebreaker’s annual effect is thus merely to shuffle a few handfuls of different minority students between a few schools—about a dozen additional Latinos into Ballard, a dozen black students into Nathan Hale, perhaps two dozen Asians into Roosevelt, and so on. The District has not met its burden of proving these marginal changes . . . outweigh the cost of subjecting hundreds of students to disparate treatment based solely upon the color of their skin.” 377 F. 3d, at 984–985 (footnote omitted).

Similarly, Jefferson County’s use of racial classifications has only a minimal effect on the assignment of students. Elementary school students are assigned to their first- or second-choice school 95 percent of the time, and transfers, which account for roughly 5 percent of assignments, are only denied 35 percent of the time—and presumably an even smaller percentage are denied on the basis of the racial guidelines, given that other factors may lead to a denial. *McFarland I*, 330 F. Supp. 2d, at 844–845, nn. 16, 18. Jefferson County estimates that the racial guidelines account for only 3 percent of assignments. Brief in Opposition in No. 05–915, p. 7, n. 4; Tr. of Oral Arg. in No. 05–915, at 46. As Jefferson County explains, “the racial guidelines have minimal impact in this process, because they ‘mostly influence student assignment in subtle and

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indirect ways.’” Brief for Respondents in No. 05–915, pp. 8–9.

While we do not suggest that *greater* use of race would be preferable, the minimal impact of the districts’ racial classifications on school enrollment casts doubt on the necessity of using racial classifications. In *Grutter*, the consideration of race was viewed as indispensable in more than tripling minority representation at the law school—from 4 to 14.5 percent. See 539 U. S., at 320. Here the most Jefferson County itself claims is that “because the guidelines provide a firm definition of the Board’s goal of racially integrated schools, they ‘provide administrators with the authority to facilitate, negotiate and collaborate with principals and staff to maintain schools within the 15–50% range.’” Brief in Opposition in No. 05–915, at 7 (quoting *McFarland I*, *supra*, at 842). Classifying and assigning schoolchildren according to a binary conception of race is an extreme approach in light of our precedents and our Nation’s history of using race in public schools, and requires more than such an amorphous end to justify it.

The districts have also failed to show that they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives,” *Grutter*, *supra*, at 339, and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration. See, *e.g.*, App. in No. 05–908, at 224a–225a, 253a–259a, 307a. Jefferson County has failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily through means other than the racial classifications. Brief for Respondents in No. 05–915, at 8–9. Compare *Croson*, 488 U. S., at 519 (KENNEDY, J., concurring in part and concurring in judg-

ment) (racial classifications permitted only “as a last resort”).

#### IV

JUSTICE BREYER’s dissent takes a different approach to these cases, one that fails to ground the result it would reach in law. Instead, it selectively relies on inapplicable precedent and even dicta while dismissing contrary holdings, alters and misapplies our well-established legal framework for assessing equal protection challenges to express racial classifications, and greatly exaggerates the consequences of today’s decision.

To begin with, JUSTICE BREYER seeks to justify the plans at issue under our precedents recognizing the compelling interest in remedying past intentional discrimination. See *post*, at 18–24. Not even the school districts go this far, and for good reason. The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations. See, e.g., *Milliken*, 433 U. S., at 280, n. 14; *Freeman*, 503 U. S., at 495–496 (“Where resegregation is a product not of state action but of private choices, it does not have constitutional implications”). The dissent elides this distinction between *de jure* and *de facto* segregation, casually intimates that Seattle’s school attendance patterns reflect illegal segregation, *post*, at 5, 18, 23,<sup>15</sup> and

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<sup>15</sup>JUSTICE BREYER makes much of the fact that in 1978 Seattle “settled” an NAACP complaint alleging illegal segregation with the federal Office for Civil Rights (OCR). See *post*, at 5, 8–9, 18, 23. The memorandum of agreement between Seattle and OCR, of course, contains no admission by Seattle that such segregation ever existed or was ongoing at the time of the agreement, and simply reflects a “desire to avoid the inconvenience [*sic*] and expense of a formal OCR investigation,” which OCR was obligated under law to initiate upon the filing of such a complaint. Memorandum of Agreement between Seattle School District No. 1 of King County, Washington, and the Office for Civil Rights, United States Department of Health, Education, and Welfare 2 (June 9,

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fails to credit the judicial determination—under the most rigorous standard—that Jefferson County had eliminated the vestiges of prior segregation. The dissent thus alters in fundamental ways not only the facts presented here but the established law.

JUSTICE BREYER’s reliance on *McDaniel v. Barresi*, 402 U. S. 39 (1971), *post*, at 23–24, 29–30, highlights how far removed the discussion in the dissent is from the question actually presented in these cases. *McDaniel* concerned a Georgia school system that had been segregated by law. There was no doubt that the county had operated a “dual school system,” *McDaniel, supra*, at 41, and no one questions that the obligation to disestablish a school system segregated by law can include race-conscious remedies—whether or not a court had issued an order to that effect. See *supra*, at 12. The present cases are before us, however, because the Seattle school district was never segregated by law, and the Jefferson County district has been found to be unitary, having eliminated the vestiges of its prior dual status. The justification for race-conscious remedies in *McDaniel* is therefore not applicable here. The dissent’s persistent refusal to accept this distinction—its insistence on viewing the racial classifications here as if they were just like the ones in *McDaniel*, “devised to overcome a history of segregated public schools,” *post*, at 47—explains its inability to understand why the remedial justification for racial classifications cannot decide these cases.

JUSTICE BREYER’s dissent next relies heavily on dicta from *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S., at 16—far more heavily than the school districts themselves. Compare *post*, at 3, 22–28, with Brief for Respondents in No. 05–908, at 19–20; Brief for Respondents in No. 05–915, at 31. The dissent acknowledges that

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1978); see also 45 CFR §80.7(c) (2006).

the two-sentence discussion in *Swann* was pure dicta, *post*, at 22, but nonetheless asserts that it demonstrates a “basic principle of constitutional law” that provides “authoritative legal guidance.” *Post*, at 22, 30. Initially, as the Court explained just last Term, “we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.” *Central Va. Community College v. Katz*, 546 U. S. 356, 363 (2006). That is particularly true given that, when *Swann* was decided, this Court had not yet confirmed that strict scrutiny applies to racial classifications like those before us. See n. 16, *infra*. There is nothing “technical” or “theoretical,” *post*, at 30, about our approach to such dicta. See, e.g., *Cohens v. Virginia*, 6 Wheat. 264, 399–400 (1821) (Marshall, C. J.) (explaining why dicta is not binding).

JUSTICE BREYER would not only put such extraordinary weight on admitted dicta, but relies on the statement for something it does not remotely say. *Swann* addresses only a possible state objective; it says nothing of the permissible *means*—race conscious or otherwise—that a school district might employ to achieve that objective. The reason for this omission is clear enough, since the case did not involve any voluntary means adopted by a school district. The dissent’s characterization of *Swann* as recognizing that “the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals” is—at best—a dubious inference. *Post*, at 22. Even if the dicta from *Swann* were entitled to the weight the dissent would give it, and no dicta is, it not only did not address the question presented in *Swann*, it also does not address the question presented in these cases—whether the school districts’ use of racial classifications to achieve their stated goals is permissible.

Further, for all the lower court cases JUSTICE BREYER cites as evidence of the “prevailing legal assumption” embodied by *Swann*, very few are pertinent. Most are not.



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For example, the dissent features *Tometz v. Board of Ed., Waukegan City School Dist. No. 61*, 39 Ill. 2d 593, 596–598, 237 N. E. 2d 498, 500–502 (1968), an Illinois decision, as evidence that “state and federal courts had considered the matter settled and uncontroversial.” *Post*, at 25. But *Tometz* addressed a challenge to a statute requiring race-consciousness in drawing school attendance boundaries—an issue well beyond the scope of the question presented in these cases. Importantly, it considered that issue only under rational-basis review, 39 Ill. 2d, at 600, 237 N. E. 2d, at 502 (“The test of any legislative classification essentially is one of reasonableness”), which even the dissent grudgingly recognizes is an improper standard for evaluating express racial classifications. Other cases cited are similarly inapplicable. See, e.g., *Citizens for Better Ed. v. Goose Creek Consol. Independent School Dist.*, 719 S. W. 2d 350, 352–353 (Tex. App. 1986) (upholding rezoning plan under rational-basis review).<sup>16</sup>

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<sup>16</sup>In fact, all the cases JUSTICE BREYER’s dissent cites as evidence of the “prevailing legal assumption,” see *post*, at 25–27, were decided before this Court definitively determined that “all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny.” *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 227 (1995). Many proceeded under the now-rejected view that classifications seeking to benefit a disadvantaged racial group should be held to a lesser standard of review. See, e.g., *Springfield School Comm. v. Barksdale*, 348 F. 2d 261, 266 (CA1 1965). Even if this purported distinction, which JUSTICE STEVENS would adopt, *post*, at 2, n. 3 (dissenting opinion), had not been already rejected by this Court, the distinction has no relevance to these cases, in which students of all races are excluded from the schools they wish to attend based solely on the racial classifications. See, e.g., App. in No. 05–908, at 202a (noting that 89 nonwhite students were denied assignment to a particular school by operation of Seattle’s racial tiebreaker).

JUSTICE STEVENS’s reliance on *School Comm. of Boston v. Board of Ed.*, 352 Mass. 693, 227 N. E. 2d 729 (1967), appeal dism’d, 389 U. S. 572 (1968) (*per curiam*), *post*, at 3–5, is inapposite for the same reason that many of the cases cited by JUSTICE BREYER are inapposite; the case involved a Massachusetts law that required school districts to avoid

JUSTICE BREYER's dissent next looks for authority to a footnote in *Washington v. Seattle School Dist. No. 1*, 458 U. S. 457, 472, n. 15 (1982), *post*, at 56–57, but there this Court expressly noted that it was *not* passing on the propriety of race-conscious student assignments in the absence of a finding of *de jure* segregation. Similarly, the citation of *Crawford v. Board of Ed. of Los Angeles*, 458 U. S. 527 (1982), *post*, at 24, in which a state referendum prohibiting a race-based assignment plan was challenged, is inapposite—in *Crawford* the Court again expressly reserved the question presented by these cases. 458 U. S., at 535, n. 11. Such reservations and preliminary analyses of course did not decide the merits of this question—as evidenced by the disagreement among the lower courts on this issue. Compare *Eisenberg*, 197 F. 3d, at 133, with *Comfort*, 418 F. 3d, at 13.

JUSTICE BREYER's dissent also asserts that these cases are controlled by *Grutter*, claiming that the existence of a compelling interest in these cases “follows *a fortiori*” from *Grutter*, *post*, at 41, 64–66, and accusing us of tacitly

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racial imbalance in schools but did not specify how to achieve this goal—and certainly did not require express racial classifications as the means to do so. The law was upheld under rational-basis review, with the state court explicitly rejecting the suggestion—which is now plainly the law—that “racial group classifications bear a far heavier burden of justification.” 352 Mass., at 700, 227 N. E. 2d, at 734 (internal quotation marks and citation omitted). The passage JUSTICE STEVENS quotes proves our point; all the quoted language says is that the school committee “shall prepare a plan to eliminate the imbalance.” *Id.*, at 695, 227 N. E. 2d, at 731; see *post*, at 4, n. 5. Nothing in the opinion approves use of racial classifications as the means to address the imbalance. The suggestion that our decision today is somehow inconsistent with our disposition of that appeal is belied by the fact that neither the lower courts, the respondent school districts, nor any of their 51 *amici* saw fit even to cite the case. We raise this fact not to argue that the dismissal should be afforded any different *stare decisis* effect, but rather simply to suggest that perhaps—for the reasons noted above—the dismissal does not mean what JUSTICE STEVENS believes it does.

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overruling that case, see *post*, at 64–66. The dissent overreads *Grutter*, however, in suggesting that it renders pure racial balancing a constitutionally compelling interest; *Grutter* itself recognized that using race simply to achieve racial balance would be “patently unconstitutional,” 539 U. S., at 330. The Court was exceedingly careful in describing the interest furthered in *Grutter* as “not an interest in simple ethnic diversity” but rather a “far broader array of qualifications and characteristics” in which race was but a single element. 539 U. S., at 324–325 (internal quotation marks omitted). We take the *Grutter* Court at its word. We simply do not understand how JUSTICE BREYER can maintain that classifying every schoolchild as black or white, and using that classification as a determinative factor in assigning children to achieve pure racial balance, can be regarded as “less burdensome, and hence more narrowly tailored” than the consideration of race in *Grutter*, *post*, at 47, when the Court in *Grutter* stated that “[t]he importance of . . . individualized consideration” in the program was “paramount,” and consideration of race was one factor in a “highly individualized, holistic review.” 539 U. S., at 337. Certainly if the constitutionality of the stark use of race in these cases were as established as the dissent would have it, there would have been no need for the extensive analysis undertaken in *Grutter*. In light of the foregoing, JUSTICE BREYER’s appeal to *stare decisis* rings particularly hollow. See *post*, at 65–66.

At the same time it relies on inapplicable desegregation cases, misstatements of admitted dicta, and other noncontrolling pronouncements, JUSTICE BREYER’s dissent candidly dismisses the significance of this Court’s repeated *holdings* that all racial classifications must be reviewed under strict scrutiny, see *post*, at 31–33, 35–36, arguing that a different standard of review should be applied because the districts use race for beneficent rather than malicious purposes, see *post*, at 31–36.

This Court has recently reiterated, however, that “*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.” *Johnson*, 543 U. S., at 505 (quoting *Adarand*, 515 U. S., at 227; emphasis added by *Johnson* Court). See also *Grutter*, *supra*, at 326 (“[G]overnmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry” (internal quotation marks and emphasis omitted)). JUSTICE BREYER nonetheless relies on the good intentions and motives of the school districts, stating that he has found “no case that . . . repudiated this constitutional asymmetry between that which seeks to *exclude* and that which seeks to *include* members of minority races.” *Post*, at 29 (emphasis in original). We have found many. Our cases clearly reject the argument that motives affect the strict scrutiny analysis. See *Johnson*, *supra*, at 505 (“We have insisted on strict scrutiny in every context, even for so-called ‘benign’ racial classifications”); *Adarand*, 515 U. S., at 227 (rejecting idea that “‘benign’” racial classifications may be held to “different standard”); *Croson*, 488 U. S., at 500 (“Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice”).

This argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past, see, e.g., *Gratz*, 539 U. S., at 282 (BREYER, J., concurring in judgment); *id.*, at 301 (GINSBURG, J., dissenting); *Adarand*, *supra*, at 243 (STEVENS, J., dissenting); *Wygant*, 476 U. S., at 316–317 (STEVENS, J., dissenting), and has been repeatedly rejected. See also *Bakke*, 438 U. S., at 289–291 (opinion of Powell, J.) (rejecting argument that strict scrutiny should be applied only to classifications that disadvantage minorities, stating “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call

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for the most exacting judicial examination”).

The reasons for rejecting a motives test for racial classifications are clear enough. “The Court’s emphasis on ‘benign racial classifications’ suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility. . . . ‘[B]enign’ carries with it no independent meaning, but reflects only acceptance of the current generation’s conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable.” *Metro Broadcasting*, 497 U. S., at 609–610 (O’Connor, J., dissenting). See also *Adarand*, *supra*, at 226 (“[I]t may not always be clear that a so-called preference is in fact benign” (quoting *Bakke*, *supra*, at 298 (opinion of Powell, J.))). Accepting JUSTICE BREYER’s approach would “do no more than move us from ‘separate but equal’ to ‘unequal but benign.’” *Metro Broadcasting*, *supra*, at 638 (KENNEDY, J., dissenting).

JUSTICE BREYER speaks of bringing “the races” together (putting aside the purely black-and-white nature of the plans), as the justification for excluding individuals on the basis of their race. See *post*, at 28–29. Again, this approach to racial classifications is fundamentally at odds with our precedent, which makes clear that the Equal Protection Clause “protect[s] *persons*, not *groups*,” *Adarand*, 515 U. S., at 227 (emphasis in original). See *ibid.* (“[A]ll governmental action based on race—a *group* classification long recognized as ‘in most circumstances irrelevant and therefore prohibited,’ *Hirabayashi* [v. *United States*, 320 U. S. 81, 100 (1943)]—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed” (first emphasis in original); *Metro Broadcasting*, *supra*, at 636 (“[O]ur Constitution protects each citizen as an individual, not as a member of a group” (KENNEDY, J., dissenting)); *Bakke*, *supra*, at 289 (opinion of Powell, J.) (Four-

teenth Amendment creates rights “guaranteed to the individual. The rights established are personal rights”). This fundamental principle goes back, in this context, to *Brown* itself. See *Brown v. Board of Education*, 349 U. S. 294, 300 (1955) (*Brown II*) (“At stake is the *personal* interest of the plaintiffs in admission to public schools . . . on a nondiscriminatory basis” (emphasis added)). For the dissent, in contrast, “‘individualized scrutiny’ is simply beside the point.” *Post*, at 55.

JUSTICE BREYER’s position comes down to a familiar claim: The end justifies the means. He admits that “there is a cost in applying ‘a state-mandated racial label,’” *post*, at 67, but he is confident that the cost is worth paying. Our established strict scrutiny test for racial classifications, however, insists on “detailed examination, both as to ends *and* as to means.” *Adarand, supra*, at 236 (emphasis added). Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.

Despite his argument that these cases should be evaluated under a “standard of review that is not ‘strict’ in the traditional sense of that word,” *post*, at 36, JUSTICE BREYER still purports to apply strict scrutiny to these cases. See *post*, at 37. It is evident, however, that JUSTICE BREYER’s brand of narrow tailoring is quite unlike anything found in our precedents. Without any detailed discussion of the operation of the plans, the students who are affected, or the districts’ failure to consider race-neutral alternatives, the dissent concludes that the districts have shown that these racial classifications are necessary to achieve the districts’ stated goals. This conclusion is divorced from any evaluation of the actual impact of the plans at issue in these cases—other than to

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note that the plans “often have no effect.” *Post*, at 46.<sup>17</sup> Instead, the dissent suggests that some combination of the development of these plans over time, the difficulty of the endeavor, and the good faith of the districts suffices to demonstrate that these stark and controlling racial classifications are constitutional. The Constitution and our precedents require more.

In keeping with his view that strict scrutiny should not apply, JUSTICE BREYER repeatedly urges deference to local school boards on these issues. See, e.g., *post*, at 21, 48–49, 66. Such deference “is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified.” *Johnson*, 543 U. S., at 506, n. 1. See *Croson*, 488 U. S., at 501 (“The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis”); *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 637 (1943) (“The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted”).

JUSTICE BREYER’s dissent ends on an unjustified note of alarm. It predicts that today’s decision “threaten[s]” the validity of “[h]undreds of state and federal statutes and regulations.” *Post*, at 61; see also *post*, at 27–28. But the

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<sup>17</sup>JUSTICE BREYER also tries to downplay the impact of the racial assignments by stating that in Seattle “students can decide voluntarily to transfer to a preferred district high school (without any consideration of race-conscious criteria).” *Post*, at 46. This presumably refers to the district’s decision to cease, for 2001–2002 school year assignments, applying the racial tiebreaker to students seeking to transfer to a different school after ninth grade. See App. in No. 05–908, at 137a–139a. There are obvious disincentives for students to transfer to a different school after a full quarter of their high school experience has passed, and the record sheds no light on how transfers to the oversubscribed high schools are handled.

examples the dissent mentions—for example, a provision of the No Child Left Behind Act that requires States to set measurable objectives to track the achievement of students from major racial and ethnic groups, 20 U. S. C. §6311(b)(2)(C)(v)—have nothing to do with the pertinent issues in these cases.

JUSTICE BREYER also suggests that other means for achieving greater racial diversity in schools are necessarily unconstitutional if the racial classifications at issue in these cases cannot survive strict scrutiny. *Post*, at 58–62. These other means—*e.g.*, where to construct new schools, how to allocate resources among schools, and which academic offerings to provide to attract students to certain schools—implicate different considerations than the explicit racial classifications at issue in these cases, and we express no opinion on their validity—not even in dicta. Rather, we employ the familiar and well-established analytic approach of strict scrutiny to evaluate the plans at issue today, an approach that in no way warrants the dissent’s cataclysmic concerns. Under that approach, the school districts have not carried their burden of showing that the ends they seek justify the particular extreme means they have chosen—classifying individual students on the basis of their race and discriminating among them on that basis.

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If the need for the racial classifications embraced by the school districts is unclear, even on the districts’ own terms, the costs are undeniable. “[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *Adarand*, 515 U. S., at 214 (internal quotation marks omitted). Government action dividing us by race is inherently suspect because such classifications promote “notions of racial



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inferiority and lead to a politics of racial hostility,” *Croson*, *supra*, at 493, “reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin,” *Shaw v. Reno*, 509 U. S. 630, 657 (1993), and “endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.” *Metro Broadcasting*, 497 U. S., at 603 (O’Connor, J., dissenting). As the Court explained in *Rice v. Cayetano*, 528 U. S. 495, 517 (2000), “[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”

All this is true enough in the contexts in which these statements were made—government contracting, voting districts, allocation of broadcast licenses, and electing state officers—but when it comes to using race to assign children to schools, history will be heard. In *Brown v. Board of Education*, 347 U. S. 483 (1954) (*Brown I*), we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. *Id.*, at 493–494. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954. See *id.*, at 494 (“The impact [of segregation] is greater when it has the sanction of the law”). The next Term, we accordingly stated that “full compliance” with *Brown I* required school districts “to achieve a system of determining admission to the public schools *on a nonracial basis*.” *Brown II*, 349 U. S., at 300–301 (emphasis added).

The parties and their *amici* debate which side is more faithful to the heritage of *Brown*, but the position of the plaintiffs in *Brown* was spelled out in their brief and could

not have been clearer: “[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.” Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument in *Brown I*, O. T. 1953, p. 15 (Summary of Argument). What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? As counsel who appeared before this Court for the plaintiffs in *Brown* put it: “We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.” Tr. of Oral Arg. in *Brown I*, p. 7 (Robert L. Carter, Dec. 9, 1952). There is no ambiguity in that statement. And it was that position that prevailed in this Court, which emphasized in its remedial opinion that what was “[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable *on a nondiscriminatory basis*,” and what was required was “determining admission to the public schools *on a nonracial basis*.” *Brown II*, *supra*, at 300–301 (emphasis added). What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?

Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way “to achieve a system of determining admission to the public schools on a nonracial basis,” *Brown II*, 349 U. S., at 300–301, is to stop assigning students on a racial basis. The way to stop

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discrimination on the basis of race is to stop discriminating on the basis of race.

The judgments of the Courts of Appeals for the Sixth and Ninth Circuits are reversed, and the cases are remanded for further proceedings.

*It is so ordered.*

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

## Syllabus

SCHUETTE, ATTORNEY GENERAL OF MICHIGAN *v.*  
COALITION TO DEFEND AFFIRMATIVE ACTION,  
INTEGRATION AND IMMIGRATION RIGHTS AND  
FIGHT FOR EQUALITY BY ANY MEANS NECESSARY  
(BAMN) ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT

No. 12–682. Argued October 15, 2013—Decided April 22, 2014

After this Court decided that the University of Michigan’s undergraduate admissions plan’s use of race-based preferences violated the Equal Protection Clause, *Gratz v. Bollinger*, 539 U. S. 244, 270, but that the law school admission plan’s more limited use did not, *Grutter v. Bollinger*, 539 U. S. 306, 343, Michigan voters adopted Proposal 2, now Art. I, §26, of the State Constitution, which, as relevant here, prohibits the use of race-based preferences as part of the admissions process for state universities. In consolidated challenges, the District Court granted summary judgment to Michigan, thus upholding Proposal 2, but the Sixth Circuit reversed, concluding that the proposal violated the principles of *Washington v. Seattle School Dist. No. 1*, 458 U. S. 457.

*Held:* The judgment is reversed.

701 F. 3d 466, reversed.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE and JUSTICE ALITO, concluded that there is no authority in the Federal Constitution or in this Court’s precedents for the Judiciary to set aside Michigan laws that commit to the voters the determination whether racial preferences may be considered in governmental decisions, in particular with respect to school admissions. Pp. 4–18.

(a) This case is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. Here, the principle that the consideration of race in admissions is permissible

## Syllabus

when certain conditions are met is not being challenged. Rather, the question concerns whether, and in what manner, voters in the States may choose to prohibit the consideration of such racial preferences. Where States have prohibited race-conscious admissions policies, universities have responded by experimenting “with a wide variety of alternative approaches.” *Grutter, supra*, at 342. The decision by Michigan voters reflects the ongoing national dialogue about such practices. Pp. 4–5.

(b) The Sixth Circuit’s determination that *Seattle* controlled here extends *Seattle*’s holding in a case presenting quite different issues to reach a mistaken conclusion. Pp. 5–18.

(1) It is necessary to consider first the relevant cases preceding *Seattle* and the background against which *Seattle* arose. Both *Reitman v. Mulkey*, 387 U. S. 369, and *Hunter v. Erickson*, 393 U. S. 385, involved demonstrated injuries on the basis of race that, by reasons of state encouragement or participation, became more aggravated. In *Mulkey*, a voter-enacted amendment to the California Constitution prohibiting state legislative interference with an owner’s prerogative to decline to sell or rent residential property on any basis barred the challenging parties, on account of race, from invoking the protection of California’s statutes, thus preventing them from leasing residential property. In *Hunter*, voters overturned an Akron ordinance that was enacted to address widespread racial discrimination in housing sales and rentals had forced many to live in “‘unhealthful, unsafe, unsanitary and overcrowded’” segregated housing, 393 U. S., at 391. In *Seattle*, after the school board adopted a mandatory busing program to alleviate racial isolation of minority students in local schools, voters passed a state initiative that barred busing to desegregate. This Court found that the state initiative had the “practical effect” of removing “the authority to address a racial problem . . . from the existing decisionmaking body, in such a way as to burden minority interests” of busing advocates who must now “seek relief from the state legislature, or from the statewide electorate.” 458 U. S., at 474. Pp. 5–8.

(2) *Seattle* is best understood as a case in which the state action had the serious risk, if not purpose, of causing specific injuries on account of race as had been the case in *Mulkey* and *Hunter*. While there had been no judicial finding of *de jure* segregation with respect to *Seattle*’s school district, a finding that would be required today, see *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U. S. 701, 720–721, *Seattle* must be understood as *Seattle* understood itself, as a case in which neither the State nor the United States “challenge[d] the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding

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of prior *de jure* segregation.” 458 U. S. at 472, n. 15.

*Seattle*’s broad language, however, went well beyond the analysis needed to resolve the case. Seizing upon the statement in Justice Harlan’s concurrence in *Hunter* that the procedural change in that case had “the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest,” 385 U. S., at 395, the *Seattle* Court established a new and far-reaching rationale: Where a government policy “inures primarily to the benefit of the minority” and “minorities . . . consider” the policy to be “‘in their interest,’” then any state action that “place[s] effective decisionmaking authority over” that policy “at a different level of government” is subject to strict scrutiny. 458 U. S., at 472, 474. Pp. 8–11.

(3) To the extent *Seattle* is read to require the Court to determine and declare which political policies serve the “interest” of a group defined in racial terms, that rationale was unnecessary to the decision in *Seattle*; it has no support in precedent; and it raises serious equal protection concerns. In cautioning against “impermissible racial stereotypes,” this Court has rejected the assumption that all individuals of the same race think alike, see *Shaw v. Reno*, 509 U. S. 630, 647, but that proposition would be a necessary beginning point were the *Seattle* formulation to control. And if it were deemed necessary to probe how some races define their own interest in political matters, still another beginning point would be to define individuals according to race. Such a venture would be undertaken with no clear legal standards or accepted sources to guide judicial decision. It would also result in, or impose a high risk of, inquiries and categories dependent upon demeaning stereotypes, classifications of questionable constitutionality on their own terms. Assuming these steps could be taken, the court would next be required to determine the policy realms in which groups defined by race had a political interest. That undertaking, again without guidance from accepted legal standards, would risk the creation of incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage. Adoption of the *Seattle* formulation could affect any number of laws or decisions, involving, *e.g.*, tax policy or housing subsidies. And racial division would be validated, not discouraged.

It can be argued that objections to the larger consequences of the *Seattle* formulation need not be confronted here, for race was an undoubted subject of the ballot issue. But other problems raised by *Seattle*, such as racial definitions, still apply. And the principal flaw in the Sixth Circuit’s decision remains: Here there was no infliction of a specific injury of the kind at issue in *Mulkey* and *Hunter* and in the history of the Seattle schools, and there is no precedent for extending

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these cases to restrict the right of Michigan voters to determine that race-based preferences granted by state entities should be ended. The Sixth Circuit’s judgment also calls into question other States’ long-settled rulings on policies similar to Michigan’s.

Unlike the injuries in *Mulkey*, *Hunter*, and *Seattle*, the question here is not how to address or prevent injury caused on account of race but whether voters may determine whether a policy of race-based preferences should be continued. By approving Proposal 2 and thereby adding §26 to their State Constitution, Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power, bypassing public officials they deemed not responsive to their concerns about a policy of granting race-based preferences. The mandate for segregated schools, *Brown v. Board of Education*, 347 U. S. 483, and scores of other examples teach that individual liberty has constitutional protection. But this Nation’s constitutional system also embraces the right of citizens to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process, as Michigan voters have done here. These precepts are not inconsistent with the well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts. Such circumstances were present in *Mulkey*, *Hunter*, and *Seattle*, but they are not present here. Pp. 11–18.

JUSTICE SCALIA, joined by JUSTICE THOMAS, agreed that §26 rightly stands, though not because it passes muster under the political-process doctrine. It likely does not, but the cases establishing that doctrine should be overruled. They are patently atextual, unadministrable, and contrary to this Court’s traditional equal protection jurisprudence. The question here, as in every case in which neutral state action is said to deny equal protection on account of race, is whether the challenged action reflects a racially discriminatory purpose. It plainly does not. Pp. 1–18.

(a) The Court of Appeals for the Sixth Circuit held §26 unconstitutional under the so-called political-process doctrine, derived from *Washington v. Seattle School Dist. No. 1*, 458 U. S. 457, and *Hunter v. Erickson*, 393 U. S. 385. In those cases, one level of government exercised borrowed authority over an apparently “racial issue” until a higher level of government called the loan. This Court deemed each revocation an equal-protection violation, without regard to whether there was evidence of an invidious purpose to discriminate. The relentless, radical logic of *Hunter* and *Seattle* would point to a similar conclusion here, as in so many other cases. Pp. 3–7.

(b) The problems with the political-process doctrine begin with its triggering prong, which assigns to a court the task of determining

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whether a law that reallocates policymaking authority concerns a “racial issue,” *Seattle*, 458 U. S., at 473, *i.e.*, whether adopting one position on the question would “at bottom inur[e] primarily to the benefit of the minority, and is designed for that purpose,” *id.*, at 472. Such freeform judicial musing into ethnic and racial “interests” involves judges in the dirty business of dividing the Nation “into racial blocs,” *Metro Broadcasting, Inc. v. FCC*, 497 U. S. 547, 603, 610 (O’Connor, J., dissenting), and promotes racial stereotyping, see *Shaw v. Reno*, 509 U. S. 630, 647. More fundamentally, the analysis misreads the Equal Protection Clause to protect particular groups, a construction that has been repudiated in a “long line of cases understanding equal protection as a personal right.” *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 224, 230. Pp. 7–12.

(c) The second part of the *Hunter-Seattle* analysis directs a court to determine whether the challenged act “place[s] effective decisionmaking authority over [the] racial issue at a different level of government,” *Seattle*, *supra*, at 474; but, in another line of cases, the Court has emphasized the near-limitless sovereignty of each State to design its governing structure as it sees fit, see, *e.g.*, *Holt Civic Club v. Tuscaloosa*, 439 U. S. 60, 71. Taken to the limits of its logic, *Hunter-Seattle* is the gaping exception that nearly swallows the rule of structural state sovereignty, which would seem to permit a State to give certain powers to cities, later assign the same powers to counties, and even reclaim them for itself. Pp. 12–15.

(d) *Hunter* and *Seattle* also endorse a version of the proposition that a facially neutral law may deny equal protection solely because it has a disparate racial impact. That equal-protection theory has been squarely and soundly rejected by an “unwavering line of cases” holding “that a violation of the Equal Protection Clause requires state action motivated by discriminatory intent,” *Hernandez v. New York*, 500 U. S. 352, 372–373 (O’Connor, J., concurring in judgment), and that “official action will not be held unconstitutional solely because it results in a racially disproportionate impact,” *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 264–265. Respondents cannot prove that the action here reflects a racially discriminatory purpose, for any law expressly requiring state actors to afford all persons equal protection of the laws does not—*cannot*—deny “to any person . . . equal protection of the laws,” U. S. Const., Amdt. 14, §1. Pp. 15–17.

JUSTICE BREYER agreed that the amendment is consistent with the Equal Protection Clause, but for different reasons. First, this case addresses the amendment only as it applies to, and forbids, race-conscious admissions programs that consider race solely in order to obtain the educational benefits of a diverse student body. Second, the



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Constitution permits, but does not require, the use of the kind of race-conscious programs now barred by the Michigan Constitution. It foresees the ballot box, not the courts, as the normal instrument for resolving debates about the merits of these programs. Third, *Hunter v. Erickson*, 393 U. S. 385, and *Washington v. Seattle School Dist. No. 1*, 458 U. S. 457, which reflect the important principle that an individual's ability to participate meaningfully in the political process should be independent of his race, do not apply here. Those cases involved a restructuring of the political process that changed the political level at which policies were enacted, while this case involves an amendment that took decisionmaking authority away from unelected actors and placed it in the hands of the voters. Hence, this case does not involve a diminution of the minority's ability to participate in the political process. Extending the holding of *Hunter* and *Seattle* to situations where decisionmaking authority is moved from an administrative body to a political one would also create significant difficulties, given the nature of the administrative process. Furthermore, the principle underlying *Hunter* and *Seattle* runs up against a competing principle favoring decisionmaking through the democratic process. Pp. 1–6.

KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and ALITO, J., joined. ROBERTS, C. J., filed a concurring opinion. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined. BREYER, J., filed an opinion concurring in the judgment. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined. KAGAN, J., took no part in the consideration or decision of the case.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

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No. 12–682

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BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN, PETITIONER *v.* COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[April 22, 2014]

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE ALITO join.

The Court in this case must determine whether an amendment to the Constitution of the State of Michigan, approved and enacted by its voters, is invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

In 2003 the Court reviewed the constitutionality of two admissions systems at the University of Michigan, one for its undergraduate class and one for its law school. The undergraduate admissions plan was addressed in *Gratz v. Bollinger*, 539 U. S. 244. The law school admission plan was addressed in *Grutter v. Bollinger*, 539 U. S. 306. Each admissions process permitted the explicit consideration of an applicant’s race. In *Gratz*, the Court invalidated the undergraduate plan as a violation of the Equal Protection Clause. 539 U. S., at 270. In *Grutter*, the Court found no

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constitutional flaw in the law school admission plan's more limited use of race-based preferences. 539 U. S., at 343.

In response to the Court's decision in *Gratz*, the university revised its undergraduate admissions process, but the revision still allowed limited use of race-based preferences. After a statewide debate on the question of racial preferences in the context of governmental decisionmaking, the voters, in 2006, adopted an amendment to the State Constitution prohibiting state and other governmental entities in Michigan from granting certain preferences, including race-based preferences, in a wide range of actions and decisions. Under the terms of the amendment, race-based preferences cannot be part of the admissions process for state universities. That particular prohibition is central to the instant case.

The ballot proposal was called Proposal 2 and, after it passed by a margin of 58 percent to 42 percent, the resulting enactment became Article I, §26, of the Michigan Constitution. As noted, the amendment is in broad terms. Section 26 states, in relevant part, as follows:

“(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

“(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

“(3) For the purposes of this section ‘state’ includes,

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but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.”

Section 26 was challenged in two cases. Among the plaintiffs in the suits were the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN); students; faculty; and prospective applicants to Michigan public universities. The named defendants included then-Governor Jennifer Granholm, the Board of Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University. The Michigan Attorney General was granted leave to intervene as a defendant. The United States District Court for the Eastern District of Michigan consolidated the cases.

In 2008, the District Court granted summary judgment to Michigan, thus upholding Proposal 2. *BAMN v. Regents of Univ. of Mich.*, 539 F. Supp. 2d 924. The District Court denied a motion to reconsider the grant of summary judgment. 592 F. Supp. 2d 948. A panel of the United States Court of Appeals for the Sixth Circuit reversed the grant of summary judgment. 652 F. 3d 607 (2011). Judge Gibbons dissented from that holding. *Id.*, at 633–646. The panel majority held that Proposal 2 had violated the principles elaborated by this Court in *Washington v. Seattle School Dist. No. 1*, 458 U. S. 457 (1982), and in the cases that *Seattle* relied upon.

The Court of Appeals, sitting en banc, agreed with the panel decision. 701 F. 3d 466 (CA6 2012). The majority opinion determined that *Seattle* “mirrors the [case] before us.” *Id.*, at 475. Seven judges dissented in a number of opinions. The Court granted certiorari. 568 U. S. \_\_\_\_

(2013).

Before the Court addresses the question presented, it is important to note what this case is not about. It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. The consideration of race in admissions presents complex questions, in part addressed last Term in *Fisher v. University of Texas at Austin*, 570 U. S. — (2013). In *Fisher*, the Court did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met. In this case, as in *Fisher*, that principle is not challenged. The question here concerns not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions.

This Court has noted that some States have decided to prohibit race-conscious admissions policies. In *Grutter*, the Court noted: “Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop.” 539 U. S., at 342 (citing *United States v. Lopez*, 514 U. S. 549, 581 (1995) (KENNEDY, J., concurring) (“[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear”)). In this way, *Grutter* acknowledged the significance of a dialogue regarding this contested and complex policy question among and within States. There was recognition that our federal structure “permits ‘innovation and experimentation’” and “enables greater citizen ‘involvement in democratic processes.’” *Bond v. United*

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*States*, 564 U. S. \_\_\_, \_\_\_ (2011) (slip op., at 9) (quoting *Gregory v. Ashcroft*, 501 U. S. 452, 458 (1991)). While this case arises in Michigan, the decision by the State's voters reflects in part the national dialogue regarding the wisdom and practicality of race-conscious admissions policies in higher education. See, e.g., *Coalition for Economic Equity v. Wilson*, 122 F. 3d 692 (CA9 1997).

In Michigan, the State Constitution invests independent boards of trustees with plenary authority over public universities, including admissions policies. Mich. Const., Art. VIII, §5; see also *Federated Publications, Inc. v. Board of Trustees of Mich. State Univ.*, 460 Mich. 75, 86–87, 594 N. W. 2d 491, 497 (1999). Although the members of the boards are elected, some evidence in the record suggests they delegated authority over admissions policy to the faculty. But whether the boards or the faculty set the specific policy, Michigan's public universities did consider race as a factor in admissions decisions before 2006.

In holding §26 invalid in the context of student admissions at state universities, the Court of Appeals relied in primary part on *Seattle*, *supra*, which it deemed to control the case. But that determination extends *Seattle*'s holding in a case presenting quite different issues to reach a conclusion that is mistaken here. Before explaining this further, it is necessary to consider the relevant cases that preceded *Seattle* and the background against which *Seattle* itself arose.

Though it has not been prominent in the arguments of the parties, this Court's decision in *Reitman v. Mulkey*, 387 U. S. 369 (1967), is a proper beginning point for discussing the controlling decisions. In *Mulkey*, voters amended the California Constitution to prohibit any state legislative interference with an owner's prerogative to decline to sell or rent residential property on any basis. Two different cases gave rise to *Mulkey*. In one a couple could not rent an apartment, and in the other a couple

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were evicted from their apartment. Those adverse actions were on account of race. In both cases the complaining parties were barred, on account of race, from invoking the protection of California's statutes; and, as a result, they were unable to lease residential property. This Court concluded that the state constitutional provision was a denial of equal protection. The Court agreed with the California Supreme Court that the amendment operated to insinuate the State into the decision to discriminate by encouraging that practice. The Court noted the "immediate design and intent" of the amendment was to "establish a purported constitutional right to privately discriminate." *Id.*, at 374 (internal quotation marks omitted and emphasis deleted). The Court agreed that the amendment "expressly authorized and constitutionalized the private right to discriminate." *Id.*, at 376. The effect of the state constitutional amendment was to "significantly encourage and involve the State in private racial discriminations." *Id.*, at 381. In a dissent joined by three other Justices, Justice Harlan disagreed with the majority's holding. *Id.*, at 387. The dissent reasoned that California, by the action of its voters, simply wanted the State to remain neutral in this area, so that the State was not a party to discrimination. *Id.*, at 389. That dissenting voice did not prevail against the majority's conclusion that the state action in question encouraged discrimination, causing real and specific injury.

The next precedent of relevance, *Hunter v. Erickson*, 393 U. S. 385 (1969), is central to the arguments the respondents make in the instant case. In *Hunter*, the Court for the first time elaborated what the Court of Appeals here styled the "political process" doctrine. There, the Akron City Council found that the citizens of Akron consisted of "people of different race[s], . . . many of whom live in circumscribed and segregated areas, under sub-standard unhealthful, unsafe, unsanitary and overcrowded condi-

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tions, because of discrimination in the sale, lease, rental and financing of housing.’” *Id.*, at 391. To address the problem, Akron enacted a fair housing ordinance to prohibit that sort of discrimination. In response, voters amended the city charter to overturn the ordinance and to require that any additional antidiscrimination housing ordinance be approved by referendum. But most other ordinances “regulating the real property market” were not subject to those threshold requirements. *Id.*, at 390. The plaintiff, a black woman in Akron, Ohio, alleged that her real estate agent could not show her certain residences because the owners had specified they would not sell to black persons.

Central to the Court’s reasoning in *Hunter* was that the charter amendment was enacted in circumstances where widespread racial discrimination in the sale and rental of housing led to segregated housing, forcing many to live in “unhealthful, unsafe, unsanitary and overcrowded conditions.” *Id.*, at 391. The Court stated: “It is against this background that the referendum required by [the charter amendment] must be assessed.” *Ibid.* Akron attempted to characterize the charter amendment “simply as a public decision to move slowly in the delicate area of race relations” and as a means “to allow the people of Akron to participate” in the decision. *Id.*, at 392. The Court rejected Akron’s flawed “justifications for its discrimination,” justifications that by their own terms had the effect of acknowledging the targeted nature of the charter amendment. *Ibid.* The Court noted, furthermore, that the charter amendment was unnecessary as a general means of public control over the city council; for the people of Akron already were empowered to overturn ordinances by referendum. *Id.*, at 390, n. 6. The Court found that the city charter amendment, by singling out antidiscrimination ordinances, “places special burden on racial minorities within the governmental process,” thus becoming as im-



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permissible as any other government action taken with the invidious intent to injure a racial minority. *Id.*, at 391. Justice Harlan filed a concurrence. He argued the city charter amendment “has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest.” *Id.*, at 395. But without regard to the sentence just quoted, *Hunter* rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities. The facts in *Hunter* established that invidious discrimination would be the necessary result of the procedural restructuring. Thus, in *Mulkey* and *Hunter*, there was a demonstrated injury on the basis of race that, by reasons of state encouragement or participation, became more aggravated.

*Seattle* is the third case of principal relevance here. There, the school board adopted a mandatory busing program to alleviate racial isolation of minority students in local schools. Voters who opposed the school board’s busing plan passed a state initiative that barred busing to desegregate. The Court first determined that, although “white as well as Negro children benefit from” diversity, the school board’s plan “inures primarily to the benefit of the minority.” 458 U. S., at 472. The Court next found that “the practical effect” of the state initiative was to “remov[e] the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests” because advocates of busing “now must seek relief from the state legislature, or from the statewide electorate.” *Id.*, at 474. The Court therefore found that the initiative had “explicitly us[ed] the racial nature of a decision to determine the decisionmaking process.” *Id.*, at 470 (emphasis deleted).

*Seattle* is best understood as a case in which the state action in question (the bar on busing enacted by the

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State’s voters) had the serious risk, if not purpose, of causing specific injuries on account of race, just as had been the case in *Mulkey* and *Hunter*. Although there had been no judicial finding of *de jure* segregation with respect to Seattle’s school district, it appears as though school segregation in the district in the 1940’s and 1950’s may have been the partial result of school board policies that “permitted white students to transfer out of black schools while restricting the transfer of black students into white schools.” *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U. S. 701, 807–808 (2007) (BREYER, J., dissenting). In 1977, the National Association for the Advancement of Colored People (NAACP) filed a complaint with the Office for Civil Rights, a federal agency. The NAACP alleged that the school board had maintained a system of *de jure* segregation. Specifically, the complaint alleged “that the Seattle School Board had created or perpetuated unlawful racial segregation through, *e.g.*, certain school-transfer criteria, a construction program that needlessly built new schools in white areas, district line-drawing criteria, the maintenance of inferior facilities at black schools, the use of explicit racial criteria in the assignment of teachers and other staff, and a general pattern of delay in respect to the implementation of promised desegregation efforts.” *Id.*, at 810. As part of a settlement with the Office for Civil Rights, the school board implemented the “Seattle Plan,” which used busing and mandatory reassignments between elementary schools to reduce racial imbalance and which was the subject of the state initiative at issue in *Seattle*. See 551 U. S., at 807–812.

As this Court held in *Parents Involved*, the school board’s purported remedial action would not be permissible today absent a showing of *de jure* segregation. *Id.*, at 720–721. That holding prompted JUSTICE BREYER to observe in dissent, as noted above, that one permissible

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reading of the record was that the school board had maintained policies to perpetuate racial segregation in the schools. In all events we must understand *Seattle* as *Seattle* understood itself, as a case in which neither the State nor the United States “challenge[d] the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation.” 458 U. S. at 472, n. 15. In other words the legitimacy and constitutionality of the remedy in question (busing for desegregation) was assumed, and *Seattle* must be understood on that basis. *Ibid.* *Seattle* involved a state initiative that “was carefully tailored to interfere only with desegregative busing.” *Id.*, at 471. The *Seattle* Court, accepting the validity of the school board’s busing remedy as a predicate to its analysis of the constitutional question, found that the State’s disapproval of the school board’s busing remedy was an aggravation of the very racial injury in which the State itself was complicit.

The broad language used in *Seattle*, however, went well beyond the analysis needed to resolve the case. The Court there seized upon the statement in Justice Harlan’s concurrence in *Hunter* that the procedural change in that case had “the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest.” 385 U. S., at 395. That language, taken in the context of the facts in *Hunter*, is best read simply to describe the necessity for finding an equal protection violation where specific injuries from hostile discrimination were at issue. The *Seattle* Court, however, used the language from the *Hunter* concurrence to establish a new and far-reaching rationale. *Seattle* stated that where a government policy “inures primarily to the benefit of the minority” and “minorities . . . consider” the policy to be “‘in their interest,’” then any state action that “place[s] effective decisionmaking authority over” that policy “at a different level of government” must

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be reviewed under strict scrutiny. 458 U. S., at 472, 474. In essence, according to the broad reading of *Seattle*, any state action with a “racial focus” that makes it “more difficult for certain racial minorities than for other groups” to “achieve legislation that is in their interest” is subject to strict scrutiny. It is this reading of *Seattle* that the Court of Appeals found to be controlling here. And that reading must be rejected.

The broad rationale that the Court of Appeals adopted goes beyond the necessary holding and the meaning of the precedents said to support it; and in the instant case neither the formulation of the general rule just set forth nor the precedents cited to authenticate it suffice to invalidate Proposal 2. The expansive reading of *Seattle* has no principled limitation and raises serious questions of compatibility with the Court’s settled equal protection jurisprudence. To the extent *Seattle* is read to require the Court to determine and declare which political policies serve the “interest” of a group defined in racial terms, that rationale was unnecessary to the decision in *Seattle*; it has no support in precedent; and it raises serious constitutional concerns. That expansive language does not provide a proper guide for decisions and should not be deemed authoritative or controlling. The rule that the Court of Appeals elaborated and respondents seek to establish here would contradict central equal protection principles.

In cautioning against “impermissible racial stereotypes,” this Court has rejected the assumption that “members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.” *Shaw v. Reno*, 509 U. S. 630, 647 (1993); see also *Metro Broadcasting, Inc. v. FCC*, 497 U. S. 547, 636 (1990) (KENNEDY, J., dissenting) (rejecting the “demeaning notion that members of . . . defined racial groups ascribe to certain ‘minority views’

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that must be different from those of other citizens”). It cannot be entertained as a serious proposition that all individuals of the same race think alike. Yet that proposition would be a necessary beginning point were the *Seattle* formulation to control, as the Court of Appeals held it did in this case. And if it were deemed necessary to probe how some races define their own interest in political matters, still another beginning point would be to define individuals according to race. But in a society in which those lines are becoming more blurred, the attempt to define race-based categories also raises serious questions of its own. Government action that classifies individuals on the basis of race is inherently suspect and carries the danger of perpetuating the very racial divisions the polity seeks to transcend. Cf. *Ho v. San Francisco Unified School Dist.*, 147 F. 3d 854, 858 (CA9 1998) (school district delineating 13 racial categories for purposes of racial balancing). Were courts to embark upon this venture not only would it be undertaken with no clear legal standards or accepted sources to guide judicial decision but also it would result in, or at least impose a high risk of, inquiries and categories dependent upon demeaning stereotypes, classifications of questionable constitutionality on their own terms.

Even assuming these initial steps could be taken in a manner consistent with a sound analytic and judicial framework, the court would next be required to determine the policy realms in which certain groups—groups defined by race—have a political interest. That undertaking, again without guidance from any accepted legal standards, would risk, in turn, the creation of incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage. Thus could racial antagonisms and conflict tend to arise in the context of judicial decisions as courts undertook to announce what particular issues of public policy should be classified as advantageous to some group defined by race.

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This risk is inherent in adopting the *Seattle* formulation.

There would be no apparent limiting standards defining what public policies should be included in what *Seattle* called policies that “inur[e] primarily to the benefit of the minority” and that “minorities . . . consider” to be “‘in their interest.’” 458 U. S., at 472, 474. Those who seek to represent the interests of particular racial groups could attempt to advance those aims by demanding an equal protection ruling that any number of matters be foreclosed from voter review or participation. In a nation in which governmental policies are wide ranging, those who seek to limit voter participation might be tempted, were this Court to adopt the *Seattle* formulation, to urge that a group they choose to define by race or racial stereotypes are advantaged or disadvantaged by any number of laws or decisions. Tax policy, housing subsidies, wage regulations, and even the naming of public schools, highways, and monuments are just a few examples of what could become a list of subjects that some organizations could insist should be beyond the power of voters to decide, or beyond the power of a legislature to decide when enacting limits on the power of local authorities or other governmental entities to address certain subjects. Racial division would be validated, not discouraged, were the *Seattle* formulation, and the reasoning of the Court of Appeals in this case, to remain in force.

Perhaps, when enacting policies as an exercise of democratic self-government, voters will determine that race-based preferences should be adopted. The constitutional validity of some of those choices regarding racial preferences is not at issue here. The holding in the instant case is simply that the courts may not disempower the voters from choosing which path to follow. In the realm of policy discussions the regular give-and-take of debate ought to be a context in which rancor or discord based on race are avoided, not invited. And if these factors are to be inter-

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jected, surely it ought not to be at the invitation or insistence of the courts.

One response to these concerns may be that objections to the larger consequences of the *Seattle* formulation need not be confronted in this case, for here race was an undoubted subject of the ballot issue. But a number of problems raised by *Seattle*, such as racial definitions, still apply. And this principal flaw in the ruling of the Court of Appeals does remain: Here there was no infliction of a specific injury of the kind at issue in *Mulkey* and *Hunter* and in the history of the Seattle schools. Here there is no precedent for extending these cases to restrict the right of Michigan voters to determine that race-based preferences granted by Michigan governmental entities should be ended.

It should also be noted that the judgment of the Court of Appeals in this case of necessity calls into question other long-settled rulings on similar state policies. The California Supreme Court has held that a California constitutional amendment prohibiting racial preferences in public contracting does not violate the rule set down by *Seattle*. *Coral Constr., Inc. v. City and County of San Francisco*, 50 Cal. 4th 315, 235 P. 3d 947 (2010). The Court of Appeals for the Ninth Circuit has held that the same amendment, which also barred racial preferences in public education, does not violate the Equal Protection Clause. *Wilson*, 122 F. 3d 692 (1997). If the Court were to affirm the essential rationale of the Court of Appeals in the instant case, those holdings would be invalidated, or at least would be put in serious question. The Court, by affirming the judgment now before it, in essence would announce a finding that the past 15 years of state public debate on this issue have been improper. And were the argument made that *Coral* might still stand because it involved racial preferences in public contracting while this case concerns racial preferences in university admissions, the implication would be

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that the constitutionality of laws forbidding racial preferences depends on the policy interest at stake, the concern that, as already explained, the voters deem it wise to avoid because of its divisive potential. The instant case presents the question involved in *Coral* and *Wilson* but not involved in *Mulkey*, *Hunter*, and *Seattle*. That question is not how to address or prevent injury caused on account of race but whether voters may determine whether a policy of race-based preferences should be continued.

By approving Proposal 2 and thereby adding §26 to their State Constitution, the Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power. In the federal system States “respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times.” *Bond*, 564 U. S., at — (slip op., at 9). Michigan voters used the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority of the voters with respect to a policy of granting race-based preferences that raises difficult and delicate issues.

The freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power. The mandate for segregated schools, *Brown v. Board of Education*, 347 U. S. 483 (1954); a wrongful invasion of the home, *Silverman v. United States*, 365 U. S. 505 (1961); or punishing a protester whose views offend others, *Texas v. Johnson*, 491 U. S. 397 (1989); and scores of other examples teach that individual liberty has constitutional protection, and that liberty’s full extent and meaning may remain yet to be discovered and affirmed. Yet freedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course



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of their own times and the course of a nation that must strive always to make freedom ever greater and more secure. Here Michigan voters acted in concert and statewide to seek consensus and adopt a policy on a difficult subject against a historical background of race in America that has been a source of tragedy and persisting injustice. That history demands that we continue to learn, to listen, and to remain open to new approaches if we are to aspire always to a constitutional order in which all persons are treated with fairness and equal dignity. Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate; or that the policies at issue remain too delicate to be resolved save by university officials or faculties, acting at some remove from immediate public scrutiny and control; or that these matters are so arcane that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate, that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process.

The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign. Quite in addition to the serious First Amendment implications of that position with respect to any particular election, it is inconsistent with the underlying premises of a responsible, functioning democracy. One of those premises is that a democracy has the capacity—and the duty—to learn from its past mistakes; to discover and confront persisting biases; and by respectful, rationale deliberation to rise above those flaws and injustices. That process is impeded, not advanced, by court decrees based on the proposition

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that the public cannot have the requisite repose to discuss certain issues. It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds. The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage. An informed public can, and must, rise above this. The idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people. These First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine.

These precepts are not inconsistent with the well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts. Cf. *Johnson v. California*, 543 U. S. 499, 511–512 (2005) (“[S]earching judicial review . . . is necessary to guard against invidious discrimination”); *Edmonson v. Leesville Concrete Co.*, 500 U. S. 614, 619 (1991) (“Racial discrimination” is “invidious in all contexts”). As already noted, those were the circumstances that the Court found present in *Mulkey*, *Hunter*, and *Seattle*. But those circumstances are not present here.

For reasons already discussed, *Mulkey*, *Hunter*, and *Seattle* are not precedents that stand for the conclusion that Michigan’s voters must be disempowered from acting. Those cases were ones in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race. What is at stake here is not whether injury will be inflicted but

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whether government can be instructed not to follow a course that entails, first, the definition of racial categories and, second, the grant of favored status to persons in some racial categories and not others. The electorate's instruction to governmental entities not to embark upon the course of race-defined and race-based preferences was adopted, we must assume, because the voters deemed a preference system to be unwise, on account of what voters may deem its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it. Whether those adverse results would follow is, and should be, the subject of debate. Voters might likewise consider, after debate and reflection, that programs designed to increase diversity—consistent with the Constitution—are a necessary part of progress to transcend the stigma of past racism.

This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters. See *Sailors v. Board of Ed. of County of Kent*, 387 U. S. 105, 109 (1967) ("Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs"). Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

*It is so ordered.*

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

ROBERTS, C. J., concurring

## SUPREME COURT OF THE UNITED STATES

No. 12–682

BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN, PETITIONER *v.* COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[April 22, 2014]

CHIEF JUSTICE ROBERTS, concurring.

The dissent devotes 11 pages to expounding its own policy preferences in favor of taking race into account in college admissions, while nonetheless concluding that it “do[es] not mean to suggest that the virtues of adopting race-sensitive admissions policies should inform the legal question before the Court.” *Post*, at 57 (opinion of SOTOMAYOR, J.). The dissent concedes that the governing boards of the State’s various universities could have implemented a policy making it illegal to “discriminate against, or grant preferential treatment to,” any individual on the basis of race. See *post*, at 3, 34–35. On the dissent’s view, if the governing boards conclude that drawing racial distinctions in university admissions is undesirable or counterproductive, they are permissibly exercising their policymaking authority. But others who might reach the same conclusion are failing to take race seriously.

The dissent states that “[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race.” *Post*, at 46. And it urges that “[r]ace matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts:

ROBERTS, C. J., concurring

‘I do not belong here.’” *Ibid.* But it is not “out of touch with reality” to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely that doubt, and—if so—that the preferences do more harm than good. *Post*, at 45. To disagree with the dissent’s views on the costs and benefits of racial preferences is not to “wish away, rather than confront” racial inequality. *Post*, at 46. People can disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate.\*

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\*JUSTICE SCALIA and JUSTICE SOTOMAYOR question the relationship between *Washington v. Seattle School Dist. No. 1*, 458 U. S. 457 (1982), and *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U. S. 701 (2007). See *post*, at 6, n. 2 (SCALIA, J., concurring in judgment); *post*, at 23, n. 9 (SOTOMAYOR, J., dissenting). The plurality today addresses that issue, explaining that the race-conscious action in *Parents Involved* was unconstitutional given the absence of a showing of prior *de jure* segregation. *Parents Involved*, *supra*, at 720–721 (majority opinion), 736 (plurality opinion); see *ante*, at 9. Today’s plurality notes that the Court in *Seattle* “assumed” the constitutionality of the busing remedy at issue there, “even absent a finding of prior *de jure* segregation.” *Ante*, at 10 (quoting *Seattle*, *supra*, at 472, n. 15). The assumption on which *Seattle* proceeded did not constitute a finding sufficient to justify the race-conscious action in *Parents Involved*, though it is doubtless pertinent in analyzing *Seattle*. “As this Court held in *Parents Involved*, the [Seattle] school board’s purported remedial action would not be permissible today absent a *showing of de jure* segregation,” but “we must understand *Seattle* as *Seattle* understood itself.” *Ante*, at 9–10 (emphasis added).

SCALIA, J., concurring in judgment

## SUPREME COURT OF THE UNITED STATES

No. 12–682

BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN, PETITIONER *v.* COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[April 22, 2014]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

It has come to this. Called upon to explore the jurisprudential twilight zone between two errant lines of precedent, we confront a frighteningly bizarre question: Does the Equal Protection Clause of the Fourteenth Amendment *forbid* what its text plainly *requires*? Needless to say (except that this case obliges us to say it), the question answers itself. “The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.” *Grutter v. Bollinger*, 539 U. S. 306, 349 (2003) (SCALIA, J., concurring in part and dissenting in part). It is precisely this understanding—the correct understanding—of the federal Equal Protection Clause that the people of the State of Michigan have adopted for their own fundamental law. By adopting it, they did not simultaneously *offend* it.

Even taking this Court’s sorry line of race-based-admissions cases as a given, I find the question presented only slightly less strange: Does the Equal Protection Clause forbid a State from banning a practice that the Clause barely—and only provisionally—permits? React-

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ing to those race-based-admissions decisions, some States—whether deterred by the prospect of costly litigation; aware that *Grutter’s* bell may soon toll, see 539 U. S., at 343; or simply opposed in principle to the notion of “benign” racial discrimination—have gotten out of the racial-preferences business altogether. And with our express encouragement: “Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaging in experimenting with a wide variety of alternative approaches. Universities in other States can *and should* draw on the most promising aspects of these race-neutral alternatives as they develop.” *Id.*, at 342 (emphasis added). Respondents seem to think this admonition was merely in jest.<sup>1</sup> The experiment, they maintain, is not only over; it never rightly began. Neither the people of the States nor their legislatures ever had the option of directing subordinate public-university officials to cease considering the race of applicants, since that would deny members of those minority groups the option of enacting a policy designed to further their interest, thus denying them the equal protection of the laws. Never mind that it is hotly disputed whether the practice of race-based admissions is *ever* in a racial minority’s interest. Cf. *id.*, at 371–373 (THOMAS, J., concurring in part and dissenting in part). And never mind that, were a public university to stake its defense of a race-based-admissions policy on the ground that it was *designed* to benefit primarily minorities (as opposed to all students, regardless of color, by enhancing diversity), *we would hold the policy unconstitutional*. See *id.*, at 322–325.

But the battleground for this case is not the constitu-

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<sup>1</sup>For simplicity’s sake, I use “respondent” or “respondents” throughout the opinion to describe only those parties who are adverse to petitioner, not Eric Russell, a respondent who supports petitioner.

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tionality of race-based admissions—at least, not quite. Rather, it is the so-called political-process doctrine, derived from this Court’s opinions in *Washington v. Seattle School Dist. No. 1*, 458 U. S. 457 (1982), and *Hunter v. Erickson*, 393 U. S. 385 (1969). I agree with those parts of the plurality opinion that repudiate this doctrine. But I do not agree with its reinterpretation of *Seattle* and *Hunter*, which makes them stand in part for the cloudy and doctrinally anomalous proposition that whenever state action poses “the serious risk . . . of causing specific injuries on account of race,” it denies equal protection. *Ante*, at 9. I would instead reaffirm that the “ordinary principles of our law [and] of our democratic heritage” require “plaintiffs alleging equal protection violations” stemming from facially neutral acts to “prove intent and causation and not merely the existence of racial disparity.” *Freeman v. Pitts*, 503 U. S. 467, 506 (1992) (SCALIA, J., concurring) (citing *Washington v. Davis*, 426 U. S. 229 (1976)). I would further hold that a law directing state actors to provide equal protection is (to say the least) facially neutral, and cannot violate the Constitution. Section 26 of the Michigan Constitution (formerly Proposal 2) rightly stands.

I  
A

The political-process doctrine has its roots in two of our cases. The first is *Hunter*. In 1964, the Akron City Council passed a fair-housing ordinance “‘assur[ing] equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry or national origin.’” 393 U. S., at 386. Soon after, the city’s voters passed an amendment to the Akron City Charter stating that any ordinance enacted by the council that “‘regulates’” commercial transactions in real property “‘on the basis of race, color, religion, national origin or ancestry’”—including the already enacted 1964 ordinance—“must first



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be approved by a majority of the electors voting on the question” at a later referendum. *Id.*, at 387. The question was whether the charter amendment denied equal protection. Answering yes, the Court explained that “although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law’s impact falls on the minority. The majority needs no protection against discrimination.” *Id.*, at 391. By placing a “special burden on racial minorities within the governmental processes,” the amendment “disadvantage[d]” a racial minority “by making it more difficult to enact legislation in its behalf.” *Id.*, at 391, 393.

The reasoning in *Seattle* is of a piece. Resolving to “eliminate all [racial] imbalance from the Seattle public schools,” the city school board passed a mandatory busing and pupil-reassignment plan of the sort typically imposed on districts guilty of *de jure* segregation. 458 U. S., at 460–461. A year later, the citizens of the State of Washington passed Initiative 350, which directed (with exceptions) that “‘no school . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student’s place of residence . . . and which offers the course of study pursued by such student,’” permitting only court-ordered race-based busing. *Id.*, at 462. The lower courts held Initiative 350 unconstitutional, and we affirmed, announcing in the prelude of our analysis—as though it were beyond debate—that the Equal Protection Clause forbade laws that “subtly distort governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.” *Id.*, at 467.

The first question in *Seattle* was whether the subject matter of Initiative 350 was a “‘racial’ issue,” triggering *Hunter* and its process doctrine. 458 U. S., at 471–472. It was “undoubtedly . . . true” that whites and blacks were

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“counted among both the supporters and the opponents of Initiative 350.” *Id.*, at 472. It was “equally clear” that both white and black children benefited from desegregated schools. *Ibid.* Nonetheless, we concluded that desegregation “inures *primarily* to the benefit of the minority, and is designed for that purpose.” *Ibid.* (emphasis added). In any event, it was “enough that minorities may consider busing for integration to be ‘legislation that is in their interest.’” *Id.*, at 474 (quoting *Hunter*, *supra*, at 395 (Harlan, J., concurring)).

So we proceeded to the heart of the political-process analysis. We held Initiative 350 unconstitutional, since it removed “the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests.” *Seattle*, 458 U. S., at 474. Although school boards in Washington retained authority over *other* student-assignment issues and over most matters of educational policy generally, under Initiative 350, minorities favoring race-based busing would have to “surmount a considerably higher hurdle” than the mere petitioning of a local assembly: They “now must seek relief from the state legislature, or from the statewide electorate,” a “different level of government.” *Ibid.*

The relentless logic of *Hunter* and *Seattle* would point to a similar conclusion in this case. In those cases, one level of government exercised borrowed authority over an apparently “racial issue,” until a higher level of government called the loan. So too here. In those cases, we deemed the revocation an equal-protection violation *regardless* of whether it facially classified according to race or reflected an invidious purpose to discriminate. Here, the Court of Appeals did the same.

The plurality sees it differently. Though it, too, disavows the political-process-doctrine basis on which *Hunter* and *Seattle* were decided, *ante*, at 10–14, it does not take

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the next step of overruling those cases. Rather, it reinterprets them beyond recognition. *Hunter*, the plurality suggests, was a case in which the challenged act had “target[ed] racial minorities.” *Ante*, at 8. Maybe, but the *Hunter* Court neither found that to be so nor considered it relevant, bypassing the question of intent entirely, satisfied that its newly minted political-process theory sufficed to invalidate the charter amendment.

As for *Seattle*, what was *really* going on, according to the plurality, was that Initiative 350 had the consequence (if not the purpose) of preserving the harms effected by prior *de jure* segregation. Thus, “the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race.” *Ante*, at 17. That conclusion is derived not from the opinion but from recently discovered evidence that the city of Seattle had been a cause of its schools’ racial imbalance all along: “Although there had been no judicial finding of *de jure* segregation with respect to Seattle’s school district, it appears as though school segregation in the district in the 1940’s and 1950’s may have been the partial result of school board policies.” *Ante*, at 9.<sup>2</sup> That the district’s effort to end racial imbalance had been stymied by Initiative 350 meant that the people, by passing it, somehow had become complicit in Seattle’s equal-protection-denying status quo, whether they knew it or not. Hence, there was in *Seattle* a government-furthered “infliction of a

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<sup>2</sup>The plurality cites evidence from JUSTICE BREYER’s dissent in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U. S. 701 (2007), to suggest that the city had been a “partial” cause of its segregation problem. *Ante*, at 9. The plurality in *Parents Involved* criticized that dissent for relying on irrelevant evidence, for “elid[ing] the] distinction between *de jure* and *de facto* segregation,” and for “casually intimat[ing] that Seattle’s school attendance patterns reflect[ed] illegal segregation.” 551 U. S., at 736–737, and n. 15. Today’s plurality sides with the dissent and repeats its errors.

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specific”—and, presumably, constitutional—“injury.” *Ante*, at 14.

Once again this describes what our opinion in *Seattle* might have been, but assuredly not what it was. The opinion assumes throughout that Seattle’s schools suffered at most from *de facto* segregation, see, e.g., 458 U. S., at 474, 475—that is, segregation not the “product . . . of state action but of private choices,” having no “constitutional implications,” *Freeman*, 503 U. S., at 495–496. Nor did it anywhere state that the current racial imbalance was the (judicially remediable) effect of prior *de jure* segregation. Absence of *de jure* segregation or the effects of *de jure* segregation was a necessary premise of the *Seattle* opinion. That is what made the issue of busing and pupil reassignment a matter of political choice rather than judicial mandate.<sup>3</sup> And precisely *because* it was a question for the political branches to decide, the manner—which is to say, the *process*—of its resolution implicated the Court’s new process theory. The opinion itself says this: “[I]n the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process. For present purposes, it is enough [to hold reallocation of that political decision to a higher level unconstitutional] that minorities may consider busing for integration to be legislation that is in their interest.” 458 U. S., at 474 (internal quotation marks omitted).

## B

Patently atextual, unadministrable, and contrary to our traditional equal-protection jurisprudence, *Hunter* and

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<sup>3</sup>Or so the Court assumed. See 458 U. S., at 472, n. 15 (“Appellants and the United States do not challenge the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation. We therefore do not specifically pass on that issue”).

SCALIA, J., concurring in judgment

*Seattle* should be overruled.

The problems with the political-process doctrine begin with its triggering prong, which assigns to a court the task of determining whether a law that reallocates policy-making authority concerns a “racial issue.” *Seattle*, 458 U. S., at 473. *Seattle* takes a couple of dissatisfying cracks at defining this crucial term. It suggests that an issue is racial if adopting one position on the question would “at bottom inur[e] primarily to the benefit of the minority, and is designed for that purpose.” *Id.*, at 472. It is irrelevant that, as in *Hunter* and *Seattle*, 458 U. S., at 472, both the racial minority and the racial majority benefit from the policy in question, and members of both groups favor it. Judges should instead focus their guesswork on their own juridical sense of what is primarily for the benefit of minorities. Cf. *ibid.* (regarding as dispositive what “our cases” suggest is beneficial to minorities). On second thought, maybe judges need only ask this question: Is it possible “that minorities may consider” the policy in question to be “in their interest”? *Id.*, at 474. If so, you can be sure that you are dealing with a “racial issue.”<sup>4</sup>

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<sup>4</sup>The dissent’s version of this test is just as scattershot. Since, according to the dissent, the doctrine forbids “reconfigur[ing] the political process in a manner that *burdens* only a racial minority,” *post*, at 5 (opinion of SOTOMAYOR, J.) (emphasis added), it must be that the reason the underlying issue (that is, the issue concerning which the process has been reconfigured) is “racial” is that the policy in question *benefits* only a racial minority (if it also benefited persons not belonging to a racial majority, then the political-process reconfiguration would burden them as well). On second thought: The issue is “racial” if the policy benefits *primarily* a racial minority and “[is] designed for that purpose,” *post*, at 44. This is the standard *Seattle* purported to apply. But under that standard, §26 does not affect a “racial issue,” because under *Grutter v. Bollinger*, 539 U. S. 306 (2003), race-based admissions policies may not constitutionally be “designed for [the] purpose,” *Seattle, supra*, at 472, of benefiting primarily racial minorities, but must be designed for the purpose of achieving educational benefits for students of all races, *Grutter, supra*, at 322–325. So the dissent must

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No good can come of such random judicial musing. The plurality gives two convincing reasons why. For one thing, it involves judges in the dirty business of dividing the Nation “into racial blocs,” *Metro Broadcasting, Inc. v. FCC*, 497 U. S. 547, 603, 610 (1990) (O’Connor, J., dissenting); *ante*, at 11–13. That task is as difficult as it is unappealing. (Does a half-Latino, half-American Indian have Latino interests, American-Indian interests, both, half of both?<sup>5</sup>) What is worse, the exercise promotes the noxious fiction that, knowing only a person’s color or ethnicity, we can be sure that he has a predetermined set of policy “interests,” thus “reinforc[ing] the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, [and] share the same political interests.”<sup>6</sup> *Shaw v. Reno*, 509 U. S. 630, 647 (1993). Whether done by a judge or a school board, such “racial stereotyping [is] at odds with equal protection mandates.” *Miller v. Johnson*, 515 U. S. 900, 920 (1995).

But that is not the “racial issue” prong’s only defect. More fundamentally, it misreads the Equal Protection Clause to protect “particular group[s],” a construction that we have tirelessly repudiated in a “long line of cases understanding equal protection as a personal right.”

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mean that an issue is “racial” so long as the policy in question has the incidental effect (an effect not flowing from its design) of benefiting primarily racial minorities.

<sup>5</sup>And how many members of a particular racial group must take the same position on an issue before we suppose that the position is in the *entire group’s* interest? Not *every* member, the dissent suggests, *post*, at 44. Beyond that, who knows? Five percent? Eighty-five percent?

<sup>6</sup>The dissent proves my point. After asserting—without citation, though I and many others of all races deny it—that it is “common-sense reality” that affirmative action benefits racial minorities, *post*, at 16, the dissent suggests throughout, *e.g.*, *post*, at 30, that that view of “reality” is so necessarily shared by members of racial minorities that they *must* favor affirmative action.

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*Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 224, 230 (1995). It is a “basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*.” *Id.*, at 227; *Metro Broadcasting, supra*, at 636 (KENNEDY, J., dissenting).<sup>7</sup> Yet *Seattle* insists that only those political-process alterations that burden racial *minorities* deny equal protection. “The majority,” after all, “needs no protection against discrimination.” 458 U. S., at 468 (quoting *Hunter*, 393 U. S., at 391). In the years since *Seattle*, we have repeatedly rejected “a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process.” *Richmond v. J. A. Croson Co.*, 488 U. S. 469, 495 (1989). Meant to obliterate rather than endorse the practice of racial classifications, the Fourteenth Amendment’s guarantees “obtai[n] with equal force regardless of ‘the race of those burdened or benefited.’” *Miller, supra*, at 904 (quoting *Croson, supra*, at 494 (plurality opinion)); *Adarand, supra*, at 223, 227. The Equal Protection Clause “cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection it is not equal.” *Regents of Univ. of Cal. v. Bakke*, 438 U. S. 265, 289–290 (1978) (opinion of Powell, J.).

The dissent trots out the old saw, derived from dictum in a footnote, that legislation motivated by “prejudice

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<sup>7</sup>The dissent contends, *post*, at 39, that this point “ignores the obvious: Discrimination against an individual occurs because of that individual’s membership in a particular group.” No, I do not ignore the obvious; it is the dissent that misses the point. Of course discrimination against a group constitutes discrimination against each member of that group. But since it is persons and not groups that are protected, one cannot say, as the dissent would, that the Constitution prohibits discrimination against minority groups, but not against majority groups.

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against discrete and insular minorities” merits “‘more exacting judicial scrutiny.’” *Post*, at 31 (quoting *United States v. Carolene Products*, 304 U. S. 144, 152–153, n. 4). I say derived from that dictum (expressed by the four-Justice majority of a seven-Justice Court) because the dictum itself merely said “[n]or need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition,” *id.*, at 153, n. 4 (emphasis added). The dissent does not argue, of course, that such “prejudice” produced §26. Nor does it explain why certain racial minorities in Michigan qualify as “insular,” meaning that “other groups will not form coalitions with them—and, critically, not because of lack of common interests but because of ‘prejudice.’” Strauss, *Is Carolene Products Obsolete?* 2010 U. Ill. L. Rev. 1251, 1257. Nor does it even make the case that a group’s “discreteness” and “insularity” are political *liabilities* rather than political *strengths*<sup>8</sup>—a serious question that alone demonstrates the prudence of the *Carolene Products* dictumizers in leaving the “enquir[y]” for another day. As for the question whether “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . is to be subjected to more exacting judicial scrutiny,” the *Carolene Products* Court found it “unnecessary to consider [that] now.” 304 U. S., at 152, n. 4. If the dissent thinks that worth considering today, it should explain why the election of a university’s governing board is a “political process which can

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<sup>8</sup>Cf., e.g., Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 723–724 (1985) (“Other things being equal, ‘discreteness and insularity’ will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics. Except for special cases, the concerns that underlie *Carolene* should lead judges to protect groups that possess the opposite characteristic from the ones *Carolene* emphasizes—groups that are ‘anonymous and diffuse’ rather than ‘discrete and insular’”).



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ordinarily be expected to bring about repeal of undesirable legislation,” but Michigan voters’ ability to amend their Constitution is not. It seems to me quite the opposite. Amending the Constitution requires the approval of only “a majority of the electors voting on the question.” Mich. Const., Art. XII, §2. By contrast, voting in a favorable board (each of which has eight members) at the three major public universities requires electing by majority vote at least 15 different candidates, several of whom would be running during different election cycles. See *BAMN v. Regents of Univ. of Mich.*, 701 F. 3d 466, 508 (CA6 2012) (Sutton, J., dissenting). So if Michigan voters, instead of amending their Constitution, had pursued the dissent’s preferred path of electing board members promising to “abolish race-sensitive admissions policies,” *post*, at 3, it would have been *harder*, not easier, for racial minorities favoring affirmative action to overturn that decision. But the more important point is that we should not design our jurisprudence to conform to dictum in a footnote in a four-Justice opinion.

## C

Moving from the appalling to the absurd, I turn now to the second part of the *Hunter-Seattle* analysis—which is apparently no more administrable than the first, compare *post*, at 4–6 (BREYER, J., concurring in judgment) (“This case . . . does not involve a reordering of the *political* process”), with *post*, at 25–29 (SOTOMAYOR, J., dissenting) (yes, it does). This part of the inquiry directs a court to determine whether the challenged act “place[s] effective decisionmaking authority over [the] racial issue at a different level of government.” *Seattle*, 458 U. S., at 474. The laws in both *Hunter* and *Seattle* were thought to fail this test. In both cases, “the effect of the challenged action was to redraw decisionmaking authority over racial matters—and only over racial matters—in such a way as

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to place comparative burdens on minorities.” 458 U. S., at 475, n. 17. This, we said, a State may not do.

By contrast, in another line of cases, we have emphasized the near-limitless sovereignty of each State to design its governing structure as it sees fit. Generally, “a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power” and may create “political subdivisions such as cities and counties . . . ‘as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them.’” *Holt Civic Club v. Tuscaloosa*, 439 U. S. 60, 71 (1978) (quoting *Hunter v. Pittsburgh*, 207 U. S. 161, 178 (1907)). Accordingly, States have “absolute discretion” to determine the “number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised.” *Holt Civic Club*, *supra*, at 71. So it would seem to go without saying that a State may give certain powers to cities, later assign the same powers to counties, and even reclaim them for itself.

Taken to the limits of its logic, *Hunter-Seattle* is the gaping exception that nearly swallows the rule of structural state sovereignty. If indeed the Fourteenth Amendment forbids States to “place effective decisionmaking authority over” racial issues at “different level[s] of government,” then it must be true that the Amendment’s ratification in 1868 worked a partial ossification of each State’s governing structure, rendering basically irrevocable the power of any subordinate state official who, the day *before* the Fourteenth Amendment’s passage, happened to enjoy legislatively conferred authority over a “racial issue.” Under the Fourteenth Amendment, that subordinate entity (suppose it is a city council) could itself take action on the issue, action either favorable or unfavorable to minorities. It could even reverse itself later. What it could not do, however, is redelegate its power to an even lower level of state government (such as a city-

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council committee) without forfeiting it, since the necessary effect of wresting it back would be to put an additional obstacle in the path of minorities. Likewise, no entity or official higher up the state chain (*e.g.*, a county board) could exercise authority over the issue. Nor, even, could the state legislature, or the people by constitutional amendment, revoke the legislative conferral of power to the subordinate, whether the city council, its subcommittee, or the county board. *Seattle's* logic would create affirmative-action safe havens wherever subordinate officials in public universities (1) traditionally have enjoyed “effective decisionmaking authority” over admissions policy but (2) have not yet used that authority to prohibit race-conscious admissions decisions. The mere existence of a subordinate’s discretion over the matter would work a kind of reverse pre-emption. It is “a strange notion—alien to our system—that local governmental bodies can forever pre-empt the ability of a State—the sovereign power—to address a matter of compelling concern to the State.” 458 U. S., at 495 (Powell, J., dissenting). But that is precisely what the political-process doctrine contemplates.

Perhaps the spirit of *Seattle* is especially disquieted by enactments of constitutional amendments. That appears to be the dissent’s position. The problem with §26, it suggests, is that amending Michigan’s Constitution is simply not a part of that State’s “existing” political process. *E.g., post*, at 4, 41. What a peculiar notion: that a revision of a State’s fundamental law, made in precisely the manner that law prescribes, by the very people who are the source of that law’s authority, is not part of the “political process” which, but for those people and that law, would not exist. This will surely come as news to the people of Michigan, who, since 1914, have amended their Constitution 20 times. Brief for Gary Segura et al. as *Amici Curiae* 12. Even so, the dissent concludes that the amendment attacked here worked an illicit “chang[ing]

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[of] the basic rules of the political process in that State” in “the middle of the game.” *Post*, at 2, 4. Why, one might ask, is not the amendment provision of the Michigan Constitution one (perhaps the most basic one) of the rules of the State’s political process? And why does democratic invocation of that provision not qualify as working through the “existing political process,” *post*, at 41?<sup>9</sup>

## II

I part ways with *Hunter, Seattle*, and (I think) the plurality for an additional reason: Each endorses a version of the proposition that a facially neutral law may deny equal protection solely because it has a disparate racial impact. Few equal-protection theories have been so squarely and soundly rejected. “An unwavering line of cases from this Court holds that a violation of the Equal Protection Clause requires state action motivated by discriminatory intent,” *Hernandez v. New York*, 500 U. S. 352, 372–373 (1991) (O’Connor, J., concurring in judgment), and that “official action will not be held unconstitutional solely because it results in a racially disproportionate impact,” *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 264–265 (1977). Indeed, we affirmed this principle the same day we decided *Seattle*: “[E]ven when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown.” *Crawford v. Board of Ed. of Los Angeles*, 458 U. S. 527, 537–538

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<sup>9</sup>The dissent thinks I do not understand its argument. Only when amending Michigan’s Constitution violates *Hunter-Seattle*, it says, is that constitutionally prescribed activity necessarily not part of the State’s existing political process. *Post*, at 21, n. 7. I understand the argument quite well; and see quite well that it begs the question. Why is Michigan’s action here unconstitutional? Because it violates *Hunter-Seattle*. And why does it violate *Hunter-Seattle*? Because it is not part of the State’s existing political process. And why is it not part of the State’s existing political process? Because it violates *Hunter-Seattle*.

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(1982).

Notwithstanding our dozens of cases confirming the exception-less nature of the *Washington v. Davis* rule, the plurality opinion leaves ajar an effects-test escape hatch modeled after *Hunter* and *Seattle*, suggesting that state action denies equal protection when it “ha[s] the *serious risk*, if not purpose, of causing specific injuries on account of race,” or is either “designed to be used, or . . . *likely to be used*, to encourage infliction of injury by reason of race.” *Ante*, at 9, 17 (emphasis added). Since these formulations enable a determination of an equal-protection violation where there is no discriminatory intent, they are inconsistent with the long *Washington v. Davis* line of cases.<sup>10</sup>

Respondents argue that we need not bother with the discriminatory-purpose test, since §26 may be struck more straightforwardly as a racial “classification.” Admitting (as they must) that §26 does not on its face “distribut[e] burdens or benefits on the basis of individual racial classifications,” *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U. S. 701, 720 (2007), respondents rely on *Seattle*’s statement that “when the political process or the decisionmaking mechanism used to address racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment,” then that “singling out” is a racial classification. 458 U. S., at 485, 486, n. 30. But this is just the political-process theory bedecked in different doctrinal

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<sup>10</sup> According to the dissent, *Hunter-Seattle* fills an important doctrinal gap left open by *Washington v. Davis*, since *Hunter-Seattle*’s rule—unique among equal-protection principles—makes clear that “the majority” may not alter a political process with the goal of “prevent[ing] minority groups from partaking in that process on equal footing.” *Post*, at 33. Nonsense. There is no gap. To “manipulate the ground rules,” *post*, at 34, or to “ri[g] the contest,” *post*, at 35, in order to harm persons because of their race is to deny equal protection under *Washington v. Davis*.

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dress. A law that “neither says nor implies that persons are to be treated differently on account of their race” is not a racial classification. *Crawford, supra*, at 537. That is particularly true of statutes mandating equal treatment. “[A] law that prohibits the State from classifying individuals by race . . . *a fortiori* does not classify individuals by race.” *Coalition for Economic Equity v. Wilson*, 122 F. 3d 692, 702 (CA9 1997) (O’Scannlain, J.).

Thus, the question in this case, as in every case in which neutral state action is said to deny equal protection on account of race, is whether the action reflects a racially discriminatory purpose. *Seattle* stresses that “singling out the political processes affecting racial issues for uniquely disadvantageous treatment inevitably raises dangers of impermissible motivation.” 458 U. S., at 486, n. 30. True enough, but that motivation must be proved. And respondents do not have a prayer of proving it here. The District Court noted that, under “conventional equal protection” doctrine, the suit was “doom[ed].” 539 F. Supp. 2d 924, 951 (ED Mich. 2008). Though the Court of Appeals did not opine on this question, I would not leave it for them on remand. In my view, any law expressly requiring state actors to afford all persons equal protection of the laws (such as Initiative 350 in *Seattle*, though not the charter amendment in *Hunter*) does not—*cannot*—deny “to any person . . . equal protection of the laws,” U. S. Const., Amdt. 14, §1, regardless of whatever evidence of seemingly foul purposes plaintiffs may cook up in the trial court.

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As Justice Harlan observed over a century ago, “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Plessy v. Ferguson*, 163 U. S. 537, 559 (1896) (dissenting opinion). The people of Michigan wish the same for their governing charter. It would

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be shameful for us to stand in their way.<sup>11</sup>

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<sup>11</sup>And doubly shameful to equate “the majority” behind §26 with “the majority” responsible for Jim Crow. *Post*, at 1–2 (SOTOMAYOR, J., dissenting).

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## SUPREME COURT OF THE UNITED STATES

No. 12–682

BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN, PETITIONER *v.* COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[April 22, 2014]

JUSTICE BREYER, concurring in the judgment.

Michigan has amended its Constitution to forbid state universities and colleges to “discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” Mich. Const., Art. I, §26. We here focus on the prohibition of “grant[ing] . . . preferential treatment . . . on the basis of race . . . in . . . public education.” I agree with the plurality that the amendment is consistent with the Federal Equal Protection Clause. U. S. Const., Amdt. 14. But I believe this for different reasons.

First, we do not address the amendment insofar as it forbids the use of race-conscious admissions programs designed to remedy past exclusionary racial discrimination or the direct effects of that discrimination. Application of the amendment in that context would present different questions which may demand different answers. Rather, we here address the amendment only as it applies to, and forbids, programs that, as in *Grutter v. Bollinger*, 539 U. S. 306 (2003), rest upon “one justification”: using



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“race in the admissions process” solely in order to “obtai[n] the educational benefits that flow from a diverse student body,” *id.*, at 328 (internal quotation marks omitted).

Second, dissenting in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U. S. 701 (2007), I explained why I believe race-conscious programs of this kind are constitutional, whether implemented by law schools, universities, high schools, or elementary schools. I concluded that the Constitution does not “authorize judges” either to forbid or to require the adoption of diversity-seeking race-conscious “solutions” (of the kind at issue here) to such serious problems as “how best to administer America’s schools” to help “create a society that includes all Americans.” *Id.*, at 862.

I continue to believe that the Constitution permits, though it does not require, the use of the kind of race-conscious programs that are now barred by the Michigan Constitution. The serious educational problems that faced Americans at the time this Court decided *Grutter* endure. See, *e.g.*, I. Mullis, M. Martin, P. Foy, & K. Drucker, Progress in International Reading Literacy Study, 2011 International Results in Reading 38, Exh. 1.1 (2012) (elementary-school students in numerous other countries outperform their counterparts in the United States in reading); I. Mullis, M. Martin, P. Foy, & A. Arora, Trends in International Mathematics and Science Study (TIMSS), 2011 International Results in Mathematics 40, Exh. 1.1 (2012) (same in mathematics); M. Martin, I. Mullis, P. Foy, & G. Stanco, TIMSS, 2011 International Results in Science, 38, Exh. 1.1 (2012) (same in science); Organisation of Economic Co-operation Development (OECD), Education at a Glance 2013: OECD Indicators 50 (Table A2.1a) (secondary-school graduation rate lower in the United States than in numerous other countries); McKinsey & Co., The Economic Impact of the Achievement Gap in America’s Schools 8 (Apr. 2009) (same; United States

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ranks 18th of 24 industrialized nations). And low educational achievement continues to be correlated with income and race. See, e.g., National Center for Education Statistics, Digest of Education Statistics, Advance Release of Selected 2013 Digest Tables (Table 104.20) (White Americans more likely to have completed high school than African-Americans or Hispanic-Americans), online at <http://nces.ed.gov/programs/digest> (as visited Apr. 15, 2014, and available in Clerk of Court’s case file); *id.*, Table 219.75 (Americans in bottom quartile of income most likely to drop out of high school); *id.*, Table 302.60 (White Americans more likely to enroll in college than African-Americans or Hispanic-Americans); *id.*, Table 302.30 (middle- and high-income Americans more likely to enroll in college than low-income Americans).

The Constitution allows local, state, and national communities to adopt narrowly tailored race-conscious programs designed to bring about greater inclusion and diversity. But the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits of these programs. Compare *Parents Involved*, 551 U. S., at 839 (BREYER, J., dissenting) (identifying studies showing the benefits of racially integrated education), with *id.*, at 761–763 (THOMAS, J., concurring) (identifying studies suggesting racially integrated schools may not confer educational benefits). In short, the “Constitution creates a democratic political system through which the people themselves must together find answers” to disagreements of this kind. *Id.*, at 862 (BREYER, J., dissenting).

Third, cases such as *Hunter v. Erickson*, 393 U. S. 385 (1969), and *Washington v. Seattle School Dist. No. 1*, 458 U. S. 457 (1982), reflect an important principle, namely, that an individual’s ability to participate meaningfully in the political process should be independent of his race. Although racial minorities, like other political minorities,

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will not always succeed at the polls, they must have the same opportunity as others to secure through the ballot box policies that reflect their preferences. In my view, however, neither *Hunter* nor *Seattle* applies here. And the parties do not here suggest that the amendment violates the Equal Protection Clause if not under the *Hunter-Seattle* doctrine.

*Hunter* and *Seattle* involved efforts to manipulate the political process in a way not here at issue. Both cases involved a restructuring of the political process that changed the political level at which policies were enacted. In *Hunter*, decisionmaking was moved from the elected city council to the local electorate at large. 393 U. S., at 389–390. And in *Seattle*, decisionmaking by an elected school board was replaced with decisionmaking by the state legislature and electorate at large. 458 U. S., at 466.

This case, in contrast, does not involve a reordering of the *political* process; it does not in fact involve the movement of decisionmaking from one political level to another. Rather, here, Michigan law delegated broad policymaking authority to elected university boards, see Mich. Const., Art. VIII, §5, but those boards delegated admissions-related decisionmaking authority to unelected university faculty members and administrators, see, e.g., Bylaws of Univ. of Mich. Bd. of Regents §8.01; Mich. State Univ. Bylaws of Bd. of Trustees, Preamble; Mich. State Univ. Bylaws for Academic Governance §4.4.3; Wayne State Univ. Stat. §§2–34–09, 2–34–12. Although the boards unquestionably retained the *power* to set policy regarding race-conscious admissions, see *post*, at 25–29 (SOTOMAYOR, J., dissenting), in *fact* faculty members and administrators set the race-conscious admissions policies in question. (It is often true that elected bodies—including, for example, school boards, city councils, and state legislatures—have the power to enact policies, but in fact delegate that power to administrators.) Although at

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limited times the university boards were advised of the content of their race-conscious admissions policies, see 701 F. 3d 466, 481–482 (CA6 2012), to my knowledge no board voted to accept or reject any of those policies. Thus, unelected faculty members and administrators, not voters or their elected representatives, adopted the race-conscious admissions programs affected by Michigan’s constitutional amendment. The amendment took decisionmaking authority away from these unelected actors and placed it in the hands of the voters.

Why does this matter? For one thing, considered conceptually, the doctrine set forth in *Hunter* and *Seattle* does not easily fit this case. In those cases minorities had participated in the political process and they had won. The majority’s subsequent reordering of the political process repealed the minority’s successes and made it more difficult for the minority to succeed in the future. The majority thereby diminished the minority’s ability to participate meaningfully in the electoral process. But one cannot as easily characterize the movement of the decisionmaking mechanism at issue here—from an administrative process to an electoral process—as diminishing the minority’s ability to participate meaningfully in the *political* process. There is no prior electoral process in which the minority participated.

For another thing, to extend the holding of *Hunter* and *Seattle* to reach situations in which decisionmaking authority is moved from an administrative body to a political one would pose significant difficulties. The administrative process encompasses vast numbers of decisionmakers answering numerous policy questions in hosts of different fields. See *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U. S. 477, \_\_\_\_ (2010) (BREYER, J., dissenting). Administrative bodies modify programs in detail, and decisionmaking authority within the administrative process frequently moves around—due to amend-

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ments to statutes, new administrative rules, and evolving agency practice. It is thus particularly difficult in this context for judges to determine when a change in the locus of decisionmaking authority places a comparative structural burden on a racial minority. And to apply *Hunter* and *Seattle* to the administrative process would, by tending to hinder change, risk discouraging experimentation, interfering with efforts to see when and how race-conscious policies work.

Finally, the principle that underlies *Hunter* and *Seattle* runs up against a competing principle, discussed above. This competing principle favors decisionmaking through the democratic process. Just as this principle strongly supports the right of the people, or their elected representatives, to adopt race-conscious policies for reasons of inclusion, so must it give them the right to vote not to do so.

As I have said, my discussion here is limited to circumstances in which decisionmaking is moved from an unelected administrative body to a politically responsive one, and in which the targeted race-conscious admissions programs consider race solely in order to obtain the educational benefits of a diverse student body. We need now decide no more than whether the Federal Constitution permits Michigan to apply its constitutional amendment in those circumstances. I would hold that it does. Therefore, I concur in the judgment of the Court.

SOTOMAYOR, J., dissenting

## SUPREME COURT OF THE UNITED STATES

No. 12–682

BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN, PETITIONER *v.* COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[April 22, 2014]

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

We are fortunate to live in a democratic society. But without checks, democratically approved legislation can oppress minority groups. For that reason, our Constitution places limits on what a majority of the people may do. This case implicates one such limit: the guarantee of equal protection of the laws. Although that guarantee is traditionally understood to prohibit intentional discrimination under existing laws, equal protection does not end there. Another fundamental strand of our equal protection jurisprudence focuses on process, securing to all citizens the right to participate meaningfully and equally in self-government. That right is the bedrock of our democracy, for it preserves all other rights.

Yet to know the history of our Nation is to understand its long and lamentable record of stymieing the right of racial minorities to participate in the political process. At first, the majority acted with an open, invidious purpose. Notwithstanding the command of the Fifteenth Amendment, certain States shut racial minorities out of the political process altogether by withholding the right to

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vote. This Court intervened to preserve that right. The majority tried again, replacing outright bans on voting with literacy tests, good character requirements, poll taxes, and gerrymandering. The Court was not fooled; it invalidated those measures, too. The majority persisted. This time, although it allowed the minority access to the political process, the majority changed the ground rules of the process so as to make it more difficult for the minority, and the minority alone, to obtain policies designed to foster racial integration. Although these political restructurings may not have been discriminatory in purpose, the Court reaffirmed the right of minority members of our society to participate meaningfully and equally in the political process.

This case involves this last chapter of discrimination: A majority of the Michigan electorate changed the basic rules of the political process in that State in a manner that uniquely disadvantaged racial minorities.<sup>1</sup> Prior to the enactment of the constitutional initiative at issue here, all of the admissions policies of Michigan's public colleges and universities—including race-sensitive admissions policies<sup>2</sup>—were in the hands of each institution's governing

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<sup>1</sup>I of course do not mean to suggest that Michigan's voters acted with anything like the invidious intent, see n. 8, *infra*, of those who historically stymied the rights of racial minorities. Contra, *ante*, at 18, n. 11 (SCALIA, J., concurring in judgment). But like earlier chapters of political restructuring, the Michigan amendment at issue in this case changed the rules of the political process to the disadvantage of minority members of our society.

<sup>2</sup>Although the term "affirmative action" is commonly used to describe colleges' and universities' use of race in crafting admissions policies, I instead use the term "race-sensitive admissions policies." Some comprehend the term "affirmative action" as connoting intentional preferential treatment based on race alone—for example, the use of a quota system, whereby a certain proportion of seats in an institution's incoming class must be set aside for racial minorities; the use of a "points" system, whereby an institution accords a fixed numerical advantage to an applicant because of her race; or the admission of otherwise unquali-

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board. The members of those boards are nominated by political parties and elected by the citizenry in statewide elections. After over a century of being shut out of Michigan's institutions of higher education, racial minorities in Michigan had succeeded in persuading the elected board representatives to adopt admissions policies that took into account the benefits of racial diversity. And this Court twice blessed such efforts—first in *Regents of Univ. of Cal. v. Bakke*, 438 U. S. 265 (1978), and again in *Grutter v. Bollinger*, 539 U. S. 306 (2003), a case that itself concerned a Michigan admissions policy.

In the wake of *Grutter*, some voters in Michigan set out to eliminate the use of race-sensitive admissions policies. Those voters were of course free to pursue this end in any number of ways. For example, they could have persuaded existing board members to change their minds through individual or grassroots lobbying efforts, or through general public awareness campaigns. Or they could have mobilized efforts to vote uncooperative board members out of office, replacing them with members who would share their desire to abolish race-sensitive admissions policies. When this Court holds that the Constitution permits a particular policy, nothing prevents a majority of a State's

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fied students to an institution solely on account of their race. None of this is an accurate description of the practices that public universities are permitted to adopt after this Court's decision in *Grutter v. Bollinger*, 539 U. S. 306 (2003). There, we instructed that institutions of higher education could consider race in admissions in only a very limited way in an effort to create a diverse student body. To comport with *Grutter*, colleges and universities must use race flexibly, *id.*, at 334, and must not maintain a quota, *ibid.* And even this limited sensitivity to race must be limited in time, *id.*, at 341–343, and must be employed only after “serious, good faith consideration of workable race-neutral alternatives,” *id.*, at 339. *Grutter*-compliant admissions plans, like the ones in place at Michigan's institutions, are thus a far cry from affirmative action plans that confer preferential treatment intentionally and solely on the basis of race.



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voters from choosing not to adopt that policy. Our system of government encourages—and indeed, depends on—that type of democratic action.

But instead, the majority of Michigan voters changed the rules in the middle of the game, reconfiguring the existing political process in Michigan in a manner that burdened racial minorities. They did so in the 2006 election by amending the Michigan Constitution to enact Art. I, §26, which provides in relevant part that Michigan’s public universities “shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”

As a result of §26, there are now two very different processes through which a Michigan citizen is permitted to influence the admissions policies of the State’s universities: one for persons interested in race-sensitive admissions policies and one for everyone else. A citizen who is a University of Michigan alumnus, for instance, can advocate for an admissions policy that considers an applicant’s legacy status by meeting individually with members of the Board of Regents to convince them of her views, by joining with other legacy parents to lobby the Board, or by voting for and supporting Board candidates who share her position. The same options are available to a citizen who wants the Board to adopt admissions policies that consider athleticism, geography, area of study, and so on. The one and only policy a Michigan citizen may not seek through this long-established process is a race-sensitive admissions policy that considers race in an individualized manner when it is clear that race-neutral alternatives are not adequate to achieve diversity. For that policy alone, the citizens of Michigan must undertake the daunting task of amending the State Constitution.

Our precedents do not permit political restructurings

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that create one process for racial minorities and a separate, less burdensome process for everyone else. This Court has held that the Fourteenth Amendment does not tolerate “a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.” *Washington v. Seattle School Dist. No. 1*, 458 U. S. 457, 467 (1982) (internal quotation marks omitted). Such restructuring, the Court explained, “is no more permissible than denying [the minority] the [right to] vote, on an equal basis with others.” *Hunter v. Erickson*, 393 U. S. 385, 391 (1969). In those cases—*Hunter* and *Seattle*—the Court recognized what is now known as the “political-process doctrine”: When the majority reconfigures the political process in a manner that burdens only a racial minority, that alteration triggers strict judicial scrutiny.

Today, disregarding *stare decisis*, a majority of the Court effectively discards those precedents. The plurality does so, it tells us, because the freedom actually secured by the Constitution is the freedom of self-government—because the majority of Michigan citizens “exercised their privilege to enact laws as a basic exercise of their democratic power.” *Ante*, at 15. It would be “demeaning to the democratic process,” the plurality concludes, to disturb that decision in any way. *Ante*, at 17. This logic embraces majority rule without an important constitutional limit.

The plurality’s decision fundamentally misunderstands the nature of the injustice worked by §26. This case is not, as the plurality imagines, about “who may resolve” the debate over the use of race in higher education admissions. *Ante*, at 18. I agree wholeheartedly that nothing vests the resolution of that debate exclusively in the courts or requires that we remove it from the reach of the electorate. Rather, this case is about *how* the debate over the use of race-sensitive admissions policies may be resolved,

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contra, *ibid.*—that is, it must be resolved in constitutionally permissible ways. While our Constitution does not guarantee minority groups victory in the political process, it does guarantee them meaningful and equal access to that process. It guarantees that the majority may not win by stacking the political process against minority groups permanently, forcing the minority alone to surmount unique obstacles in pursuit of its goals—here, educational diversity that cannot reasonably be accomplished through race-neutral measures. Today, by permitting a majority of the voters in Michigan to do what our Constitution forbids, the Court ends the debate over race-sensitive admissions policies in Michigan in a manner that contravenes constitutional protections long recognized in our precedents.

Like the plurality, I have faith that our citizenry will continue to learn from this Nation’s regrettable history; that it will strive to move beyond those injustices towards a future of equality. And I, too, believe in the importance of public discourse on matters of public policy. But I part ways with the plurality when it suggests that judicial intervention in this case “impede[s]” rather than “advance[s]” the democratic process and the ultimate hope of equality. *Ante*, at 16. I firmly believe that our role as judges includes policing the process of self-government and stepping in when necessary to secure the constitutional guarantee of equal protection. Because I would do so here, I respectfully dissent.

## I

For much of its history, our Nation has denied to many of its citizens the right to participate meaningfully and equally in its politics. This is a history we strive to put behind us. But it is a history that still informs the society we live in, and so it is one we must address with candor. Because the political-process doctrine is best understood against the backdrop of this history, I will briefly trace its

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course.

The Fifteenth Amendment, ratified after the Civil War, promised to racial minorities the right to vote. But many States ignored this promise. In addition to outright tactics of fraud, intimidation, and violence, there are countless examples of States categorically denying to racial minorities access to the political process. Consider Texas; there, a 1923 statute prevented racial minorities from participating in primary elections. After this Court declared that statute unconstitutional, *Nixon v. Herndon*, 273 U. S. 536, 540–541 (1927), Texas responded by changing the rules. It enacted a new statute that gave political parties themselves the right to determine who could participate in their primaries. Predictably, the Democratic Party specified that only white Democrats could participate in its primaries. *Nixon v. Condon*, 286 U. S. 73, 81–82 (1932). The Court invalidated that scheme, too. *Id.*, at 89; see also *Smith v. Allwright*, 321 U. S. 649 (1944); *Terry v. Adams*, 345 U. S. 461 (1953).

Some States were less direct. Oklahoma was one of many that required all voters to pass a literacy test. But the test did not apply equally to all voters. Under a “grandfather clause,” voters were exempt if their grandfathers had been voters or had served as soldiers before 1866. This meant, of course, that black voters had to pass the test, but many white voters did not. The Court held the scheme unconstitutional. *Guinn v. United States*, 238 U. S. 347 (1915). In response, Oklahoma changed the rules. It enacted a new statute under which all voters who were qualified to vote in 1914 (under the unconstitutional grandfather clause) remained qualified, and the remaining voters had to apply for registration within a 12-day period. *Lane v. Wilson*, 307 U. S. 268, 270–271 (1939). The Court struck down that statute as well. *Id.*, at 275.

Racial minorities were occasionally able to surmount the hurdles to their political participation. Indeed, in some

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States, minority citizens were even able to win elective office. But just as many States responded to the Fifteenth Amendment by subverting minorities' access to the polls, many States responded to the prospect of elected minority officials by undermining the ability of minorities to win and hold elective office. Some States blatantly removed black officials from local offices. See, e.g., H. Rabinowitz, *Race Relations in the Urban South, 1865–1890*, pp. 267, 269–270 (1978) (describing events in Tennessee and Virginia). Others changed the processes by which local officials were elected. See, e.g., *Extension of the Voting Rights Act, Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 97th Cong., 1st Sess., pt. 1*, pp. 2016–2017 (1981) (hereinafter 1981 Hearings) (statement of Professor J. Morgan Kousser) (after a black judge refused to resign in Alabama, the legislature abolished the court on which he served and replaced it with one whose judges were appointed by the Governor); Rabinowitz, *supra*, at 269–270 (the North Carolina Legislature divested voters of the right to elect justices of the peace and county commissioners, then arrogated to itself the authority to select justices of the peace and gave them the power to select commissioners).

This Court did not stand idly by. In Alabama, for example, the legislature responded to increased black voter registration in the city of Tuskegee by amending the State Constitution to authorize legislative abolition of the county in which Tuskegee was located, Ala. Const. Amdt. 132 (1957), repealed by Ala. Const. Amdt. 406 (1982), and by redrawing the city's boundaries to remove all the black voters “while not removing a single white voter,” *Gomillion v. Lightfoot*, 364 U. S. 339, 341 (1960). The Court intervened, finding it “inconceivable that guaranties embedded in the Constitution” could be “manipulated out of existence” by being “cloaked in the garb of [political] rea-

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lignment.” *Id.*, at 345 (internal quotation marks omitted).

This Court’s landmark ruling in *Brown v. Board of Education*, 347 U. S. 483 (1954), triggered a new era of political restructuring, this time in the context of education. In Virginia, the General Assembly transferred control of student assignment from local school districts to a State Pupil Placement Board. See B. Muse, *Virginia’s Massive Resistance* 34, 74 (1961). And when the legislature learned that the Arlington County school board had prepared a desegregation plan, the General Assembly “swiftly retaliated” by stripping the county of its right to elect its school board by popular vote and instead making the board an appointed body. *Id.*, at 24; see also B. Smith, *They Closed Their Schools* 142–143 (1965).

Other States similarly disregarded this Court’s mandate by changing their political process. See, e.g., *Bush v. Orleans Parish School Bd.*, 187 F. Supp. 42, 44–45 (ED La. 1960) (the Louisiana Legislature gave the Governor the authority to supersede any school board’s decision to integrate); Extension of the Voting Rights Act, Hearings on H. R. 4249 et al. before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., 146–149 (1969) (statement of Thomas E. Harris, Assoc. Gen. Counsel, American Federation of Labor and Congress of Industrial Organizations) (the Mississippi Legislature removed from the people the right to elect superintendents of education in 11 counties and instead made those positions appointive).

The Court remained true to its command in *Brown*. In Arkansas, for example, it enforced a desegregation order against the Little Rock school board. *Cooper v. Aaron*, 358 U. S. 1, 5 (1958). On the very day the Court announced that ruling, the Arkansas Legislature responded by changing the rules. It enacted a law permitting the Governor to close any public school in the State, and stripping local school districts of their decisionmaking authority so long

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as the Governor determined that local officials could not maintain “a general, suitable, and efficient educational system.” *Aaron v. Cooper*, 261 F. 2d 97, 99 (CA8 1958) (*per curiam*) (quoting Arkansas statute). The then-Governor immediately closed all of Little Rock’s high schools. *Id.*, at 99–100; see also S. Breyer, *Making Our Democracy Work* 49–67 (2010) (discussing the events in Little Rock).

The States’ political restructuring efforts in the 1960’s and 1970’s went beyond the context of education. Many States tried to suppress the political voice of racial minorities more generally by reconfiguring the manner in which they filled vacancies in local offices, often transferring authority from the electorate (where minority citizens had a voice at the local level) to the States’ executive branch (where minorities wielded little if any influence). See, *e.g.*, 1981 Hearings, pt. 1, at 815 (report of J. Cox & A. Turner) (the Alabama Legislature changed all municipal judgeships from elective to appointive offices); *id.*, at 1955 (report of R. Hudlin & K. Brimah, Voter Educ. Project, Inc.) (the Georgia Legislature eliminated some elective offices and made others appointive when it appeared that a minority candidate would be victorious); *id.*, at 501 (statement of Frank R. Parker, Director, Lawyers’ Comm. for Civil Rights Under Law) (the Mississippi Legislature changed the manner of filling vacancies for various public offices from election to appointment).

## II

It was in this historical context that the Court intervened in *Hunter v. Erickson*, 393 U. S. 385 (1969), and *Washington v. Seattle School Dist. No. 1*, 458 U. S. 457 (1982). Together, *Hunter* and *Seattle* recognized a fundamental strand of this Court’s equal protection jurisprudence: the political-process doctrine. To understand that doctrine fully, it is necessary to set forth in detail precisely

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what the Court had before it, and precisely what it said. For to understand *Hunter* and *Seattle* is to understand why those cases straightforwardly resolve this one.

## A

In *Hunter*, the City Council of Akron, Ohio, enacted a fair housing ordinance to “assure equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry, or national origin.” 393 U. S., at 386 (internal quotation marks omitted). A majority of the citizens of Akron disagreed with the ordinance and overturned it. But the majority did not stop there; it also amended the city charter to prevent the City Council from implementing any future ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the Akron electorate. *Ibid.* That amendment changed the rules of the political process in Akron. The Court described the result of the change as follows:

“[T]o enact an ordinance barring housing discrimination on the basis of race or religion, proponents had to obtain the approval of the City Council and of a majority of the voters citywide. To enact an ordinance preventing housing discrimination on other grounds, or to enact any other type of housing ordinance, proponents needed the support of only the City Council.” *Seattle*, 458 U. S., at 468 (describing *Hunter*; emphasis deleted).

The Court invalidated the Akron charter amendment under the Equal Protection Clause. It concluded that the amendment unjustifiably “place[d] special burdens on racial minorities within the governmental process,” thus effecting “a real, substantial, and invidious denial of the equal protection of the laws.” *Hunter*, 393 U. S., at 391, 393. The Court characterized the amendment as “no more



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permissible” than denying racial minorities the right to vote on an equal basis with the majority. *Id.*, at 391. For a “State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.” *Id.*, at 392–393. The vehicle for the change—a popular referendum—did not move the Court: “The sovereignty of the people,” it explained, “is itself subject to . . . constitutional limitations.” *Id.*, at 392.

Justice Harlan, joined by Justice Stewart, wrote in his concurrence that although a State can normally allocate political power according to any general principle, it bears a “far heavier burden of justification” when it reallocates political power based on race, because the selective reallocation necessarily makes it far more difficult for racial minorities to “achieve legislation that is in their interest.” *Id.*, at 395 (internal quotation marks omitted).

In *Seattle*, a case that mirrors the one before us, the Court applied *Hunter* to invalidate a statute, enacted by a majority of Washington State’s citizens, that prohibited racially integrative busing in the wake of *Brown*. As early as 1963, Seattle’s School District No. 1 began taking steps to cure the *de facto* racial segregation in its schools. 458 U. S., at 460–461. Among other measures, it enacted a desegregation plan that made extensive use of busing and mandatory assignments. *Id.*, at 461. The district was under no obligation to adopt the plan; *Brown* charged school boards with a duty to integrate schools that were segregated because of *de jure* racial discrimination, but there had been no finding that the *de facto* segregation in Seattle’s schools was the product of *de jure* discrimination. 458 U. S., at 472, n. 15. Several residents who opposed the desegregation efforts formed a committee and sued to enjoin implementation of the plan. *Id.*, at 461. When these efforts failed, the committee sought to change the

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rules of the political process. It drafted a statewide initiative “designed to terminate the use of mandatory busing for purposes of racial integration.” *Id.*, at 462. A majority of the State’s citizens approved the initiative. *Id.*, at 463–464.

The Court invalidated the initiative under the Equal Protection Clause. It began by observing that equal protection of the laws “guarantees racial minorities the right to full participation in the political life of the community.” *Id.*, at 467. “It is beyond dispute,” the Court explained, “that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner.” *Ibid.* But the Equal Protection Clause reaches further, the Court stated, reaffirming the principle espoused in *Hunter*—that while “laws structuring political institutions or allocating political power according to neutral principles” do not violate the Constitution, “a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process.” 458 U. S., at 470. That kind of state action, it observed, “places *special* burdens on racial minorities within the governmental process,” by making it “*more* difficult for certain racial and religious minorities” than for other members of the community “to achieve legislation . . . in their interest.” *Ibid.*

Rejecting the argument that the initiative had no racial focus, the Court found that the desegregation of public schools, like the Akron housing ordinance, “inure[d] primarily to the benefit of the minority, and [was] designed for that purpose.” *Id.*, at 472. Because minorities had good reason to “consider busing for integration to be ‘legislation that is in their interest,’” the Court concluded that the “racial focus of [the initiative] . . . suffice[d] to trigger application of the *Hunter* doctrine.” *Id.*, at 474 (quoting *Hunter*, 393 U. S., at 395) (Harlan, J. concurring)).

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The Court next concluded that “the practical effect of [the initiative was] to work a reallocation of power of the kind condemned in *Hunter*.” *Seattle*, 458 U. S., at 474. It explained: “Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board.” *Ibid.* Thus, the initiative required those in favor of racial integration in public schools to “surmount a considerably higher hurdle than persons seeking comparable legislative action” in different contexts. *Ibid.*

The Court reaffirmed that the “‘simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.’” *Id.*, at 483 (quoting *Crawford v. Board of Ed. of Los Angeles*, 458 U. S. 527, 539 (1982)). But because the initiative burdened future attempts to integrate by lodging the decisionmaking authority at a “new and remote level of government,” it was more than a “mere repeal”; it was an unconstitutionally discriminatory change to the political process.<sup>3</sup> *Seattle*,

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<sup>3</sup>In *Crawford*, the Court confronted an amendment to the California Constitution prohibiting state courts from mandating pupil assignments unless a federal court would be required to do so under the Equal Protection Clause. We upheld the amendment as nothing more than a repeal of existing legislation: The standard previously required by California went beyond what was federally required; the amendment merely moved the standard back to the federal baseline. The Court distinguished the amendment from the one in *Seattle* because it left the rules of the political game unchanged. Racial minorities in *Crawford*, unlike racial minorities in *Seattle*, could still appeal to their local school districts for relief.

The *Crawford* Court distinguished *Hunter v. Erickson*, 393 U. S. 385 (1969), by clarifying that the charter amendment in *Hunter* was “something more than a mere repeal” because it altered the framework of the

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458 U. S., at 483–484.

## B

*Hunter* and *Seattle* vindicated a principle that is as elementary to our equal protection jurisprudence as it is essential: The majority may not suppress the minority’s right to participate on equal terms in the political process. Under this doctrine, governmental action deprives minority groups of equal protection when it (1) has a racial focus, targeting a policy or program that “inures primarily to the benefit of the minority,” *Seattle*, 458 U. S., at 472; and (2) alters the political process in a manner that uniquely burdens racial minorities’ ability to achieve their goals through that process. A faithful application of the doctrine resoundingly resolves this case in respondents’ favor.

## 1

Section 26 has a “racial focus.” *Seattle*, 458 U. S., at 474. That is clear from its text, which prohibits Michigan’s public colleges and universities from “grant[ing] preferential treatment to any individual or group on the basis of race.” Mich. Const., Art. I, §26. Like desegregation of public schools, race-sensitive admissions policies “inur[e] primarily to the benefit of the minority,” 458 U. S., at 472, as they are designed to increase minorities’ access to institutions of higher education.<sup>4</sup>

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political process. 458 U. S., at 540. And the *Seattle* Court drew the same distinction when it held that the initiative “work[ed] something more than the ‘mere repeal’ of a desegregation law by the political entity that created it.” 458 U. S., at 483.

<sup>4</sup>JUSTICE SCALIA accuses me of crafting my own version (or versions) of the racial-focus prong. See *ante*, at 8–9, n. 4 (opinion concurring in judgment). I do not. I simply apply the test announced in *Seattle*: whether the policy in question “inures primarily to the benefit of the minority.” 458 U. S., at 472. JUSTICE SCALIA ignores this analysis, see Part II–B–1, *supra*, and instead purports to identify three versions of the test that he thinks my opinion advances. The first—whether “the policy in question *benefits* only a racial minority,” *ante*, at 8, n. 4

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Petitioner argues that race-sensitive admissions policies cannot “inur[e] primarily to the benefit of the minority,” *ibid.*, as the Court has upheld such policies only insofar as they further “the educational benefits that flow from a diverse student body,” *Grutter*, 539 U. S., at 343. But there is no conflict between this Court’s pronouncement in *Grutter* and the common-sense reality that race-sensitive admissions policies benefit minorities. Rather, race-sensitive admissions policies further a compelling state interest in achieving a diverse student body precisely because they increase minority enrollment, which necessarily benefits minority groups. In other words, constitutionally permissible race-sensitive admissions policies can both serve the compelling interest of obtaining the educational benefits that flow from a diverse student body, and inure to the benefit of racial minorities. There is nothing mutually exclusive about the two. Cf. *Seattle*, 458 U. S., at 472 (concluding that the desegregation plan had a racial focus even though “white as well as Negro children benefit from exposure to ‘ethnic and racial diversity in the classroom’”).

It is worth emphasizing, moreover, that §26 is relevant

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(quoting *supra*, at 5)—misunderstands the doctrine and misquotes my opinion. The racial-focus prong has never required a policy to benefit *only* a minority group. The sentence from which JUSTICE SCALIA appears to quote makes the altogether different point that the political-process doctrine is obviously not implicated in the first place by a restructuring that burdens members of society equally. This is the second prong of the political-process doctrine. See *supra*, at 5 (explaining that the political-process doctrine is implicated “[w]hen the majority reconfigures the political process in a manner that burdens only a racial minority”). The second version—which asks whether a policy “benefits *primarily* a racial minority,” *ante*, at 8, n. 4—is the one articulated by the *Seattle* Court and, as I have explained, see *supra*, at 15 and this page, it is easily met in this case. And the third—whether the policy has “the incidental effect” of benefitting racial minorities,” *ante*, at 8–9, n. 4—is not a test I advance at all.

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only to admissions policies that have survived strict scrutiny under *Grutter*; other policies, under this Court's rulings, would be forbidden with or without §26. A *Grutter*-compliant admissions policy must use race flexibly, not maintain a quota; must be limited in time; and must be employed only after "serious, good faith consideration of workable race-neutral alternatives," 539 U. S., at 339. The policies banned by §26 meet all these requirements and thus already constitute the least restrictive ways to advance Michigan's compelling interest in diversity in higher education.

## 2

Section 26 restructures the political process in Michigan in a manner that places unique burdens on racial minorities. It establishes a distinct and more burdensome political process for the enactment of admissions plans that consider racial diversity.

Long before the enactment of §26, the Michigan Constitution granted plenary authority over all matters relating to Michigan's public universities, including admissions criteria, to each university's eight-member governing board. See Mich. Const., Art. VIII, §5 (establishing the Board of Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University). The boards have the "power to enact ordinances, by-laws and regulations for the government of the university." Mich. Comp. Laws Ann. §390.5 (West 2010); see also §390.3 ("The government of the university is vested in the board of regents"). They are "'constitutional corporation[s] of independent authority, which, within the scope of [their] functions, [are] co-ordinate with and equal to . . . the legislature.'" *Federated Publications, Inc. v. Board of Trustees of Mich. State Univ.*, 460 Mich. 75, 84, n. 8, 594 N. W. 2d 491, 496, n. 8 (1999).

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The boards are indisputably a part of the political process in Michigan. Each political party nominates two candidates for membership to each board, and board members are elected to 8-year terms in the general statewide election. See Mich. Comp. Laws Ann. §§168.282, 168.286 (West 2008); Mich. Const., Art. VIII, §5. Prior to §26, board candidates frequently included their views on race-sensitive admissions in their campaigns. For example, in 2005, one candidate pledged to “work to end so-called ‘Affirmative-Action,’ a racist, degrading system.” See League of Women Voters, 2005 General Election Voter Guide, online at <http://www.lwvka.org/guide04/regents/html> (all Internet materials as visited Apr. 18, 2014, and available in Clerk of Court’s case file); see also George, U-M Regents Race Tests Policy, Detroit Free Press, Oct. 26, 2000, p. 2B (noting that one candidate “opposes affirmative action admissions policies” because they “basically sa[y] minority students are not qualified”).

Before the enactment of §26, Michigan’s political structure permitted both supporters and opponents of race-sensitive admissions policies to vote for their candidates of choice and to lobby the elected and politically accountable boards. Section 26 reconfigured that structure. After §26, the boards retain plenary authority over all admissions criteria *except* for race-sensitive admissions policies.<sup>5</sup> To change admissions policies on this one issue, a Michigan citizen must instead amend the Michigan Constitution. That is no small task. To place a proposed constitutional

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<sup>5</sup> By stripping the governing boards of the authority to decide whether to adopt race-sensitive admissions policies, the majority removed the decision from bodies well suited to make that decision: boards engaged in the arguments on both sides of a matter, which deliberate and then make and refine “considered judgment[s]” about racial diversity and admissions policies, see *Grutter*, 539 U. S., at 387 (KENNEDY, J., dissenting).

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amendment on the ballot requires either the support of two-thirds of both Houses of the Michigan Legislature or a vast number of signatures from Michigan voters—10 percent of the total number of votes cast in the preceding gubernatorial election. See Mich. Const., Art. XII, §§1, 2. Since more than 3.2 million votes were cast in the 2010 election for Governor, more than 320,000 signatures are currently needed to win a ballot spot. See Brief for Gary Segura et al. as *Amici Curiae* 9 (hereinafter Segura Brief). Moreover, “[t]o account for invalid and duplicative signatures, initiative sponsors ‘need to obtain substantially more than the actual required number of signatures, typically by a 25% to 50% margin.’” *Id.*, at 10 (quoting Tolbert, Lowenstein, & Donovan, Election Law and Rules for Using Initiatives, in *Citizens as Legislators: Direct Democracy in the United States* 27, 37 (S. Bowler, T. Donovan, & C. Tolbert eds., 1998)).

And the costs of qualifying an amendment are significant. For example, “[t]he vast majority of petition efforts . . . require initiative sponsors to hire paid petition circulators, at significant expense.” Segura Brief 10; see also T. Donovan, C. Mooney, & D. Smith, *State and Local Politics: Institutions and Reform* 96 (2012) (hereinafter Donovan) (“In many states, it is difficult to place a measure on the ballot unless professional petition firms are paid to collect some or all the signatures required for qualification”); Tolbert, *supra*, at 35 (“‘Qualifying an initiative for the statewide ballot is . . . no longer so much a measure of general citizen interest as it is a test of fundraising ability’”). In addition to the cost of collecting signatures, campaigning for a majority of votes is an expensive endeavor, and “organizations advocating on behalf of marginalized groups remain . . . outmoneyed by corporate, business, and professional organizations.” Strolovitch & Forrest, *Social and Economic Justice Movements and Organizations*, in *The Oxford Handbook of*



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American Political Parties and Interest Groups 468, 471 (L. Maisel & J. Berry eds., 2010). In 2008, for instance, over \$800 million was spent nationally on state-level initiative and referendum campaigns, nearly \$300 million more than was spent in the 2006 cycle. Donovan 98. “In several states, more money [is] spent on ballot initiative campaigns than for all other races for political office combined.” *Ibid.* Indeed, the amount spent on state-level initiative and referendum campaigns in 2008 eclipsed the \$740.6 million spent by President Obama in his 2008 presidential campaign, Salant, Spending Doubled as Obama Led Billion-Dollar Campaign, Bloomberg News, Dec. 27, 2008, online at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=anLDS9WWPQW8>.

Michigan’s Constitution has only rarely been amended through the initiative process. Between 1914 and 2000, voters have placed only 60 statewide initiatives on the Michigan ballot, of which only 20 have passed. See Segura Brief 12. Minority groups face an especially uphill battle. See Donovan 106 (“[O]n issues dealing with racial and ethnic matters, studies show that racial and ethnic minorities do end up more on the losing side of the popular vote”). In fact, “[i]t is difficult to find even a single statewide initiative in any State in which voters approved policies that explicitly favor racial or ethnic minority groups.”<sup>6</sup> Segura Brief 13.

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<sup>6</sup>In the face of this overwhelming evidence, JUSTICE SCALIA claims that it is actually easier, not harder, for minorities to effectuate change at the constitutional amendment level than at the board level. See *ante*, at 11–12 (opinion concurring in judgment) (“voting in a favorable board (each of which has eight members) at the three major public universities requires electing by majority vote at least 15 different candidates, several of whom would be running during different election cycles”). This claim minimizes just how difficult it is to amend the State Constitution. See *supra*, at 18–20. It is also incorrect in its premise that minorities must elect an entirely new slate of board members in order to effectuate change at the board level. JUSTICE

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This is the onerous task that §26 forces a Michigan citizen to complete in order to change the admissions policies of Michigan’s public colleges and universities with respect to racial sensitivity. While substantially less grueling paths remain open to those advocating for any other admissions policies, a constitutional amendment is the only avenue by which race-sensitive admissions policies may be obtained. The effect of §26 is that a white graduate of a public Michigan university who wishes to pass his historical privilege on to his children may freely lobby the board of that university in favor of an expanded legacy admissions policy, whereas a black Michigander who was denied the opportunity to attend that very university cannot lobby the board in favor of a policy that might give his children a chance that he never had and that they might never have absent that policy.

Such reordering of the political process contravenes *Hunter* and *Seattle*.<sup>7</sup> See *Seattle*, 458 U. S., at 467 (the Equal Protection Clause prohibits “‘a political structure that treats all individuals as equals,’ yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to

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SCALIA overlooks the fact that minorities need not elect any new board members in order to effect change; they may instead seek to persuade existing board members to adopt changes in their interests.

<sup>7</sup>I do not take the position, as JUSTICE SCALIA asserts, that the process of amending the Michigan Constitution is not a part of Michigan’s existing political process. See *ante*, at 13–14 (opinion concurring in judgment). It clearly is. The problem with §26 is not that “amending Michigan’s Constitution is simply not a part of that State’s ‘existing political process.’” *Ante*, at 14. It is that §26 reconfigured the political process in Michigan such that it is now more difficult for racial minorities, and racial minorities alone, to achieve legislation in their interest. Section 26 elevated the issue of race-sensitive admissions policies, and not any other kinds of admissions policies, to a higher plane of the existing political process in Michigan: that of a constitutional amendment.

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achieve beneficial legislation” (citation omitted)). Where, as here, the majority alters the political process to the detriment of a racial minority, the governmental action is subject to strict scrutiny. See *id.*, at 485, n. 28. Michigan does not assert that §26 satisfies a compelling state interest. That should settle the matter.

C  
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The plurality sees it differently. Disregarding the language used in *Hunter*, the plurality asks us to contort that case into one that “rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities.” *Ante*, at 8. And the plurality recasts *Seattle* “as a case in which the state action in question . . . had the serious risk, if not purpose, of causing specific injuries on account of race.” *Ante*, at 8–9. According to the plurality, the *Hunter* and *Seattle* Courts were not concerned with efforts to reconfigure the political process to the detriment of racial minorities; rather, those cases invalidated governmental actions merely because they reflected an invidious purpose to discriminate. This is not a tenable reading of those cases.

The plurality identifies “invidious discrimination” as the “necessary result” of the restructuring in *Hunter*. *Ante*, at 8. It is impossible to assess whether the housing amendment in *Hunter* was motivated by discriminatory purpose, for the opinion does not discuss the question of intent.<sup>8</sup>

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<sup>8</sup>It certainly is fair to assume that some voters may have supported the *Hunter* amendment because of discriminatory animus. But others may have been motivated by their strong beliefs in the freedom of contract or the freedom to alienate property. Similarly, here, although some Michiganders may have voted for §26 out of racial animus, some may have been acting on a personal belief, like that of some of my colleagues today, that using race-sensitive admissions policies in higher education is unwise. The presence (or absence) of invidious discrimination has no place in the current analysis. That is the very purpose of

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What is obvious, however, is that the possibility of invidious discrimination played no role in the Court's reasoning. We ordinarily understand our precedents to mean what they actually say, not what we later think they could or should have said. The *Hunter* Court was clear about why it invalidated the Akron charter amendment: It was impermissible as a restructuring of the political process, not as an action motivated by discriminatory intent. See 393 U. S., at 391 (striking down the Akron charter amendment because it "places a special burden on racial minorities within the governmental process").

Similarly, the plurality disregards what *Seattle* actually says and instead opines that "the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race." *Ante*, at 17. Here, the plurality derives its conclusion not from *Seattle* itself, but from evidence unearthed more than a quarter-century later in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U. S. 701 (2007): "Although there had been no judicial finding of *de jure* segregation with respect to Seattle's school district, it appears as though school desegregation in the district in the 1940's and 1950's *may have been* the partial result of school board policies that 'permitted white students to transfer out of black schools while restricting the transfer of black students into white schools.'" <sup>9</sup> *Ante*, at 9 (quoting *Parents Involved*, 551 U. S., at 807–808 (BREYER, J., dissenting) (emphasis added)). It follows, according to the

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the political-process doctrine; it operates irrespective of discriminatory intent, for it protects a process-based right.

<sup>9</sup>The plurality relies on JUSTICE BREYER's dissent in *Parents Involved* to conclude that "one permissible reading of the record was that the school board had maintained policies to perpetuate racial segregation in the schools." *Ante*, at 9–10. Remarkably, some Members of today's plurality criticized JUSTICE BREYER's reading of the record in *Parents Involved* itself. See 551 U. S., at 736.

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plurality, that Seattle's desegregation plan was constitutionally required, so that the initiative halting the plan was an instance of invidious discrimination aimed at inflicting a racial injury.

Again, the plurality might prefer that the *Seattle* Court had said that, but it plainly did not. Not once did the Court suggest the presence of *de jure* segregation in Seattle. Quite the opposite: The opinion explicitly suggested the desegregation plan was adopted to remedy *de facto* rather than *de jure* segregation. See 458 U. S., at 472, n. 15 (referring to the "absen[ce]" of "a finding of prior *de jure* segregation"). The Court, moreover, assumed that no "constitutional violation" through *de jure* segregation had occurred. *Id.*, at 474. And it unmistakably rested its decision on *Hunter*, holding Seattle's initiative invalid because it "use[d] the racial nature of an issue to define the governmental decisionmaking structure, and thus impose[d] substantial and unique burdens on racial minorities." 458 U. S., at 470.

It is nothing short of baffling, then, for the plurality to insist—in the face of clear language in *Hunter* and *Seattle* saying otherwise—that those cases were about nothing more than the intentional and invidious infliction of a racial injury. *Ante*, at 8 (describing the injury in *Hunter* as "a demonstrated injury on the basis of race"); *ante*, at 8–9 (describing the injury in *Seattle* as an "injur[y] on account of race"). The plurality's attempt to rewrite *Hunter* and *Seattle* so as to cast aside the political-process doctrine *sub silentio* is impermissible as a matter of *stare decisis*. Under the doctrine of *stare decisis*, we usually stand by our decisions, even if we disagree with them, because people rely on what we say, and they believe they can take us at our word.

And what now of the political-process doctrine? After the plurality's revision of *Hunter* and *Seattle*, it is unclear what is left. The plurality certainly does not tell us. On

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this point, and this point only, I agree with JUSTICE SCALIA that the plurality has rewritten those precedents beyond recognition. See *ante*, at 5–7 (opinion concurring in judgment).

## 2

JUSTICE BREYER concludes that *Hunter* and *Seattle* do not apply. Section 26, he reasons, did not move the relevant decisionmaking authority from one political level to another; rather, it removed that authority from “unelected actors and placed it in the hands of the voters.” *Ante*, at 5 (opinion concurring in judgment). He bases this conclusion on the premise that Michigan’s elected boards “delegated admissions-related decisionmaking authority to unelected university faculty members and administrators.” *Ibid.* But this premise is simply incorrect.

For one thing, it is undeniable that prior to §26, board candidates often pledged to end or carry on the use of race-sensitive admissions policies at Michigan’s public universities. See *supra*, at 18. Surely those were not empty promises. Indeed, the issue of race-sensitive admissions policies often dominated board elections. See, e.g., George, Detroit Free Press, at 2B (observing that “[t]he race for the University of Michigan Board of Regents could determine . . . the future of [the University’s] affirmative action policies”); Kosseff, UM Policy May Hang On Election, Crain’s Detroit Business, Sept. 18, 2000, p. 1 (noting that an upcoming election could determine whether the University would continue to defend its affirmative action policies); University of Michigan’s Admissions Policy Still an Issue for Regents’ Election, Black Issues in Higher Education, Oct. 21, 2004, p. 17 (commenting that although “the Supreme Court struck down the University of Michigan’s undergraduate admissions policy as too formulaic,” the issue “remains an important [one] to several people running” in an upcoming election for the Board of

Regents).

Moreover, a careful examination of the boards and their governing structure reveals that they remain actively involved in setting admissions policies and procedures. Take Wayne State University, for example. Its Board of Governors has enacted university statutes that govern the day-to-day running of the institution. See Wayne State Univ. Stat., online at <http://bog.wayne.edu/code>. A number of those statutes establish general admissions procedures, see §2.34.09 (establishing undergraduate admissions procedures); §2.34.12 (establishing graduate admissions procedures), and some set out more specific instructions for university officials, see, *e.g.*, §2.34.09.030 (“Admissions decisions will be based on a full evaluation of each student’s academic record, and on empirical data reflecting the characteristics of students who have successfully graduated from [the university] within the four years prior to the year in which the student applies”); §§2.34.12.080, 2.34.12.090 (setting the requisite grade point average for graduate applicants).

The Board of Governors does give primary responsibility over day-to-day admissions matters to the university’s President. §2.34.09.080. But the President is “elected by and answerable to the Board.” Brief for Respondent Board of Governors of Wayne State University et al. 15. And while university officials and faculty members “serv[e] an important advisory role in recommending educational policy,” *id.*, at 14, the Board alone ultimately controls educational policy and decides whether to adopt (or reject) program-specific admissions recommendations. For example, the Board has voted on recommendations “to revise guidelines for establishment of honors curricula, including admissions criteria”; “to modify the honor point criteria for graduate admission”; and “to modify the maximum number of transfer credits that the university would allow in certain cases where articulation agreements rendered

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modification appropriate.” *Id.*, at 17; see also *id.*, at 18–20 (providing examples of the Board’s “review[ing] and pass[ing] upon admissions requirements in the course of voting on broader issues, such as the implementation of new academic programs”). The Board also “engages in robust and regular review of administrative actions involving admissions policy and related matters.” *Id.*, at 16.

Other public universities more clearly entrust admissions policy to university officials. The Board of Regents of the University of Michigan, for example, gives primary responsibility for admissions to the Associate Vice Provost, Executive Director of Undergraduate Admissions, and Directors of Admissions. Bylaws §8.01, online at <http://www.regents.umich.edu/bylaws>. And the Board of Trustees of Michigan State University relies on the President to make recommendations regarding admissions policies. Bylaws, Art. 8, online at <http://www.trustees.msu.edu/bylaws>. But the bylaws of the Board of Regents and the Board of Trustees “make clear that all university operations remain subject to their control.” Brief for Respondents Regents of the University of Michigan, the Board of Trustees of Michigan State University et al. 13–14.

The boards retain ultimate authority to adopt or reject admissions policies in at least three ways. First, they routinely meet with university officials to review admissions policies, including race-sensitive admissions policies. For example, shortly after this Court’s decisions in *Gratz v. Bollinger*, 539 U. S. 244 (2003), and *Grutter*, 539 U. S., at 306, the President of the University of Michigan appeared before the University’s Board of Regents to discuss the impact of those decisions on the University. See Proceedings 2003–2004, pp. 10–12 (July 2003), online at <http://name.umdl.umich.edu/ACW7513.2003.001>. Six members of the Board voiced strong support for the University’s use of race as a factor in admissions. *Id.*, at 11–12. In June 2004, the President again appeared before the



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Board to discuss changes to undergraduate admissions policies. *Id.*, at 301 (June 2004). And in March 2007, the University’s Provost appeared before the Board of Regents to present strategies to increase diversity in light of the passage of Proposal 2. Proceedings 2006–2007, pp. 264–265 (Mar. 2007), online at <http://name.umd.umich.edu/ACW7513.2006.001>.

Second, the boards may enact bylaws with respect to specific admissions policies and may alter any admissions policies set by university officials. The Board of Regents may amend any bylaw “at any regular meeting of the board, or at any special meeting, provided notice is given to each regent one week in advance.” Bylaws §14.03. And Michigan State University’s Board of Trustees may, “[u]pon the recommendation of the President[,] . . . determine and establish the qualifications of students for admissions at any level.” Bylaws, Art. 8. The boards may also permanently remove certain admissions decisions from university officials.<sup>10</sup> This authority is not merely theoretical. Between 2008 and 2012, the University of Michigan’s Board of Regents “revised more than two dozen of its bylaws, two of which fall within Chapter VIII, the section regulating admissions practices.” App. to Pet. for Cert. 30a.

Finally, the boards may appoint university officials who share their admissions goals, and they may remove those officials if the officials’ goals diverge from those of the boards. The University of Michigan’s Board of Regents “directly appoints [the University’s] Associate Vice Provost and Executive Director of Undergraduate Admissions,”

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<sup>10</sup>Under the bylaws of the University of Michigan’s Board of Regents, “[a]ny and all delegations of authority made at any time and from time to time by the board to any member of the university staff, or to any unit of the university may be revoked by the board at any time, and notice of such revocation shall be given in writing.” Bylaws §14.04, online at <http://www.regents.umich.edu/bylaws>.

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and Michigan State University's Board of Trustees elects that institution's President. Brief for Respondents Regents of the University of Michigan, the Board of Trustees of Michigan State University et al. 14.

The salient point is this: Although the elected and politically accountable boards may well entrust university officials with certain day-to-day admissions responsibilities, they often weigh in on admissions policies themselves and, at all times, they retain complete supervisory authority over university officials and over all admissions decisions.

There is no question, then, that the elected boards in Michigan had the power to eliminate or adopt race-sensitive admissions policies prior to §26. There is also no question that §26 worked an impermissible reordering of the political process; it removed that power from the elected boards and placed it instead at a higher level of the political process in Michigan. See *supra*, at 17–22. This case is no different from *Hunter* and *Seattle* in that respect. Just as in *Hunter* and *Seattle*, minorities in Michigan “participated in the political process and won.” *Ante*, at 5 (BREYER, J., concurring in judgment). And just as in *Hunter* and *Seattle*, “the majority’s subsequent reordering of the political process repealed the minority’s successes and made it more difficult for the minority to succeed in the future,” thereby “diminish[ing] the minority’s ability to participate meaningfully in the electoral process.” *Ibid*. There is therefore no need to consider “extend[ing] the holding of *Hunter* and *Seattle* to reach situations in which decisionmaking authority is moved from an administrative body to a political one,” *ibid*. Such a scenario is not before us.

### III

The political-process doctrine not only resolves this case as a matter of *stare decisis*; it is correct as a matter of first

principles.

A

Under our Constitution, majority rule is not without limit. Our system of government is predicated on an equilibrium between the notion that a majority of citizens may determine governmental policy through legislation enacted by their elected representatives, and the overriding principle that there are nonetheless some things the Constitution forbids even a majority of citizens to do. The political-process doctrine, grounded in the Fourteenth Amendment, is a central check on majority rule.

The Fourteenth Amendment instructs that all who act for the government may not “deny to any person . . . the equal protection of the laws.” We often think of equal protection as a guarantee that the government will apply the law in an equal fashion—that it will not intentionally discriminate against minority groups. But equal protection of the laws means more than that; it also secures the right of all citizens to participate meaningfully and equally in the process through which laws are created.

Few rights are as fundamental as the right to participate meaningfully and equally in the process of government. See *Yick Wo v. Hopkins*, 118 U. S. 356, 370 (1886) (political rights are “fundamental” because they are “preservative of all rights”). That right is the bedrock of our democracy, recognized from its very inception. See J. Ely, *Democracy and Distrust* 87 (1980) (the Constitution “is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes,” and on the other, “with ensuring broad participation in the processes and distributions of government”).

This should come as no surprise. The political process is the channel of change. *Id.*, at 103 (describing the importance of the judiciary in policing the “channels of political change”). It is the means by which citizens may both

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obtain desirable legislation and repeal undesirable legislation. Of course, we do not expect minority members of our society to obtain every single result they seek through the political process—not, at least, when their views conflict with those of the majority. The minority plainly does not have a right to prevail over majority groups in any given political contest. But the minority does have a right to play by the same rules as the majority. It is this right that *Hunter* and *Seattle* so boldly vindicated.

This right was hardly novel at the time of *Hunter* and *Seattle*. For example, this Court focused on the vital importance of safeguarding minority groups' access to the political process in *United States v. Carolene Products Co.*, 304 U. S. 144 (1938), a case that predated *Hunter* by 30 years. In a now-famous footnote, the Court explained that while ordinary social and economic legislation carries a presumption of constitutionality, the same may not be true of legislation that offends fundamental rights or targets minority groups. Citing cases involving restrictions on the right to vote, restraints on the dissemination of information, interferences with political organizations, and prohibition of peaceable assembly, the Court recognized that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” could be worthy of “more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.” *Id.*, at 152, n. 4; see also Ely, *supra*, at 76 (explaining that “[p]aragraph two [of *Carolene Products* footnote 4] suggests that it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open”). The Court also noted that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political pro-

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cesses ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” *Carolene Products*, 304 U. S., at 153, n. 4, see also Ely, *supra*, at 76 (explaining that “[p]aragraph three [of *Carolene Products* footnote 4] suggests that the Court should also concern itself with what majorities do to minorities, particularly mentioning laws ‘directed at’ religious, national and racial minorities and those infected by prejudice against them”).

The values identified in *Carolene Products* lie at the heart of the political-process doctrine. Indeed, *Seattle* explicitly relied on *Carolene Products*. See 458 U. S., at 486 (“[W]hen the State’s allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the ‘special condition’ of prejudice, the governmental action seriously ‘curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities’” (quoting *Carolene Products*, 304 U. S., at 153, n. 4)). These values are central tenets of our equal protection jurisprudence.

Our cases recognize at least three features of the right to meaningful participation in the political process. Two of them, thankfully, are uncontroversial. First, every eligible citizen has a right to vote. See *Shaw v. Reno*, 509 U. S. 630, 639 (1993). This, woefully, has not always been the case. But it is a right no one would take issue with today. Second, the majority may not make it more difficult for the minority to exercise the right to vote. This, too, is widely accepted. After all, the Court has invalidated grandfather clauses, good character requirements, poll taxes, and gerrymandering provisions.<sup>11</sup> The third fea-

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<sup>11</sup> Attempts by the majority to make it more difficult for the minority to exercise its right to vote are, sadly, not a thing of the past. See *Shelby County v. Holder*, 570 U. S. \_\_\_, \_\_\_ (2013) (slip op., at 15–17) (GINSBURG, J., dissenting) (describing recent examples of discriminatory changes to state voting laws, including a 1995 dual voter registration

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ture, the one the plurality dismantles today, is that a majority may not reconfigure the existing political process in a manner that creates a two-tiered system of political change, subjecting laws designed to protect or benefit discrete and insular minorities to a more burdensome political process than all other laws. This is the political-process doctrine of *Hunter* and *Seattle*.

My colleagues would stop at the second. The plurality embraces the freedom of “self-government” without limits. See *ante*, at 13. And JUSTICE SCALIA values a “near-limitless” notion of state sovereignty. See *ante*, at 13 (opinion concurring in judgment). The wrong sought to be corrected by the political-process doctrine, they say, is not one that should concern us and is in any event beyond the reach of the Fourteenth Amendment. As they see it, the Court’s role in protecting the political process ends once we have removed certain barriers to the minority’s participation in that process. Then, they say, we must sit back and let the majority rule without the key constitutional limit recognized in *Hunter* and *Seattle*.

That view drains the Fourteenth Amendment of one of its core teachings. Contrary to today’s decision, protecting the right to meaningful participation in the political process must mean more than simply removing barriers to participation. It must mean vigilantly policing the political process to ensure that the majority does not use other methods to prevent minority groups from partaking in that process on equal footing. Why? For the same reason we guard the right of every citizen to vote. If “[e]fforts to reduce the impact of minority votes, in contrast to direct

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system in Mississippi to disfranchise black voters, a 2000 redistricting plan in Georgia to decrease black voting strength, and a 2003 proposal to change the voting mechanism for school board elections in South Carolina). Until this Court’s decision last Term in *Shelby County*, the preclearance requirement of §5 of the Voting Rights Act of 1965 blocked those and many other discriminatory changes to voting procedures.

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attempts to block access to the ballot,” were “‘second-generation barriers’” to minority voting, *Shelby County v. Holder*, 570 U. S. \_\_\_, \_\_\_ (2013) (GINSBURG, J., dissenting) (slip op., at 5), efforts to reconfigure the political process in ways that uniquely disadvantage minority groups who have already long been disadvantaged are third-generation barriers. For as the Court recognized in *Seattle*, “minorities are no less powerless with the vote than without it when a racial criterion is used to assign governmental power in such a way as to exclude particular racial groups ‘from effective participation in the political proces[s].’”<sup>12</sup> 458 U. S., at 486.

To accept the first two features of the right to meaningful participation in the political process, while renouncing the third, paves the way for the majority to do what it has done time and again throughout our Nation’s history: afford the minority the opportunity to participate, yet manipulate the ground rules so as to ensure the minority’s defeat. This is entirely at odds with our idea of equality under the law.

To reiterate, none of this is to say that the political-process doctrine prohibits the exercise of democratic self-government. Nothing prevents a majority of citizens from pursuing or obtaining its preferred outcome in a political contest. Here, for instance, I agree with the plurality that

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<sup>12</sup>Preserving the right to participate meaningfully and equally in the process of government is especially important with respect to education policy. I do not mean to suggest that “the constitutionality of laws forbidding racial preferences depends on the policy interest at stake.” *Ante*, at 14–15 (plurality opinion). I note only that we have long recognized that “‘education . . . is the very foundation of good citizenship.’” *Grutter*, 539 U. S., at 331 (quoting *Brown v. Board of Education*, 347 U. S. 483, 493 (1954)). Our Nation’s colleges and universities “represent the training ground for a large number of our Nation’s leaders,” and so there is special reason to safeguard the guarantee “‘that public institutions are open and available to all segments of American society, including people of all races and ethnicities.’” 539 U. S., at 331–332.

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Michiganders who were unhappy with *Grutter* were free to pursue an end to race-sensitive admissions policies in their State. See *ante*, at 16–17. They were free to elect governing boards that opposed race-sensitive admissions policies or, through public discourse and dialogue, to lobby the existing boards toward that end. They were also free to remove from the boards the authority to make any decisions with respect to admissions policies, as opposed to only decisions concerning race-sensitive admissions policies. But what the majority could not do, consistent with the Constitution, is change the ground rules of the political process in a manner that makes it more difficult for racial minorities alone to achieve their goals. In doing so, the majority effectively rigs the contest to guarantee a particular outcome. That is the very wrong the political-process doctrine seeks to remedy. The doctrine “hews to the unremarkable notion that when two competitors are running a race, one may not require the other to run twice as far or to scale obstacles not present in the first runner’s course.” *BAMN v. Regents of Univ. of Michigan*, 701 F. 3d 466, 474 (CA6 2012).

## B

The political-process doctrine also follows from the rest of our equal protection jurisprudence—in particular, our reapportionment and vote dilution cases. In those cases, the Court described the right to vote as “the essence of a democratic society.” *Shaw*, 509 U. S., at 639. It rejected States’ use of ostensibly race-neutral measures to prevent minorities from exercising their political rights. See *id.*, at 639–640. And it invalidated practices such as at-large electoral systems that reduce or nullify a minority group’s ability to vote as a cohesive unit, when those practices were adopted with a discriminatory purpose. *Id.*, at 641. These cases, like the political-process doctrine, all sought to preserve the political rights of the minority.



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Two more recent cases involving discriminatory restructurings of the political process are also worthy of mention: *Romer v. Evans*, 517 U. S. 620 (1996), and *League of United Latin American Citizens v. Perry*, 548 U. S. 399 (2006) (*LULAC*).

*Romer* involved a Colorado constitutional amendment that removed from the local political process an issue primarily affecting gay and lesbian citizens. The amendment, enacted in response to a number of local ordinances prohibiting discrimination against gay citizens, repealed these ordinances and effectively prohibited the adoption of similar ordinances in the future without another amendment to the State Constitution. 517 U. S., at 623–624. Although the Court did not apply the political-process doctrine in *Romer*,<sup>13</sup> the case resonates with the principles undergirding the political-process doctrine. The Court rejected an attempt by the majority to transfer decision-making authority from localities (where the targeted minority group could influence the process) to state government (where it had less ability to participate effectively). See *id.*, at 632 (describing this type of political restructuring as a “disability” on the minority group). Rather than being able to appeal to municipalities for policy changes, the Court commented, the minority was forced to “enlis[t] the citizenry of Colorado to amend the State Constitution,” *id.*, at 631—just as in this case.

*LULAC*, a Voting Rights Act case, involved an enactment by the Texas Legislature that redrew district lines for a number of Texas seats in the House of Representatives. 548 U. S., at 409 (plurality opinion). In striking

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<sup>13</sup>The Court invalidated Amendment 2 on the basis that it lacked any rational relationship to a legitimate end. It concluded that the amendment “impose[d] a broad and undifferentiated disability on a single named group,” and was “so discontinuous with the reasons offered for it that [it] seem[ed] inexplicable by anything but animus toward the class it affect[ed].” *Romer*, 517 U. S., at 632.

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down the enactment, the Court acknowledged the “‘long, well-documented history of discrimination’” in Texas that “‘touched upon the rights of . . . Hispanics to register, to vote, or to participate otherwise in the electoral process,’” *id.*, at 439, and it observed that that the “‘political, social, and economic legacy of past discrimination’ . . . may well [have] ‘hinder[ed] their ability to participate effectively in the political process,’” *id.*, at 440. Against this backdrop, the Court found that just as “Latino voters were poised to elect their candidate of choice,” *id.*, at 438, the State’s enactment “took away [their] opportunity because [they] were about to exercise it,” *id.*, at 440. The Court refused to sustain “the resulting vote dilution of a group that was beginning to achieve [the] goal of overcoming prior electoral discrimination.” *Id.*, at 442.

As in *Romer*, the *LULAC* Court—while using a different analytic framework—applied the core teaching of *Hunter* and *Seattle*: The political process cannot be restructured in a manner that makes it more difficult for a traditionally excluded group to work through the existing process to seek beneficial policies. And the events giving rise to *LULAC* are strikingly similar to those here. Just as redistricting prevented Latinos in Texas from attaining a benefit they had fought for and were poised to enjoy, §26 prevents racial minorities in Michigan from enjoying a last-resort benefit that they, too, had fought for through the existing political processes.

#### IV

My colleagues claim that the political-process doctrine is unadministrable and contrary to our more recent equal protection precedents. See *ante*, at 11–15 (plurality opinion); *ante*, at 7–17 (SCALIA, J., concurring in judgment). It is only by not acknowledging certain strands of our jurisprudence that they can reach such a conclusion.

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## A

Start with the claim that *Hunter* and *Seattle* are no longer viable because of the cases that have come after them. I note that in the view of many, it is those precedents that have departed from the mandate of the Equal Protection Clause in the first place, by applying strict scrutiny to actions designed to benefit rather than burden the minority. See *Gratz*, 539 U. S., at 301 (GINSBURG, J., dissenting) (“[A]s I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion. Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated” (citation omitted)); *id.*, at 282 (BREYER, J., concurring in judgment) (“I agree . . . that, in implementing the Constitution’s equality instruction, government decisionmakers may properly distinguish between policies of inclusion and exclusion, for the former are more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally” (citation omitted)); *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 243 (1995) (Stevens, J., dissenting) (“There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society”); *Wygant v. Jackson Bd. of Ed.*, 476 U. S. 267, 301–302 (1986) (Marshall, J., dissenting) (when dealing with an action to eliminate “pernicious vestiges of past discrimination,” a “less exacting standard of review is appropriate”); *Fullilove v. Klutznick*, 448 U. S. 448, 518–519 (1980) (Marshall, J., concurring in judgment) (race-based governmental action

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designed to “remed[y] the continuing effects of past racial discrimination . . . should not be subjected to conventional ‘strict scrutiny’”; *Bakke*, 438 U. S., at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part) (“racial classifications designed to further remedial purposes” should be subjected only to intermediate scrutiny).

But even assuming that strict scrutiny should apply to policies designed to benefit racial minorities, that view is not inconsistent with *Hunter* and *Seattle*. For nothing the Court has said in the last 32 years undermines the principles announced in those cases.

## 1

JUSTICE SCALIA first argues that the political-process doctrine “misreads the Equal Protection Clause to protect ‘particular group[s],’” running counter to a line of cases that treat “‘equal protection as a personal right.’” *Ante*, at 9 (opinion concurring in judgment) (quoting *Adarand*, 515 U. S., at 230). Equal protection, he says, protects “‘persons, not groups.’” *Ante*, at 10 (quoting *Adarand*, 515 U. S., at 227). This criticism ignores the obvious: Discrimination against an individual occurs because of that individual’s membership in a particular group. Yes, equal protection is a personal right, but there can be no equal protection violation unless the injured individual is a member of a protected group or a class of individuals. It is membership in the group—here the racial minority—that gives rise to an equal protection violation.

Relatedly, JUSTICE SCALIA argues that the political-process doctrine is inconsistent with our precedents because it protects only the minority from political restructurings. This aspect of the doctrine, he says, cannot be tolerated because our precedents have rejected “‘a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different

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groups to defend their interests in the representative process.” *Ante*, at 10 (quoting *Richmond v. J. A. Croson Co.*, 488 U. S., 469, 495 (1989) (plurality opinion)). Equal protection, he continues, “cannot mean one thing when applied to one individual and something else when applied to a person of another color.” *Ante*, at 10 (quoting *Bakke*, 438 U. S., at 289–290) (opinion of Powell, J.).

JUSTICE SCALIA is troubled that the political-process doctrine has not been applied to trigger strict scrutiny for political restructurings that burden the majority. But the doctrine is inapplicable to the majority. The minority cannot achieve such restructurings against the majority, for the majority is, well, the majority. As the *Seattle* Court explained, “[t]he majority needs no protection against discriminat[ory restructurings], and if it did, a referendum, [for instance], might be bothersome but no more than that.” 458 U. S., at 468. Stated differently, the doctrine protects only the minority because it implicates a problem that affects only the minority. Nothing in my opinion suggests, as JUSTICE SCALIA says, that under the political-process doctrine, “the Constitution prohibits discrimination against minority groups, but not against majority groups.” *Ante*, at 10, n. 7. If the minority somehow managed to effectuate a political restructuring that burdened only the majority, we could decide then whether to apply the political-process doctrine to safeguard the political right of the majority. But such a restructuring is not before us, and I cannot fathom how it could be achieved.

## 2

JUSTICE SCALIA next invokes state sovereignty, arguing that “we have emphasized the near-limitless sovereignty of each State to design its governing structure as it sees fit.” *Ante*, at 13 (opinion concurring in judgment). But state sovereignty is not absolute; it is subject to constitu-

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tional limits. The Court surely did not offend state sovereignty by barring States from changing their voting procedures to exclude racial minorities. So why does the political-process doctrine offend state sovereignty? The doctrine takes nothing away from state sovereignty that the Equal Protection Clause does not require. All it says is that a State may not reconfigure its existing political processes in a manner that establishes a distinct and more burdensome process for minority members of our society alone to obtain legislation in their interests.

More broadly, JUSTICE SCALIA is troubled that the political-process doctrine would create supposed “affirmative-action safe havens” in places where the ordinary political process has thus far produced race-sensitive admissions policies. *Ante*, at 13–14. It would not. As explained previously, the voters in Michigan who opposed race-sensitive admissions policies had any number of options available to them to challenge those policies. See *supra*, at 34–35. And in States where decisions regarding race-sensitive admissions policies are not subject to the political process in the first place, voters are entirely free to eliminate such policies via a constitutional amendment because that action would not reallocate power in the manner condemned in *Hunter* and *Seattle* (and, of course, present here). The *Seattle* Court recognized this careful balance between state sovereignty and constitutional protections:

“[W]e do not undervalue the magnitude of the State’s interest in its system of education. Washington could have reserved to state officials the right to make all decisions in the areas of education and student assignment. It has chosen, however, to use a more elaborate system; having done so, the State is obligated to operate that system within the confines of the Fourteenth Amendment.” 458 U. S., at 487.

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The same is true of Michigan.

## 3

Finally, JUSTICE SCALIA disagrees with “the proposition that a facially neutral law may deny equal protection solely because it has a disparate racial impact.” *Ante*, at 15 (opinion concurring in judgment). He would acknowledge, however, that an act that draws racial distinctions or makes racial classifications triggers strict scrutiny regardless of whether discriminatory intent is shown. See *Adarand*, 515 U. S., at 213. That should settle the matter: Section 26 draws a racial distinction. As the *Seattle* Court explained, “when the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on ‘distinctions based on race.’” 458 U. S., at 485 (some internal quotation marks omitted); see also *id.*, at 470 (noting that although a State may “allocate governmental power on the basis of any general principle,” it may not use racial considerations “to define the governmental decisionmaking structure”).

But in JUSTICE SCALIA’s view, cases like *Washington v. Davis*, 426 U. S. 229 (1976), and *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977), call *Seattle* into question. It is odd to suggest that prior precedents call into question a later one. *Seattle* (decided in 1982) postdated both *Washington v. Davis* (1976) and *Arlington Heights* (1977). JUSTICE SCALIA’s suggestion that *Seattle* runs afoul of the principles established in *Washington v. Davis* and *Arlington Heights* would come as a surprise to Justice Blackmun, who joined the majority opinions in all three cases. Indeed, the *Seattle* Court explicitly rejected the argument that *Hunter* had been effectively overruled by *Washington v. Davis* and *Arlington Heights*:

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“There is one immediate and crucial difference between *Hunter* and [those cases]. While decisions such as *Washington v. Davis* and *Arlington Heights* considered classifications facially unrelated to race, the charter amendment at issue in *Hunter* dealt in explicitly racial terms with legislation designed to benefit minorities ‘as minorities,’ not legislation intended to benefit some larger group of underprivileged citizens among whom minorities were disproportionately represented.” 458 U. S., at 485.

And it concluded that both the *Hunter* amendment and the *Seattle* initiative rested on distinctions based on race. 458 U. S., at 485. So does §26.<sup>14</sup>

## B

My colleagues also attack the first prong of the doctrine as “rais[ing] serious constitutional concerns,” *ante*, at 11 (plurality opinion), and being “unadministrable,” *ante*, at 7 (SCALIA, J., concurring in judgment). JUSTICE SCALIA wonders whether judges are equipped to weigh in on what constitutes a “racial issue.” See *ante*, at 8. The plurality, too, thinks courts would be “with no clear legal standards or accepted sources to guide judicial decision.” *Ante*, at 12.

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<sup>14</sup>The plurality raises another concern with respect to precedent. It points to decisions by the California Supreme Court and the United States Court of Appeals for the Ninth Circuit upholding as constitutional Proposition 209, a California constitutional amendment identical in substance to §26. *Ante*, at 14. The plurality notes that if we were to affirm the lower court’s decision in this case, “those holdings would be invalidated . . . .” *Ibid.* I fail to see the significance. We routinely resolve conflicts between lower courts; the necessary result, of course, is that decisions of courts on one side of the debate are invalidated or called into question. I am unaware of a single instance where that (inevitable) fact influenced the Court’s decision one way or the other. Had the lower courts proceeded in opposite fashion—had the California Supreme Court and Ninth Circuit invalidated Proposition 209 and the Sixth Circuit upheld §26—would the plurality come out the other way?



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Yet as JUSTICE SCALIA recognizes, *Hunter* and *Seattle* provide a standard: Does the public policy at issue “inure[e] primarily to the benefit of the minority, and [was it] designed for that purpose”? *Seattle*, 458 U. S., at 472; see *ante*, at 8. Surely this is the kind of factual inquiry that judges are capable of making. JUSTICE SCALIA, for instance, accepts the standard announced in *Washington v. Davis*, which requires judges to determine whether discrimination is intentional or whether it merely has a discriminatory effect. Such an inquiry is at least as difficult for judges as the one called for by *Hunter* and *Seattle*. In any event, it is clear that the constitutional amendment in this case has a racial focus; it is facially race-based and, by operation of law, disadvantages only minorities. See *supra*, at 15–16.

“No good can come” from these inquiries, JUSTICE SCALIA responds, because they divide the Nation along racial lines and perpetuate racial stereotypes. *Ante*, at 9. The plurality shares that view; it tells us that we must not assume all individuals of the same race think alike. See *ante*, at 11–12. The same could have been said about desegregation: Not all members of a racial minority in *Seattle* necessarily regarded the integration of public schools as good policy. Yet the *Seattle* Court had little difficulty saying that school integration as a general matter “inure[d] . . . to the benefit of” the minority. 458 U. S., at 472.

My colleagues are of the view that we should leave race out of the picture entirely and let the voters sort it out. See *ante*, at 13 (plurality opinion) (“Racial division would be validated, not discouraged, were the *Seattle* formulation . . . to remain in force”); *ante*, at 9 (SCALIA, J., concurring in judgment) (“[R]acial stereotyping [is] at odds with equal protection mandates”). We have seen this reasoning before. See *Parents Involved*, 551 U. S., at 748 (“The way to stop discrimination on the basis of race is to stop

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discriminating on the basis of race”). It is a sentiment out of touch with reality, one not required by our Constitution, and one that has properly been rejected as “not sufficient” to resolve cases of this nature. *Id.*, at 788 (KENNEDY, J., concurring in part and concurring in judgment). While “[t]he enduring hope is that race should not matter[,] the reality is that too often it does.” *Id.*, at 787. “[R]acial discrimination . . . [is] not ancient history.” *Bartlett v. Strickland*, 556 U. S. 1, 25 (2009) (plurality opinion).

Race matters. Race matters in part because of the long history of racial minorities’ being denied access to the political process. See Part I, *supra*; see also *South Carolina v. Katzenbach*, 383 U. S. 301, 309 (1966) (describing racial discrimination in voting as “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution”). And although we have made great strides, “voting discrimination still exists; no one doubts that.” *Shelby County*, 570 U. S., at \_\_\_\_ (slip op., at 2).

Race also matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities. See *Gratz*, 539 U. S., at 298–300 (GINSBURG, J., dissenting) (cataloging the many ways in which “the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools,” in areas like employment, poverty, access to health care, housing, consumer transactions, and education); *Adarand*, 515 U. S., at 273 (GINSBURG, J., dissenting) (recognizing that the “lingering effects” of discrimination, “reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods”).

And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man’s view of society when he spends his teenage years watching

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others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, "No, where are you *really* from?", regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: "I do not belong here."

In my colleagues' view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race *does* matter.

## V

Although the only constitutional rights at stake in this case are process-based rights, the substantive policy at issue is undeniably of some relevance to my colleagues. See *ante*, at 18 (plurality opinion) (suggesting that race-sensitive admissions policies have the "potential to become . . . the source of the very resentments and hostilities based on race that this Nation seeks to put behind it"). I will therefore speak in response.

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## A

For over a century, racial minorities in Michigan fought to bring diversity to their State's public colleges and universities. Before the advent of race-sensitive admissions policies, those institutions, like others around the country, were essentially segregated. In 1868, two black students were admitted to the University of Michigan, the first of their race. See Expert Report of James D. Anderson 4, in *Gratz v. Bollinger*, No. 97–75231 (ED Mich.). In 1935, over six decades later, there were still only 35 black students at the University. *Ibid.* By 1954, this number had risen to slightly below 200. *Ibid.* And by 1966, to around 400, among a total student population of roughly 32,500—barely over 1 percent. *Ibid.* The numbers at the University of Michigan Law School are even more telling. During the 1960's, the Law School produced 9 black graduates among a total of 3,041—less than three-tenths of 1 percent. See App. in *Grutter v. Bollinger*, O. T. 2002, No. 02–241, p. 204.

The housing and extracurricular policies at these institutions also perpetuated open segregation. For instance, incoming students were permitted to opt out of rooming with black students. Anderson, *supra*, at 7–8. And some fraternities and sororities excluded black students from membership. *Id.*, at 6–7.

In 1966, the Defense Department conducted an investigation into the University's compliance with Title VI of the Civil Rights Act, and made 25 recommendations for increasing opportunities for minority students. *Id.*, at 9. In 1970, a student group launched a number of protests, including a strike, demanding that the University increase its minority enrollment. *Id.*, at 16–23. The University's Board of Regents responded, adopting a goal of 10 percent black admissions by the fall of 1973. *Id.*, at 23.

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During the 1970's, the University continued to improve its admissions policies,<sup>15</sup> encouraged by this Court's 1978 decision in *Bakke*. In that case, the Court told our Nation's colleges and universities that they could consider race in admissions as part of a broader goal to create a diverse student body, in which students of different backgrounds would learn together, and thereby learn to live together. A little more than a decade ago, in *Grutter*, the Court reaffirmed this understanding. In upholding the admissions policy of the Law School, the Court laid to rest any doubt whether student body diversity is a compelling interest that may justify the use of race.

Race-sensitive admissions policies are now a thing of the past in Michigan after §26, even though—as experts agree and as research shows—those policies were making a difference in achieving educational diversity. In *Grutter*, Michigan's Law School spoke candidly about the strides the institution had taken successfully because of race-sensitive admissions. One expert retained by the Law School opined that a race-blind admissions system would have a “very dramatic, negative effect on underrepresented minority admissions.” *Grutter*, 539 U. S., at 320 (internal quotation marks omitted). He testified that the school had admitted 35 percent of underrepresented minority students who had applied in 2000, as opposed to only 10 percent who would have been admitted had race not been considered. *Ibid.* Underrepresented minority students would thus have constituted 4 percent, as opposed to the actual 14.5 percent, of the class that entered in 2000. *Ibid.*

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<sup>15</sup>In 1973, the Law School graduated 41 black students (out of a class of 446) and the first Latino student in its history. App. in *Grutter v. Bollinger*, O. T. 2002, No. 02–241, p. 204. In 1976, it graduated its first Native American student. *Ibid.* On the whole, during the 1970's, the Law School graduated 262 black students, compared to 9 in the previous decade, along with 41 Latino students. *Ibid.*

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Michigan's public colleges and universities tell us the same today. The Board of Regents of the University of Michigan and the Board of Trustees of Michigan State University inform us that those institutions cannot achieve the benefits of a diverse student body without race-sensitive admissions plans. See Brief for Respondents Regents of the University of Michigan, the Board of Trustees of Michigan State University et al. 18–25. During proceedings before the lower courts, several university officials testified that §26 would depress minority enrollment at Michigan's public universities. The Director of Undergraduate Admissions at the University of Michigan “expressed doubts over the ability to maintain minority enrollment through the use of a proxy, like socioeconomic status.” Supp. App. to Pet. for Cert. 285a. He explained that university officials in States with laws similar to §26 had not “‘achieve[d] the same sort of racial and ethnic diversity that they had prior to such measures . . . without considering race.’” *Ibid.* Similarly, the Law School's Dean of Admissions testified that she expected “a decline in minority admissions because, in her view, it is impossible ‘to get a critical mass of underrepresented minorities . . . without considering race.’” *Ibid.* And the Dean of Wayne State University Law School stated that “although some creative approaches might mitigate the effects of [§26], he ‘did not think that any one of these proposals or any combination of these proposals was reasonably likely to result in the admission of a class that had the same or similar or higher numbers of African Americans, Latinos and Native Americans as the prior policy.’” *Ibid.*

Michigan tells a different story. It asserts that although the statistics are difficult to track, “the number of underrepresented minorities . . . [in] the entering freshman class at Michigan as a percentage changed very little” after §26. Tr. of Oral Arg. 15. It also claims that “the statistics in California across the 17 campuses in the

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University of California system show that today the underrepresented minority percentage is better on 16 out of those 17 campuses”—all except Berkeley—than before California’s equivalent initiative took effect. *Id.*, at 16. As it turns out, these statistics weren’t “‘even good enough to be wrong.’” Reference Manual on Scientific Evidence 4 (2d ed. 2000) (Introduction by Stephen G. Breyer (quoting Wolfgang Pauli)).

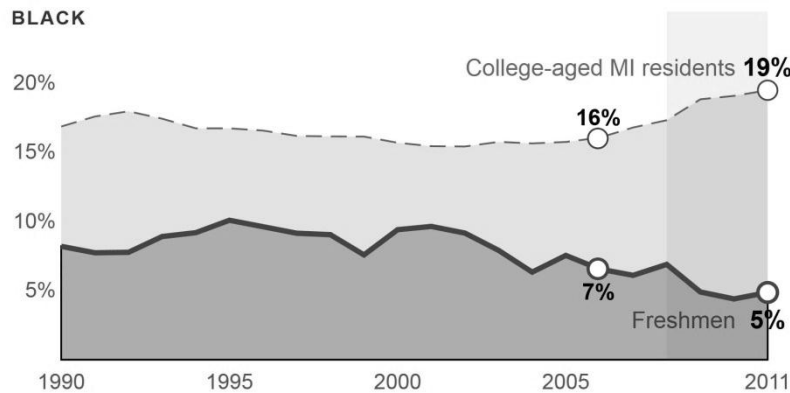
Section 26 has already led to decreased minority enrollment at Michigan’s public colleges and universities. In 2006 (before §26 took effect), underrepresented minorities made up 12.15 percent of the University of Michigan’s freshman class, compared to 9.54 percent in 2012—a roughly 25 percent decline. See University of Michigan—New Freshman Enrollment Overview, Office of the Registrar, online at <http://www.ro.umich.edu/report/10enrolloverview.pdf> and <http://www.ro.umich.edu/report/12enrollmentssummary.pdf>.<sup>16</sup> Moreover, the total number of college-aged underrepresented minorities in Michigan has *increased* even as the number of underrepresented minorities admitted to the University has *decreased*. For example, between 2006 and 2011, the proportion of black freshmen among those enrolled at the University of Michigan declined from 7 percent to 5 percent, even though the proportion of black college-aged persons in Michigan increased from 16 to 19 percent. See Fessenden and Keller, How Minorities Have Fared in States with Affirmative Action Bans, N. Y. Times, June 24, 2013, online at <http://www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html>.

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<sup>16</sup>These percentages include enrollment statistics for black students, Hispanic students, Native American students, and students who identify as members of two or more underrepresented minority groups.

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### UNIVERSITY OF MICHIGAN Black Students<sup>17</sup>



A recent study also confirms that §26 has decreased minority degree attainment in Michigan. The University of Michigan's graduating class of 2012, the first admitted after §26 took effect, is quite different from previous classes. The proportion of black students among those attaining bachelor's degrees was 4.4 percent, the lowest since 1991; the proportion of black students among those attaining master's degrees was 5.1 percent, the lowest since 1989; the proportion of black students among those attaining doctoral degrees was 3.9 percent, the lowest since 1993; and the proportion of black students among those attaining professional school degrees was 3.5 percent, the lowest since the mid-1970's. See Kidder, Restructuring Higher Education Opportunity?: African American Degree Attainment After Michigan's Ban on Affirmative Action, p.1 (Aug. 2013), online at <http://papers.ssrn.com/sol3/abstract=2318523>.

<sup>17</sup>This chart is reproduced from Fessenden and Keller, How Minorities Have Fared in States with Affirmative Action Bans, N. Y. Times, June 24, 2013, online at <http://www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html>.



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The President and Chancellors of the University of California (which has 10 campuses, not 17) inform us that “[t]he abandonment of race-conscious admissions policies resulted in an immediate and precipitous decline in the rates at which underrepresented-minority students applied to, were admitted to, and enrolled at” the university. Brief for President and Chancellors of the University of California as *Amici Curiae* 10 (hereinafter President and Chancellors Brief). At the University of California, Los Angeles (UCLA), for example, admission rates for underrepresented minorities plummeted from 52.4 percent in 1995 (before California’s ban took effect) to 24 percent in 1998. *Id.*, at 12. As a result, the percentage of underrepresented minorities fell by more than half: from 30.1 percent of the entering class in 1995 to 14.3 percent in 1998. *Ibid.* The admissions rate for underrepresented minorities at UCLA reached a new low of 13.6 percent in 2012. See Brief for California Social Science Researchers and Admissions Experts as *Amici Curiae* 28.

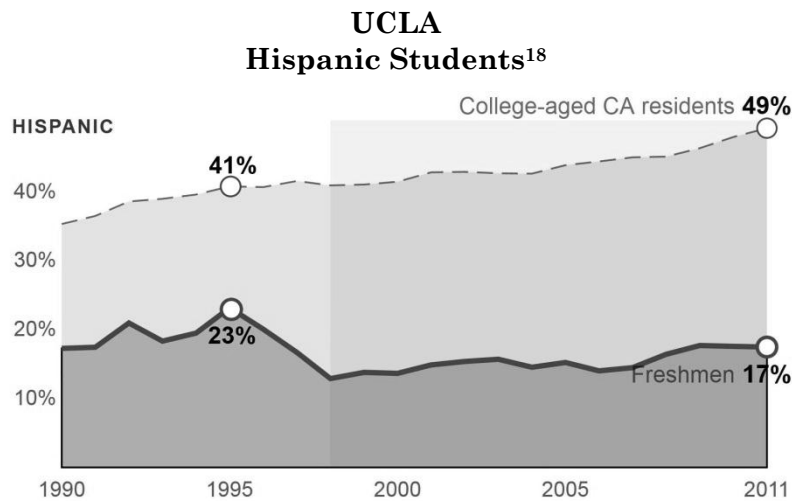
The elimination of race-sensitive admissions policies in California has been especially harmful to black students. In 2006, for example, there were fewer than 100 black students in UCLA’s incoming class of roughly 5,000, the lowest number since at least 1973. See *id.*, at 24.

The University of California also saw declines in minority representation at its graduate programs and professional schools. In 2005, underrepresented minorities made up 17 percent of the university’s new medical students, which is actually a lower rate than the 17.4 percent reported in 1975, three years before *Bakke*. President and Chancellors Brief 13. The numbers at the law schools are even more alarming. In 2005, underrepresented minorities made up 12 percent of entering law students, well below the 20.1 percent in 1975. *Id.*, at 14.

As in Michigan, the declines in minority representation at the University of California have come even as the

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minority population in California has increased. At UCLA, for example, the proportion of Hispanic freshmen among those enrolled declined from 23 percent in 1995 to 17 percent in 2011, even though the proportion of Hispanic college-aged persons in California increased from 41 percent to 49 percent during that same period. See Fessenden and Keller.



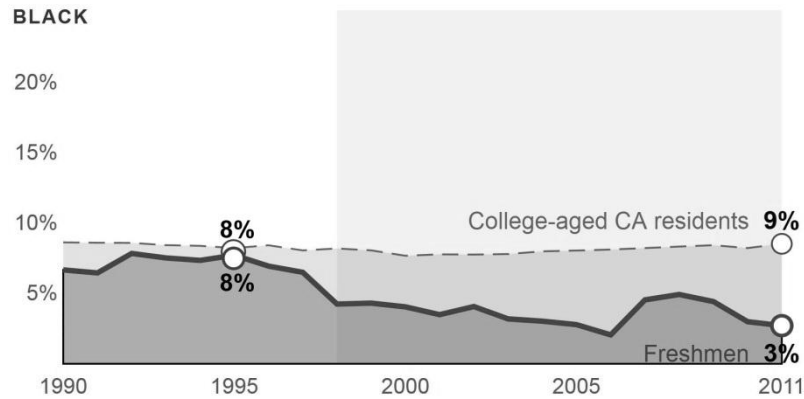
And the proportion of black freshmen among those enrolled at UCLA declined from 8 percent in 1995 to 3 percent in 2011, even though the proportion of black college-aged persons in California increased from 8 percent to 9 percent during that same period. See *ibid.*

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<sup>18</sup> *Ibid.*

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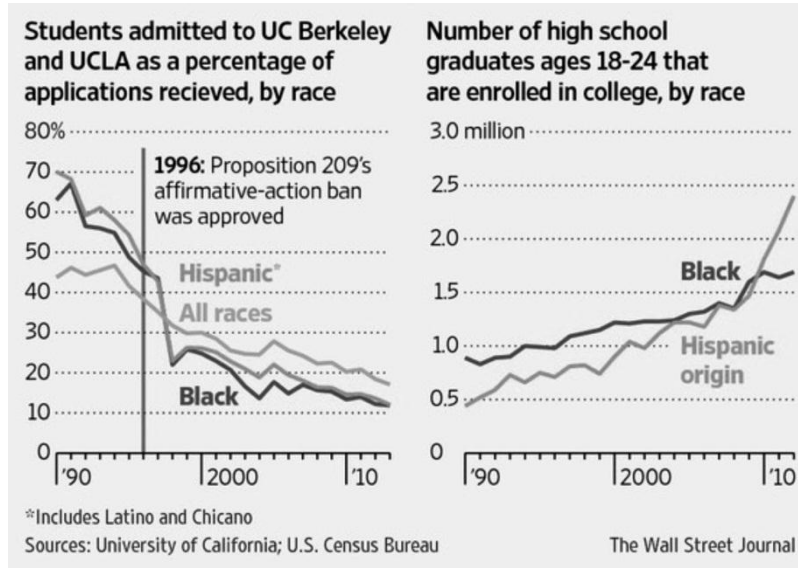
### UCLA Black Students<sup>19</sup>



While the minority admissions rates at UCLA and Berkeley have decreased, the number of minorities enrolled at colleges across the country has increased. See Phillips, *Colleges Straining to Restore Diversity: Bans on Race-Conscious Admissions Upend Racial Makeup at California Schools*, Wall Street Journal, Mar. 7, 2014, p. A3.

<sup>19</sup> *Ibid.*

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**BERKELEY AND UCLA<sup>20</sup>**

The President and Chancellors assure us that they have tried. They tell us that notwithstanding the university's efforts for the past 15 years "to increase diversity on [the University of California's] campuses through the use of race-neutral initiatives," enrollment rates have "not rebounded . . . [or] kept pace with the demographic changes among California's graduating high-school population." President and Chancellors Brief 14. Since Proposition 209 took effect, the university has spent over a half-billion dollars on programs and policies designed to increase diversity. Phillips, *supra*, at A3. Still, it has been unable to meet its diversity goals. *Ibid.* Proposition 209, it says, has "completely changed the character' of the university." *Ibid.* (quoting the Associate President and Chief Policy

<sup>20</sup>This chart is reproduced from Phillips, Colleges Straining to Restore Diversity: Bans on Race-Conscious Admissions Upend Racial Makeup at California Schools, Wall Street Journal, Mar. 7, 2014, p. A3.

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Advisor of the University of California).

## B

These statistics may not influence the views of some of my colleagues, as they question the wisdom of adopting race-sensitive admissions policies and would prefer if our Nation's colleges and universities were to discard those policies altogether. See *ante*, at 2 (ROBERTS, C. J., concurring) (suggesting that race-sensitive admissions policies might “do more harm than good”); *ante*, at 9, n. 6 (SCALIA, J., concurring in judgment); *Grutter*, 539 U. S., at 371–373 (THOMAS, J., concurring in part and dissenting in part); *id.*, at 347–348 (SCALIA, J., concurring in part and dissenting in part). That view is at odds with our recognition in *Grutter*, and more recently in *Fisher v. University of Texas at Austin*, 570 U. S. \_\_\_\_ (2013), that race-sensitive admissions policies are necessary to achieve a diverse student body when race-neutral alternatives have failed. More fundamentally, it ignores the importance of diversity in institutions of higher education and reveals how little my colleagues understand about the reality of race in America.

This Court has recognized that diversity in education is paramount. With good reason. Diversity ensures that the next generation moves beyond the stereotypes, the assumptions, and the superficial perceptions that students coming from less-heterogeneous communities may harbor, consciously or not, about people who do not look like them. Recognizing the need for diversity acknowledges that, “[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.” *Grutter*, 539 U. S., at 333. And it acknowledges that “to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to

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talented and qualified individuals of every race and ethnicity.” *Id.*, at 332.

Colleges and universities must be free to prioritize the goal of diversity. They must be free to immerse their students in a multiracial environment that fosters frequent and meaningful interactions with students of other races, and thereby pushes such students to transcend any assumptions they may hold on the basis of skin color. Without race-sensitive admissions policies, this might well be impossible. The statistics I have described make that fact glaringly obvious. We should not turn a blind eye to something we cannot help but see.

To be clear, I do not mean to suggest that the virtues of adopting race-sensitive admissions policies should inform the legal question before the Court today regarding the constitutionality of §26. But I cannot ignore the unfortunate outcome of today’s decision: Short of amending the State Constitution, a Herculean task, racial minorities in Michigan are deprived of even an opportunity to convince Michigan’s public colleges and universities to consider race in their admissions plans when other attempts to achieve racial diversity have proved unworkable, and those institutions are unnecessarily hobbled in their pursuit of a diverse student body.

\* \* \*

The Constitution does not protect racial minorities from political defeat. But neither does it give the majority free rein to erect selective barriers against racial minorities. The political-process doctrine polices the channels of change to ensure that the majority, when it wins, does so without rigging the rules of the game to ensure its success. Today, the Court discards that doctrine without good reason.

In doing so, it permits the decision of a majority of the voters in Michigan to strip Michigan’s elected university

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boards of their authority to make decisions with respect to constitutionally permissible race-sensitive admissions policies, while preserving the boards' plenary authority to make all other educational decisions. "In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Seattle*, 458 U. S., at 486 (internal quotation marks omitted). The Court abdicates that role, permitting the majority to use its numerical advantage to change the rules mid-contest and forever stack the deck against racial minorities in Michigan. The result is that Michigan's public colleges and universities are less equipped to do their part in ensuring that students of all races are "better prepare[d] . . . for an increasingly diverse workforce and society . . ." *Grutter*, 539 U. S., at 330 (internal quotation marks omitted).

Today's decision eviscerates an important strand of our equal protection jurisprudence. For members of historically marginalized groups, which rely on the federal courts to protect their constitutional rights, the decision can hardly bolster hope for a vision of democracy that preserves for all the right to participate meaningfully and equally in self-government.

I respectfully dissent.

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

## Syllabus

SHELBY COUNTY, ALABAMA *v.* HOLDER, ATTORNEY  
GENERAL, ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

No. 12–96. Argued February 27, 2013—Decided June 25, 2013

The Voting Rights Act of 1965 was enacted to address entrenched racial discrimination in voting, “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.” *South Carolina v. Katzenbach*, 383 U. S. 301, 309. Section 2 of the Act, which bans any “standard, practice, or procedure” that “results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color,” 42 U. S. C. §1973(a), applies nationwide, is permanent, and is not at issue in this case. Other sections apply only to some parts of the country. Section 4 of the Act provides the “coverage formula,” defining the “covered jurisdictions” as States or political subdivisions that maintained tests or devices as prerequisites to voting, and had low voter registration or turnout, in the 1960s and early 1970s. §1973b(b). In those covered jurisdictions, §5 of the Act provides that no change in voting procedures can take effect until approved by specified federal authorities in Washington, D. C. §1973c(a). Such approval is known as “preclearance.”

The coverage formula and preclearance requirement were initially set to expire after five years, but the Act has been reauthorized several times. In 2006, the Act was reauthorized for an additional 25 years, but the coverage formula was not changed. Coverage still turned on whether a jurisdiction had a voting test in the 1960s or 1970s, and had low voter registration or turnout at that time. Shortly after the 2006 reauthorization, a Texas utility district sought to bail out from the Act’s coverage and, in the alternative, challenged the Act’s constitutionality. This Court resolved the challenge on statutory grounds, but expressed serious doubts about the Act’s con-



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tinued constitutionality. See *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U. S. 193.

Petitioner Shelby County, in the covered jurisdiction of Alabama, sued the Attorney General in Federal District Court in Washington, D. C., seeking a declaratory judgment that sections 4(b) and 5 are facially unconstitutional, as well as a permanent injunction against their enforcement. The District Court upheld the Act, finding that the evidence before Congress in 2006 was sufficient to justify reauthorizing §5 and continuing §4(b)’s coverage formula. The D. C. Circuit affirmed. After surveying the evidence in the record, that court accepted Congress’s conclusion that §2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority voters, that §5 was therefore still necessary, and that the coverage formula continued to pass constitutional muster.

*Held:* Section 4 of the Voting Rights Act is unconstitutional; its formula can no longer be used as a basis for subjecting jurisdictions to preclearance. Pp. 9–25.

(a) In *Northwest Austin*, this Court noted that the Voting Rights Act “imposes current burdens and must be justified by current needs” and concluded that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.” 557 U. S., at 203. These basic principles guide review of the question presented here. Pp. 9–17.

(1) State legislation may not contravene federal law. States retain broad autonomy, however, in structuring their governments and pursuing legislative objectives. Indeed, the Tenth Amendment reserves to the States all powers not specifically granted to the Federal Government, including “the power to regulate elections.” *Gregory v. Ashcroft*, 501 U. S. 452, 461–462. There is also a “fundamental principle of equal sovereignty” among the States, which is highly pertinent in assessing disparate treatment of States. *Northwest Austin, supra*, at 203.

The Voting Rights Act sharply departs from these basic principles. It requires States to beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own. And despite the tradition of equal sovereignty, the Act applies to only nine States (and additional counties). That is why, in 1966, this Court described the Act as “stringent” and “potent,” *Katzenbach*, 383 U. S., at 308, 315, 337. The Court nonetheless upheld the Act, concluding that such an “uncommon exercise of congressional power” could be justified by “exceptional conditions.” *Id.*, at 334. Pp. 9–12.

(2) In 1966, these departures were justified by the “blight of ra-

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cial discrimination in voting” that had “infected the electoral process in parts of our country for nearly a century,” *Katzenbach*, 383 U. S., at 308. At the time, the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense. The Act was limited to areas where Congress found “evidence of actual voting discrimination,” and the covered jurisdictions shared two characteristics: “the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average.” *Id.*, at 330. The Court explained that “[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters.” *Ibid.* The Court therefore concluded that “the coverage formula [was] rational in both practice and theory.” *Ibid.* Pp. 12–13.

(3) Nearly 50 years later, things have changed dramatically. Largely because of the Voting Rights Act, “[v]oter turnout and registration rates” in covered jurisdictions “now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” *Northwest Austin, supra*, at 202. The tests and devices that blocked ballot access have been forbidden nationwide for over 40 years. Yet the Act has not eased §5’s restrictions or narrowed the scope of §4’s coverage formula along the way. Instead those extraordinary and unprecedented features have been reauthorized as if nothing has changed, and they have grown even stronger. Because §5 applies only to those jurisdictions singled out by §4, the Court turns to consider that provision. Pp. 13–17.

(b) Section 4’s formula is unconstitutional in light of current conditions. Pp. 17–25.

(1) In 1966, the coverage formula was “rational in both practice and theory.” *Katzenbach, supra*, at 330. It looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both. By 2009, however, the “coverage formula raise[d] serious constitutional questions.” *Northwest Austin, supra*, at 204. Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned for over 40 years. And voter registration and turnout numbers in covered States have risen dramatically. In 1965, the States could be divided into those with a recent history of voting tests and low voter registration and turnout and those without those char-

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acteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were. Pp. 17–18.

(2) The Government attempts to defend the formula on grounds that it is “reverse-engineered”—Congress identified the jurisdictions to be covered and *then* came up with criteria to describe them. *Katzenbach* did not sanction such an approach, reasoning instead that the coverage formula was rational because the “formula . . . was relevant to the problem.” 383 U. S., at 329, 330. The Government has a fallback argument—because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States identified in 1965. But this does not look to “current political conditions,” *Northwest Austin, supra*, at 203, instead relying on a comparison between the States in 1965. But history did not end in 1965. In assessing the “current need[ ]” for a preclearance system treating States differently from one another today, history since 1965 cannot be ignored. The Fifteenth Amendment is not designed to punish for the past; its purpose is to ensure a better future. To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. Pp. 18–21.

(3) Respondents also rely heavily on data from the record compiled by Congress before reauthorizing the Act. Regardless of how one looks at that record, no one can fairly say that it shows anything approaching the “pervasive,” “flagrant,” “widespread,” and “rampant” discrimination that clearly distinguished the covered jurisdictions from the rest of the Nation in 1965. *Katzenbach, supra*, at 308, 315, 331. But a more fundamental problem remains: Congress did not use that record to fashion a coverage formula grounded in current conditions. It instead re-enacted a formula based on 40-year-old facts having no logical relation to the present day. Pp. 21–22.

679 F. 3d 848, reversed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

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**SUPREME COURT OF THE UNITED STATES**

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No. 12–96

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SHELBY COUNTY, ALABAMA, PETITIONER *v.* ERIC  
H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 25, 2013]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And §4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.” *South Carolina v. Katzenbach*, 383 U. S. 301, 309 (1966). As we explained in upholding the law, “exceptional conditions can justify legislative measures not otherwise appropriate.” *Id.*, at 334. Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years. See Voting Rights Act of 1965, §4(a), 79 Stat. 438.

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Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031. There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, “the racial gap in voter registration and turnout [was] lower in the States originally covered by §5 than it [was] nationwide.” *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U. S. 193, 203–204 (2009). Since that time, Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by §5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2012) (Table 4b).

At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act’s extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, “the Act imposes current burdens and must be justified by current needs.” *Northwest Austin*, 557 U. S., at 203.

I  
A

The Fifteenth Amendment was ratified in 1870, in the wake of the Civil War. It provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude,” and it gives Congress the “power to enforce this article by appropriate legislation.”

“The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure.” *Id.*, at 197. In the 1890s, Alabama, Georgia, Louisiana,

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Mississippi, North Carolina, South Carolina, and Virginia began to enact literacy tests for voter registration and to employ other methods designed to prevent African-Americans from voting. *Katzenbach*, 383 U. S., at 310. Congress passed statutes outlawing some of these practices and facilitating litigation against them, but litigation remained slow and expensive, and the States came up with new ways to discriminate as soon as existing ones were struck down. Voter registration of African-Americans barely improved. *Id.*, at 313–314.

Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act. Section 2 was enacted to forbid, in all 50 States, any “standard, practice, or procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color.” 79 Stat. 437. The current version forbids any “standard, practice, or procedure” that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” 42 U. S. C. §1973(a). Both the Federal Government and individuals have sued to enforce §2, see, e.g., *Johnson v. De Grandy*, 512 U. S. 997 (1994), and injunctive relief is available in appropriate cases to block voting laws from going into effect, see 42 U. S. C. §1973j(d). Section 2 is permanent, applies nationwide, and is not at issue in this case.

Other sections targeted only some parts of the country. At the time of the Act’s passage, these “covered” jurisdictions were those States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election. §4(b), 79 Stat. 438. Such tests or devices included literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters, and the like. §4(c), *id.*, at 438–439. A covered jurisdiction could “bail

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out” of coverage if it had not used a test or device in the preceding five years “for the purpose or with the effect of denying or abridging the right to vote on account of race or color.” §4(a), *id.*, at 438. In 1965, the covered States included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. The additional covered subdivisions included 39 counties in North Carolina and one in Arizona. See 28 CFR pt. 51, App. (2012).

In those jurisdictions, §4 of the Act banned all such tests or devices. §4(a), 79 Stat. 438. Section 5 provided that no change in voting procedures could take effect until it was approved by federal authorities in Washington, D. C.—either the Attorney General or a court of three judges. *Id.*, at 439. A jurisdiction could obtain such “preclearance” only by proving that the change had neither “the purpose [nor] the effect of denying or abridging the right to vote on account of race or color.” *Ibid.*

Sections 4 and 5 were intended to be temporary; they were set to expire after five years. See §4(a), *id.*, at 438; *Northwest Austin, supra*, at 199. In *South Carolina v. Katzenbach*, we upheld the 1965 Act against constitutional challenge, explaining that it was justified to address “voting discrimination where it persists on a pervasive scale.” 383 U. S., at 308.

In 1970, Congress reauthorized the Act for another five years, and extended the coverage formula in §4(b) to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1968. Voting Rights Act Amendments of 1970, §§3–4, 84 Stat. 315. That swept in several counties in California, New Hampshire, and New York. See 28 CFR pt. 51, App. Congress also extended the ban in §4(a) on tests and devices nationwide. §6, 84 Stat. 315.

In 1975, Congress reauthorized the Act for seven more years, and extended its coverage to jurisdictions that had a voting test and less than 50 percent voter registration or

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turnout as of 1972. Voting Rights Act Amendments of 1975, §§101, 202, 89 Stat. 400, 401. Congress also amended the definition of “test or device” to include the practice of providing English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English. §203, *id.*, at 401–402. As a result of these amendments, the States of Alaska, Arizona, and Texas, as well as several counties in California, Florida, Michigan, New York, North Carolina, and South Dakota, became covered jurisdictions. See 28 CFR pt. 51, App. Congress correspondingly amended sections 2 and 5 to forbid voting discrimination on the basis of membership in a language minority group, in addition to discrimination on the basis of race or color. §§203, 206, 89 Stat. 401, 402. Finally, Congress made the nationwide ban on tests and devices permanent. §102, *id.*, at 400.

In 1982, Congress reauthorized the Act for 25 years, but did not alter its coverage formula. See Voting Rights Act Amendments, 96 Stat. 131. Congress did, however, amend the bailout provisions, allowing political subdivisions of covered jurisdictions to bail out. Among other prerequisites for bailout, jurisdictions and their subdivisions must not have used a forbidden test or device, failed to receive preclearance, or lost a §2 suit, in the ten years prior to seeking bailout. §2, *id.*, at 131–133.

We upheld each of these reauthorizations against constitutional challenge. See *Georgia v. United States*, 411 U. S. 526 (1973); *City of Rome v. United States*, 446 U. S. 156 (1980); *Lopez v. Monterey County*, 525 U. S. 266 (1999).

In 2006, Congress again reauthorized the Voting Rights Act for 25 years, again without change to its coverage formula. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, 120 Stat. 577. Congress also amended §5 to prohibit more conduct than before. §5, *id.*, at 580–



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581; see *Reno v. Bossier Parish School Bd.*, 528 U. S. 320, 341 (2000) (*Bossier II*); *Georgia v. Ashcroft*, 539 U. S. 461, 479 (2003). Section 5 now forbids voting changes with “any discriminatory purpose” as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, “to elect their preferred candidates of choice.” 42 U. S. C. §§1973c(b)–(d).

Shortly after this reauthorization, a Texas utility district brought suit, seeking to bail out from the Act’s coverage and, in the alternative, challenging the Act’s constitutionality. See *Northwest Austin*, 557 U. S., at 200–201. A three-judge District Court explained that only a State or political subdivision was eligible to seek bailout under the statute, and concluded that the utility district was not a political subdivision, a term that encompassed only “counties, parishes, and voter-registering subunits.” *Northwest Austin Municipal Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 232 (DC 2008). The District Court also rejected the constitutional challenge. *Id.*, at 283.

We reversed. We explained that “normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.” *Northwest Austin*, *supra*, at 205 (quoting *Escambia County v. McMillan*, 466 U. S. 48, 51 (1984) (*per curiam*)). Concluding that “underlying constitutional concerns,” among other things, “compel[led] a broader reading of the bailout provision,” we construed the statute to allow the utility district to seek bailout. *Northwest Austin*, 557 U. S., at 207. In doing so we expressed serious doubts about the Act’s continued constitutionality.

We explained that §5 “imposes substantial federalism costs” and “differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty.” *Id.*, at 202, 203 (internal quotation marks omitted). We also noted that “[t]hings have changed in the South. Voter turnout and registration rates now approach parity.

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Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” *Id.*, at 202. Finally, we questioned whether the problems that §5 meant to address were still “concentrated in the jurisdictions singled out for preclearance.” *Id.*, at 203.

Eight Members of the Court subscribed to these views, and the remaining Member would have held the Act unconstitutional. Ultimately, however, the Court’s construction of the bailout provision left the constitutional issues for another day.

## B

Shelby County is located in Alabama, a covered jurisdiction. It has not sought bailout, as the Attorney General has recently objected to voting changes proposed from within the county. See App. 87a–92a. Instead, in 2010, the county sued the Attorney General in Federal District Court in Washington, D. C., seeking a declaratory judgment that sections 4(b) and 5 of the Voting Rights Act are facially unconstitutional, as well as a permanent injunction against their enforcement. The District Court ruled against the county and upheld the Act. 811 F. Supp. 2d 424, 508 (2011). The court found that the evidence before Congress in 2006 was sufficient to justify reauthorizing §5 and continuing the §4(b) coverage formula.

The Court of Appeals for the D. C. Circuit affirmed. In assessing §5, the D. C. Circuit considered six primary categories of evidence: Attorney General objections to voting changes, Attorney General requests for more information regarding voting changes, successful §2 suits in covered jurisdictions, the dispatching of federal observers to monitor elections in covered jurisdictions, §5 preclearance suits involving covered jurisdictions, and the deterrent effect of §5. See 679 F. 3d 848, 862–863 (2012). After extensive analysis of the record, the court accepted Con-

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gress’s conclusion that §2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority voters, and that §5 was therefore still necessary. *Id.*, at 873.

Turning to §4, the D. C. Circuit noted that the evidence for singling out the covered jurisdictions was “less robust” and that the issue presented “a close question.” *Id.*, at 879. But the court looked to data comparing the number of successful §2 suits in the different parts of the country. Coupling that evidence with the deterrent effect of §5, the court concluded that the statute continued “to single out the jurisdictions in which discrimination is concentrated,” and thus held that the coverage formula passed constitutional muster. *Id.*, at 883.

Judge Williams dissented. He found “no positive correlation between inclusion in §4(b)’s coverage formula and low black registration or turnout.” *Id.*, at 891. Rather, to the extent there was any correlation, it actually went the other way: “condemnation under §4(b) is a marker of *higher* black registration and turnout.” *Ibid.* (emphasis added). Judge Williams also found that “[c]overed jurisdictions have *far more* black officeholders as a proportion of the black population than do uncovered ones.” *Id.*, at 892. As to the evidence of successful §2 suits, Judge Williams disaggregated the reported cases by State, and concluded that “[t]he five worst uncovered jurisdictions . . . have worse records than eight of the covered jurisdictions.” *Id.*, at 897. He also noted that two covered jurisdictions—Arizona and Alaska—had not had any successful reported §2 suit brought against them during the entire 24 years covered by the data. *Ibid.* Judge Williams would have held the coverage formula of §4(b) “irrational” and unconstitutional. *Id.*, at 885.

We granted certiorari. 568 U. S. \_\_\_\_ (2012).

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## II

In *Northwest Austin*, we stated that “the Act imposes current burdens and must be justified by current needs.” 557 U. S., at 203. And we concluded that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.” *Ibid.* These basic principles guide our review of the question before us.<sup>1</sup>

## A

The Constitution and laws of the United States are “the supreme Law of the Land.” U. S. Const., Art. VI, cl. 2. State legislation may not contravene federal law. The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect. A proposal to grant such authority to “negative” state laws was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause. See 1 Records of the Federal Convention of 1787, pp. 21, 164–168 (M. Farrand ed. 1911); 2 *id.*, at 27–29, 390–392.

Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. Amdt. 10. This “allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.” *Bond v. United States*, 564 U. S. \_\_\_, \_\_\_\_

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<sup>1</sup>Both the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin*, see Juris. Statement i, and Brief for Federal Appellee 29–30, in *Northwest Austin Municipal Util. Dist. No. One v. Holder*, O. T. 2008, No. 08–322, and accordingly *Northwest Austin* guides our review under both Amendments in this case.

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(2011) (slip op., at 9). But the federal balance “is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *Ibid.* (internal quotation marks omitted).

More specifically, “the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.” *Gregory v. Ashcroft*, 501 U. S. 452, 461–462 (1991) (quoting *Sugarman v. Dougall*, 413 U. S. 634, 647 (1973); some internal quotation marks omitted). Of course, the Federal Government retains significant control over federal elections. For instance, the Constitution authorizes Congress to establish the time and manner for electing Senators and Representatives. Art. I, §4, cl. 1; see also *Arizona v. Inter Tribal Council of Ariz., Inc.*, *ante*, at 4–6. But States have “broad powers to determine the conditions under which the right of suffrage may be exercised.” *Carrington v. Rash*, 380 U. S. 89, 91 (1965) (internal quotation marks omitted); see also *Arizona*, *ante*, at 13–15. And “[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.” *Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 135, 161 (1892). Drawing lines for congressional districts is likewise “primarily the duty and responsibility of the State.” *Perry v. Perez*, 565 U. S. \_\_\_, \_\_\_ (2012) (*per curiam*) (slip op., at 3) (internal quotation marks omitted).

Not only do States retain sovereignty under the Constitution, there is also a “fundamental principle of *equal* sovereignty” among the States. *Northwest Austin*, *supra*, at 203 (citing *United States v. Louisiana*, 363 U. S. 1, 16 (1960); *Lessee of Pollard v. Hagan*, 3 How. 212, 223 (1845); and *Texas v. White*, 7 Wall. 700, 725–726 (1869); emphasis added). Over a hundred years ago, this Court explained that our Nation “was and is a union of States, equal in power, dignity and authority.” *Coyle v. Smith*, 221 U. S. 559, 567 (1911). Indeed, “the constitutional equality of the

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States is essential to the harmonious operation of the scheme upon which the Republic was organized.” *Id.*, at 580. *Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle operated as a *bar* on differential treatment outside that context. 383 U. S., at 328–329. At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States. 557 U. S., at 203.

The Voting Rights Act sharply departs from these basic principles. It suspends “*all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D. C.” *Id.*, at 202. States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own, subject of course to any injunction in a §2 action. The Attorney General has 60 days to object to a preclearance request, longer if he requests more information. See 28 CFR §§51.9, 51.37. If a State seeks preclearance from a three-judge court, the process can take years.

And despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process. Even if a noncovered jurisdiction is sued, there are important differences between those proceedings and preclearance proceedings; the preclearance proceeding “not only switches the burden of proof to the suppliant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation.” 679 F. 3d, at 884 (Williams, J., dissenting) (case below).

All this explains why, when we first upheld the Act in 1966, we described it as “stringent” and “potent.” *Katzen-*

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*bach*, 383 U. S., at 308, 315, 337. We recognized that it “may have been an uncommon exercise of congressional power,” but concluded that “legislative measures not otherwise appropriate” could be justified by “exceptional conditions.” *Id.*, at 334. We have since noted that the Act “authorizes federal intrusion into sensitive areas of state and local policymaking,” *Lopez*, 525 U. S., at 282, and represents an “extraordinary departure from the traditional course of relations between the States and the Federal Government,” *Presley v. Etowah County Comm’n*, 502 U. S. 491, 500–501 (1992). As we reiterated in *Northwest Austin*, the Act constitutes “extraordinary legislation otherwise unfamiliar to our federal system.” 557 U. S., at 211.

## B

In 1966, we found these departures from the basic features of our system of government justified. The “blight of racial discrimination in voting” had “infected the electoral process in parts of our country for nearly a century.” *Katzenbach*, 383 U. S., at 308. Several States had enacted a variety of requirements and tests “specifically designed to prevent” African-Americans from voting. *Id.*, at 310. Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States “merely switched to discriminatory devices not covered by the federal decrees,” “enacted difficult new tests,” or simply “defied and evaded court orders.” *Id.*, at 314. Shortly before enactment of the Voting Rights Act, only 19.4 percent of African-Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. *Id.*, at 313. Those figures were roughly 50 percentage points or more below the figures for whites. *Ibid.*

In short, we concluded that “[u]nder the compulsion of these unique circumstances, Congress responded in a

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permissibly decisive manner.” *Id.*, at 334, 335. We also noted then and have emphasized since that this extraordinary legislation was intended to be temporary, set to expire after five years. *Id.*, at 333; *Northwest Austin, supra*, at 199.

At the time, the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense. We found that “Congress chose to limit its attention to the geographic areas where immediate action seemed necessary.” *Katzenbach*, 383 U. S., at 328. The areas where Congress found “evidence of actual voting discrimination” shared two characteristics: “the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average.” *Id.*, at 330. We explained that “[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters.” *Ibid.* We therefore concluded that “the coverage formula [was] rational in both practice and theory.” *Ibid.* It accurately reflected those jurisdictions uniquely characterized by voting discrimination “on a pervasive scale,” linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement. *Id.*, at 308. The formula ensured that the “stringent remedies [were] aimed at areas where voting discrimination ha[d] been most flagrant.” *Id.*, at 315.

## C

Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, “[v]oter turnout and



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registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” *Northwest Austin*, 557 U. S., at 202. The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years. See §6, 84 Stat. 315; §102, 89 Stat. 400.

Those conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that “[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices.” §2(b)(1), 120 Stat. 577. The House Report elaborated that “the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982,” and noted that “[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters.” H. R. Rep. No. 109–478, p. 12 (2006). That Report also explained that there have been “significant increases in the number of African-Americans serving in elected offices”; more specifically, there has been approximately a 1,000 percent increase since 1965 in the number of African-American elected officials in the six States originally covered by the Voting Rights Act. *Id.*, at 18.

The following chart, compiled from the Senate and House Reports, compares voter registration numbers from 1965 to those from 2004 in the six originally covered States. These are the numbers that were before Congress when it reauthorized the Act in 2006:

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	1965			2004		
	White	Black	Gap	White	Black	Gap
Alabama	69.2	19.3	49.9	73.8	72.9	0.9
Georgia	62.[6]	27.4	35.2	63.5	64.2	-0.7
Louisiana	80.5	31.6	48.9	75.1	71.1	4.0
Mississippi	69.9	6.7	63.2	72.3	76.1	-3.8
South Carolina	75.7	37.3	38.4	74.4	71.1	3.3
Virginia	61.1	38.3	22.8	68.2	57.4	10.8

See S. Rep. No. 109–295, p. 11 (2006); H. R. Rep. No. 109–478, at 12. The 2004 figures come from the Census Bureau. Census Bureau data from the most recent election indicate that African-American voter turnout exceeded white voter turnout in five of the six States originally covered by §5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Table 4b). The preclearance statistics are also illuminating. In the first decade after enactment of §5, the Attorney General objected to 14.2 percent of proposed voting changes. H. R. Rep. No. 109–478, at 22. In the last decade before reenactment, the Attorney General objected to a mere 0.16 percent. S. Rep. No. 109–295, at 13.

There is no doubt that these improvements are in large part *because of* the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process. See §2(b)(1), 120 Stat. 577. During the “Freedom Summer” of 1964, in Philadelphia, Mississippi, three men were murdered while working in the area to register African-American voters. See *United States v. Price*, 383 U. S. 787, 790 (1966). On “Bloody Sunday” in 1965, in Selma, Alabama, police beat

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and used tear gas against hundreds marching in support of African-American enfranchisement. See *Northwest Austin, supra*, at 220, n. 3 (THOMAS, J., concurring in judgment in part and dissenting in part). Today both of those towns are governed by African-American mayors. Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides.

Yet the Act has not eased the restrictions in §5 or narrowed the scope of the coverage formula in §4(b) along the way. Those extraordinary and unprecedented features were reauthorized—as if nothing had changed. In fact, the Act’s unusual remedies have grown even stronger. When Congress reauthorized the Act in 2006, it did so for another 25 years on top of the previous 40—a far cry from the initial five-year period. See 42 U. S. C. §1973b(a)(8). Congress also expanded the prohibitions in §5. We had previously interpreted §5 to prohibit only those redistricting plans that would have the purpose or effect of worsening the position of minority groups. See *Bossier II*, 528 U. S., at 324, 335–336. In 2006, Congress amended §5 to prohibit laws that could have favored such groups but did not do so because of a discriminatory purpose, see 42 U. S. C. §1973c(c), even though we had stated that such broadening of §5 coverage would “exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about §5’s constitutionality,” *Bossier II, supra*, at 336 (citation and internal quotation marks omitted). In addition, Congress expanded §5 to prohibit any voting law “that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States,” on account of race, color, or language minority status, “to elect their preferred candidates of choice.” §1973c(b). In light of those two amendments, the bar that covered jurisdictions must clear has been raised even as the conditions

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justifying that requirement have dramatically improved.

We have also previously highlighted the concern that “the preclearance requirements in one State [might] be unconstitutional in another.” *Northwest Austin*, 557 U. S., at 203; see *Georgia v. Ashcroft*, 539 U. S., at 491 (KENNEDY, J., concurring) (“considerations of race that would doom a redistricting plan under the Fourteenth Amendment or §2 [of the Voting Rights Act] seem to be what save it under §5”). Nothing has happened since to alleviate this troubling concern about the current application of §5.

Respondents do not deny that there have been improvements on the ground, but argue that much of this can be attributed to the deterrent effect of §5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should §5 be struck down. Under this theory, however, §5 would be effectively immune from scrutiny; no matter how “clean” the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior.

The provisions of §5 apply only to those jurisdictions singled out by §4. We now consider whether that coverage formula is constitutional in light of current conditions.

### III A

When upholding the constitutionality of the coverage formula in 1966, we concluded that it was “rational in both practice and theory.” *Katzenbach*, 383 U. S., at 330. The formula looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both.

By 2009, however, we concluded that the “coverage formula raise[d] serious constitutional questions.” *North-*

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*west Austin*, 557 U. S., at 204. As we explained, a statute’s “current burdens” must be justified by “current needs,” and any “disparate geographic coverage” must be “sufficiently related to the problem that it targets.” *Id.*, at 203. The coverage formula met that test in 1965, but no longer does so.

Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. §6, 84 Stat. 315; §102, 89 Stat. 400. And voter registration and turnout numbers in the covered States have risen dramatically in the years since. H. R. Rep. No. 109–478, at 12. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. See, e.g., *Katzenbach*, *supra*, at 313, 329–330. There is no longer such a disparity.

In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.

## B

The Government’s defense of the formula is limited. First, the Government contends that the formula is “reverse-engineered”: Congress identified the jurisdictions to be covered and *then* came up with criteria to describe them. Brief for Federal Respondent 48–49. Under that reasoning, there need not be any logical relationship between the criteria in the formula and the reason for coverage; all that is necessary is that the formula happen to capture the jurisdictions Congress wanted to single out.

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The Government suggests that *Katzenbach* sanctioned such an approach, but the analysis in *Katzenbach* was quite different. *Katzenbach* reasoned that the coverage formula was rational because the “formula . . . was relevant to the problem”: “Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters.” 383 U. S., at 329, 330.

Here, by contrast, the Government’s reverse-engineering argument does not even attempt to demonstrate the continued relevance of the formula to the problem it targets. And in the context of a decision as significant as this one—subjecting a disfavored subset of States to “extraordinary legislation otherwise unfamiliar to our federal system,” *Northwest Austin, supra*, at 211—that failure to establish even relevance is fatal.

The Government falls back to the argument that because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States Congress identified back then—regardless of how that discrimination compares to discrimination in States unburdened by coverage. Brief for Federal Respondent 49–50. This argument does not look to “current political conditions,” *Northwest Austin, supra*, at 203, but instead relies on a comparison between the States in 1965. That comparison reflected the different histories of the North and South. It was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African-Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race. The Court invoked that history—rightly so—in sustaining the disparate coverage of the Voting Rights Act in 1966. See *Katzenbach, supra*, at 308 (“The constitutional propriety of

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the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.”).

But history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the “current need[]” for a preclearance system that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.

The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future. See *Rice v. Cayetano*, 528 U. S. 495, 512 (2000) (“Consistent with the design of the Constitution, the [Fifteenth] Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment.”). To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. We made that clear in *Northwest Austin*, and we make it clear again today.

## C

In defending the coverage formula, the Government, the intervenors, and the dissent also rely heavily on data from the record that they claim justify disparate coverage. Congress compiled thousands of pages of evidence before

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reauthorizing the Voting Rights Act. The court below and the parties have debated what that record shows—they have gone back and forth about whether to compare covered to noncovered jurisdictions as blocks, how to disaggregate the data State by State, how to weigh §2 cases as evidence of ongoing discrimination, and whether to consider evidence not before Congress, among other issues. Compare, *e.g.*, 679 F. 3d, at 873–883 (case below), with *id.*, at 889–902 (Williams, J., dissenting). Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the “pervasive,” “flagrant,” “widespread,” and “rampant” discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time. *Katzenbach, supra*, at 308, 315, 331; *Northwest Austin*, 557 U. S., at 201.

But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day. The dissent relies on “second-generation barriers,” which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the §4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution. We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress. Contrary to the dissent’s contention, see *post*, at 23, we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.

The dissent also turns to the record to argue that, in



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light of voting discrimination in Shelby County, the county cannot complain about the provisions that subject it to preclearance. *Post*, at 23–30. But that is like saying that a driver pulled over pursuant to a policy of stopping all redheads cannot complain about that policy, if it turns out his license has expired. Shelby County’s claim is that the coverage formula here is unconstitutional in all its applications, because of how it selects the jurisdictions subjected to preclearance. The county was selected based on that formula, and may challenge it in court.

## D

The dissent proceeds from a flawed premise. It quotes the famous sentence from *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819), with the following emphasis: “Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end*, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *Post*, at 9 (emphasis in dissent). But this case is about a part of the sentence that the dissent does not emphasize—the part that asks whether a legislative means is “consist[ent] with the letter and spirit of the constitution.” The dissent states that “[i]t cannot tenably be maintained” that this is an issue with regard to the Voting Rights Act, *post*, at 9, but four years ago, in an opinion joined by two of today’s dissenters, the Court expressly stated that “[t]he Act’s preclearance requirement and its coverage formula raise serious constitutional questions.” *Northwest Austin, supra*, at 204. The dissent does not explain how those “serious constitutional questions” became untenable in four short years.

The dissent treats the Act as if it were just like any other piece of legislation, but this Court has made clear from the beginning that the Voting Rights Act is far from ordinary. At the risk of repetition, *Katzenbach* indicated

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that the Act was “uncommon” and “not otherwise appropriate,” but was justified by “exceptional” and “unique” conditions. 383 U. S., at 334, 335. Multiple decisions since have reaffirmed the Act’s “extraordinary” nature. See, e.g., *Northwest Austin*, *supra*, at 211. Yet the dissent goes so far as to suggest instead that the preclearance requirement and disparate treatment of the States should be upheld into the future “unless there [is] no or almost no evidence of unconstitutional action by States.” *Post*, at 33.

In other ways as well, the dissent analyzes the question presented as if our decision in *Northwest Austin* never happened. For example, the dissent refuses to consider the principle of equal sovereignty, despite *Northwest Austin*’s emphasis on its significance. *Northwest Austin* also emphasized the “dramatic” progress since 1965, 557 U. S., at 201, but the dissent describes current levels of discrimination as “flagrant,” “widespread,” and “pervasive,” *post*, at 7, 17 (internal quotation marks omitted). Despite the fact that *Northwest Austin* requires an Act’s “disparate geographic coverage” to be “sufficiently related” to its targeted problems, 557 U. S., at 203, the dissent maintains that an Act’s limited coverage actually eases Congress’s burdens, and suggests that a fortuitous relationship should suffice. Although *Northwest Austin* stated definitively that “current burdens” must be justified by “current needs,” *ibid.*, the dissent argues that the coverage formula can be justified by history, and that the required showing can be weaker on reenactment than when the law was first passed.

There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today’s statistics tell an

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entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.

\* \* \*

Striking down an Act of Congress “is the gravest and most delicate duty that this Court is called on to perform.” *Blodgett v. Holden*, 275 U. S. 142, 148 (1927) (Holmes, J., concurring). We do not do so lightly. That is why, in 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare §4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.

Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2. We issue no holding on §5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an “extraordinary departure from the traditional course of relations between the States and the Federal Government.” *Presley*, 502 U. S., at 500–501. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

The judgment of the Court of Appeals is reversed.

*It is so ordered.*

THOMAS, J., concurring

**SUPREME COURT OF THE UNITED  
STATES**

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No. 12–96

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SHELBY COUNTY, ALABAMA, PETITIONER *v.* ERIC  
H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 25, 2013]

JUSTICE THOMAS, concurring.

I join the Court’s opinion in full but write separately to explain that I would find §5 of the Voting Rights Act unconstitutional as well. The Court’s opinion sets forth the reasons.

“The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem.” *Ante*, at 1. In the face of “unremitting and ingenious defiance” of citizens’ constitutionally protected right to vote, §5 was necessary to give effect to the Fifteenth Amendment in particular regions of the country. *South Carolina v. Katzenbach*, 383 U. S. 301, 309 (1966). Though §5’s preclearance requirement represented a “shar[p] depart[ure]” from “basic principles” of federalism and the equal sovereignty of the States, *ante*, at 9, 11, the Court upheld the measure against early constitutional challenges because it was necessary at the time to address “voting discrimination where it persist[ed] on a pervasive scale.” *Katzenbach, supra*, at 308.

Today, our Nation has changed. “[T]he conditions that originally justified [§5] no longer characterize voting in the covered jurisdictions.” *Ante*, at 2. As the Court explains: “[V]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal de-

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crees are rare. And minority candidates hold office at unprecedented levels.” *Ante*, at 13–14 (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U. S. 193, 202 (2009)).

In spite of these improvements, however, Congress *increased* the already significant burdens of §5. Following its reenactment in 2006, the Voting Rights Act was amended to “prohibit more conduct than before.” *Ante*, at 5. “Section 5 now forbids voting changes with ‘any discriminatory purpose’ as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, ‘to elect their preferred candidates of choice.’” *Ante*, at 6. While the pre-2006 version of the Act went well beyond protection guaranteed under the Constitution, see *Reno v. Bossier Parish School Bd.*, 520 U. S. 471, 480–482 (1997), it now goes even further.

It is, thus, quite fitting that the Court repeatedly points out that this legislation is “extraordinary” and “unprecedented” and recognizes the significant constitutional problems created by Congress’ decision to raise “the bar that covered jurisdictions must clear,” even as “the conditions justifying that requirement have dramatically improved.” *Ante*, at 16–17. However one aggregates the data compiled by Congress, it cannot justify the considerable burdens created by §5. As the Court aptly notes: “[N]o one can fairly say that [the record] shows anything approaching the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.” *Ante*, at 21. Indeed, circumstances in the covered jurisdictions can no longer be characterized as “exceptional” or “unique.” “The extensive pattern of discrimination that led the Court to previously uphold §5 as enforcing the Fifteenth Amendment no longer exists.” *Northwest Austin*, *supra*, at 226 (THOMAS, J., concurring in judgment in part and dissenting in part).

THOMAS, J., concurring

Section 5 is, thus, unconstitutional.

While the Court claims to “issue no holding on §5 itself,” *ante*, at 24, its own opinion compellingly demonstrates that Congress has failed to justify “‘current burdens’” with a record demonstrating “‘current needs.’” See *ante*, at 9 (quoting *Northwest Austin, supra*, at 203). By leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision. For the reasons stated in the Court’s opinion, I would find §5 unconstitutional.

GINSBURG, J., dissenting

## SUPREME COURT OF THE UNITED STATES

No. 12–96

SHELBY COUNTY, ALABAMA, PETITIONER *v.* ERIC  
H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 25, 2013]

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

In the Court’s view, the very success of §5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, §5 remains justifiable,<sup>1</sup> this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments “by appropriate legislation.” With overwhelming support in both Houses, Congress concluded that, for two prime reasons, §5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those assessments were well within Congress’ province to make and should elicit this Court’s unstinting approbation.

### I

“[V]oting discrimination still exists; no one doubts that.”

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<sup>1</sup>The Court purports to declare unconstitutional only the coverage formula set out in §4(b). See *ante*, at 24. But without that formula, §5 is immobilized.

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*Ante*, at 2. But the Court today terminates the remedy that proved to be best suited to block that discrimination. The Voting Rights Act of 1965 (VRA) has worked to combat voting discrimination where other remedies had been tried and failed. Particularly effective is the VRA’s requirement of federal preclearance for all changes to voting laws in the regions of the country with the most aggravated records of rank discrimination against minority voting rights.

A century after the Fourteenth and Fifteenth Amendments guaranteed citizens the right to vote free of discrimination on the basis of race, the “blight of racial discrimination in voting” continued to “infec[t] the electoral process in parts of our country.” *South Carolina v. Katzenbach*, 383 U. S. 301, 308 (1966). Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place. This Court repeatedly encountered the remarkable “variety and persistence” of laws disenfranchising minority citizens. *Id.*, at 311. To take just one example, the Court, in 1927, held unconstitutional a Texas law barring black voters from participating in primary elections, *Nixon v. Herndon*, 273 U. S. 536, 541; in 1944, the Court struck down a “reenacted” and slightly altered version of the same law, *Smith v. Allwright*, 321 U. S. 649, 658; and in 1953, the Court once again confronted an attempt by Texas to “circumven[t]” the Fifteenth Amendment by adopting yet another variant of the all-white primary, *Terry v. Adams*, 345 U. S. 461, 469.

During this era, the Court recognized that discrimination against minority voters was a quintessentially political problem requiring a political solution. As Justice Holmes explained: If “the great mass of the white population intends to keep the blacks from voting,” “relief from [that] great political wrong, if done, as alleged, by the



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people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.” *Giles v. Harris*, 189 U. S. 475, 488 (1903).

Congress learned from experience that laws targeting particular electoral practices or enabling case-by-case litigation were inadequate to the task. In the Civil Rights Acts of 1957, 1960, and 1964, Congress authorized and then expanded the power of “the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds.” *Katzenbach*, 383 U. S., at 313. But circumstances reduced the ameliorative potential of these legislative Acts:

“Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls.” *Id.*, at 314 (footnote omitted).

Patently, a new approach was needed.

Answering that need, the Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation’s history. Requiring federal preclearance of changes in voting laws in the covered jurisdictions—those States and localities where opposition to the Constitution’s commands were

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most virulent—the VRA provided a fit solution for minority voters as well as for States. Under the preclearance regime established by §5 of the VRA, covered jurisdictions must submit proposed changes in voting laws or procedures to the Department of Justice (DOJ), which has 60 days to respond to the changes. 79 Stat. 439, codified at 42 U. S. C. §1973c(a). A change will be approved unless DOJ finds it has “the purpose [or] . . . the effect of denying or abridging the right to vote on account of race or color.” *Ibid.* In the alternative, the covered jurisdiction may seek approval by a three-judge District Court in the District of Columbia.

After a century’s failure to fulfill the promise of the Fourteenth and Fifteenth Amendments, passage of the VRA finally led to signal improvement on this front. “The Justice Department estimated that in the five years after [the VRA’s] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965.” Davidson, *The Voting Rights Act: A Brief History*, in *Controversies in Minority Voting* 7, 21 (B. Grofman & C. Davidson eds. 1992). And in assessing the overall effects of the VRA in 2006, Congress found that “[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965.” Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (hereinafter 2006 Reauthorization), §2(b)(1), 120 Stat. 577. On that matter of cause and effects there can be no genuine doubt.

Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date,

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surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens. Jurisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve, auguring that barriers to minority voting would quickly resurface were the preclearance remedy eliminated. *City of Rome v. United States*, 446 U. S. 156, 181 (1980). Congress also found that as “registration and voting of minority citizens increas[ed], other measures may be resorted to which would dilute increasing minority voting strength.” *Ibid.* (quoting H. R. Rep. No. 94–196, p. 10 (1975)). See also *Shaw v. Reno*, 509 U. S. 630, 640 (1993) (“[I]t soon became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices” such as voting dilution). Efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as “second-generation barriers” to minority voting.

Second-generation barriers come in various forms. One of the blockages is racial gerrymandering, the redrawing of legislative districts in an “effort to segregate the races for purposes of voting.” *Id.*, at 642. Another is adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority. By switching to at-large voting, the overall majority could control the election of each city council member, effectively eliminating the potency of the minority’s votes. Grofman & Davidson, *The Effect of Municipal Election Structure on Black Representation in Eight Southern States*, in *Quiet Revolution in the South* 301, 319 (C. Davidson & B. Grofman eds. 1994) (hereinafter *Quiet Revolution*). A similar effect could be achieved if the city engaged in discriminatory annexation by incorporating majority-white areas into city limits, thereby decreasing the effect

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of VRA-occasioned increases in black voting. Whatever the device employed, this Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot. *Shaw*, 509 U. S., at 640–641; *Allen v. State Bd. of Elections*, 393 U. S. 544, 569 (1969); *Reynolds v. Sims*, 377 U. S. 533, 555 (1964). See also H. R. Rep. No. 109–478, p. 6 (2006) (although “[d]iscrimination today is more subtle than the visible methods used in 1965,” “the effect and results are the same, namely a diminishing of the minority community’s ability to fully participate in the electoral process and to elect their preferred candidates”).

In response to evidence of these substituted barriers, Congress reauthorized the VRA for five years in 1970, for seven years in 1975, and for 25 years in 1982. *Ante*, at 4–5. Each time, this Court upheld the reauthorization as a valid exercise of congressional power. *Ante*, at 5. As the 1982 reauthorization approached its 2007 expiration date, Congress again considered whether the VRA’s preclearance mechanism remained an appropriate response to the problem of voting discrimination in covered jurisdictions.

Congress did not take this task lightly. Quite the opposite. The 109th Congress that took responsibility for the renewal started early and conscientiously. In October 2005, the House began extensive hearings, which continued into November and resumed in March 2006. S. Rep. No. 109–295, p. 2 (2006). In April 2006, the Senate followed suit, with hearings of its own. *Ibid.* In May 2006, the bills that became the VRA’s reauthorization were introduced in both Houses. *Ibid.* The House held further hearings of considerable length, as did the Senate, which continued to hold hearings into June and July. H. R. Rep. 109–478, at 5; S. Rep. 109–295, at 3–4. In mid-July, the House considered and rejected four amendments, then passed the reauthorization by a vote of 390 yeas to 33 nays. 152 Cong. Rec. H5207 (July 13, 2006); Persily, *The*

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Promise and Pitfalls of the New Voting Rights Act, 117 Yale L. J. 174, 182–183 (2007) (hereinafter Persily). The bill was read and debated in the Senate, where it passed by a vote of 98 to 0. 152 Cong. Rec. S8012 (July 20, 2006). President Bush signed it a week later, on July 27, 2006, recognizing the need for “further work . . . in the fight against injustice,” and calling the reauthorization “an example of our continued commitment to a united America where every person is valued and treated with dignity and respect.” 152 Cong. Rec. S8781 (Aug. 3, 2006).

In the long course of the legislative process, Congress “amassed a sizable record.” *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U. S. 193, 205 (2009). See also 679 F. 3d 848, 865–873 (CA5 2012) (describing the “extensive record” supporting Congress’ determination that “serious and widespread intentional discrimination persisted in covered jurisdictions”). The House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages. H. R. Rep. 109–478, at 5, 11–12; S. Rep. 109–295, at 2–4, 15. The compilation presents countless “examples of flagrant racial discrimination” since the last reauthorization; Congress also brought to light systematic evidence that “intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed.” 679 F. 3d, at 866.

After considering the full legislative record, Congress made the following findings: The VRA has directly caused significant progress in eliminating first-generation barriers to ballot access, leading to a marked increase in minority voter registration and turnout and the number of minority elected officials. 2006 Reauthorization §2(b)(1). But despite this progress, “second generation barriers

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constructed to prevent minority voters from fully participating in the electoral process” continued to exist, as well as racially polarized voting in the covered jurisdictions, which increased the political vulnerability of racial and language minorities in those jurisdictions. §§2(b)(2)–(3), 120 Stat. 577. Extensive “[e]vidence of continued discrimination,” Congress concluded, “clearly show[ed] the continued need for Federal oversight” in covered jurisdictions. §§2(b)(4)–(5), *id.*, at 577–578. The overall record demonstrated to the federal lawmakers that, “without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.” §2(b)(9), *id.*, at 578.

Based on these findings, Congress reauthorized preclearance for another 25 years, while also undertaking to reconsider the extension after 15 years to ensure that the provision was still necessary and effective. 42 U. S. C. §1973b(a)(7), (8) (2006 ed., Supp. V). The question before the Court is whether Congress had the authority under the Constitution to act as it did.

## II

In answering this question, the Court does not write on a clean slate. It is well established that Congress’ judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference. The VRA addresses the combination of race discrimination and the right to vote, which is “preservative of all rights.” *Yick Wo v. Hopkins*, 118 U. S. 356, 370 (1886). When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress’ power to act is at its height.

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The basis for this deference is firmly rooted in both constitutional text and precedent. The Fifteenth Amendment, which targets precisely and only racial discrimination in voting rights, states that, in this domain, “Congress shall have power to enforce this article by appropriate legislation.”<sup>2</sup> In choosing this language, the Amendment’s framers invoked Chief Justice Marshall’s formulation of the scope of Congress’ powers under the Necessary and Proper Clause:

“Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end*, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819) (emphasis added).

It cannot tenably be maintained that the VRA, an Act of Congress adopted to shield the right to vote from racial discrimination, is inconsistent with the letter or spirit of the Fifteenth Amendment, or any provision of the Constitution read in light of the Civil War Amendments. Nowhere in today’s opinion, or in *Northwest Austin*,<sup>3</sup> is there

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<sup>2</sup>The Constitution uses the words “right to vote” in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. Each of these Amendments contains the same broad empowerment of Congress to enact “appropriate legislation” to enforce the protected right. The implication is unmistakable: Under our constitutional structure, Congress holds the lead rein in making the right to vote equally real for all U. S. citizens. These Amendments are in line with the special role assigned to Congress in protecting the integrity of the democratic process in federal elections. U. S. Const., Art. I, §4 (“[T]he Congress may at any time by Law make or alter” regulations concerning the “Times, Places and Manner of holding Elections for Senators and Representatives.”); *Arizona v. Inter Tribal Council of Ariz., Inc.*, *ante*, at 5–6.

<sup>3</sup>Acknowledging the existence of “serious constitutional questions,” see *ante*, at 22 (internal quotation marks omitted), does not suggest how those questions should be answered.

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clear recognition of the transformative effect the Fifteenth Amendment aimed to achieve. Notably, “the Founders’ first successful amendment told Congress that it could ‘make no law’ over a certain domain”; in contrast, the Civil War Amendments used “language [that] authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality” and provided “sweeping enforcement powers . . . to enact ‘appropriate’ legislation targeting state abuses.” A. Amar, *America’s Constitution: A Biography* 361, 363, 399 (2005). See also McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 182 (1997) (quoting Civil War-era framer that “the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative.”).

The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States. In exercising that power, then, Congress may use “all means which are appropriate, which are plainly adapted” to the constitutional ends declared by these Amendments. *McCulloch*, 4 Wheat., at 421. So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end. “It is not for us to review the congressional resolution of [the need for its chosen remedy]. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.” *Katzenbach v. Morgan*, 384 U. S. 641, 653 (1966).

Until today, in considering the constitutionality of the VRA, the Court has accorded Congress the full measure of respect its judgments in this domain should garner. *South Carolina v. Katzenbach* supplies the standard of review:



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“As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.” 383 U. S., at 324. Faced with subsequent reauthorizations of the VRA, the Court has reaffirmed this standard. *E.g.*, *City of Rome*, 446 U. S., at 178. Today’s Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed “rational means.”

For three reasons, legislation *reauthorizing* an existing statute is especially likely to satisfy the minimal requirements of the rational-basis test. First, when reauthorization is at issue, Congress has already assembled a legislative record justifying the initial legislation. Congress is entitled to consider that preexisting record as well as the record before it at the time of the vote on reauthorization. This is especially true where, as here, the Court has repeatedly affirmed the statute’s constitutionality and Congress has adhered to the very model the Court has upheld. See *id.*, at 174 (“The appellants are asking us to do nothing less than overrule our decision in *South Carolina v. Katzenbach* . . . , in which we upheld the constitutionality of the Act.”); *Lopez v. Monterey County*, 525 U. S. 266, 283 (1999) (similar).

Second, the very fact that reauthorization is necessary arises because Congress has built a temporal limitation into the Act. It has pledged to review, after a span of years (first 15, then 25) and in light of contemporary evidence, the continued need for the VRA. Cf. *Grutter v. Bollinger*, 539 U. S. 306, 343 (2003) (anticipating, but not guaranteeing, that, in 25 years, “the use of racial preferences [in higher education] will no longer be necessary”).

Third, a reviewing court should expect the record supporting reauthorization to be less stark than the record originally made. Demand for a record of violations equivalent to the one earlier made would expose Congress to a

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catch-22. If the statute was working, there would be less evidence of discrimination, so opponents might argue that Congress should not be allowed to renew the statute. In contrast, if the statute was not working, there would be plenty of evidence of discrimination, but scant reason to renew a failed regulatory regime. See Persily 193–194.

This is not to suggest that congressional power in this area is limitless. It is this Court’s responsibility to ensure that Congress has used appropriate means. The question meet for judicial review is whether the chosen means are “adapted to carry out the objects the amendments have in view.” *Ex parte Virginia*, 100 U. S. 339, 346 (1880). The Court’s role, then, is not to substitute its judgment for that of Congress, but to determine whether the legislative record sufficed to show that “Congress could rationally have determined that [its chosen] provisions were appropriate methods.” *City of Rome*, 446 U. S., at 176–177.

In summary, the Constitution vests broad power in Congress to protect the right to vote, and in particular to combat racial discrimination in voting. This Court has repeatedly reaffirmed Congress’ prerogative to use any rational means in exercise of its power in this area. And both precedent and logic dictate that the rational-means test should be easier to satisfy, and the burden on the statute’s challenger should be higher, when what is at issue is the reauthorization of a remedy that the Court has previously affirmed, and that Congress found, from contemporary evidence, to be working to advance the legislature’s legitimate objective.

### III

The 2006 reauthorization of the Voting Rights Act fully satisfies the standard stated in *McCulloch*, 4 Wheat., at 421: Congress may choose any means “appropriate” and “plainly adapted to” a legitimate constitutional end. As we shall see, it is implausible to suggest otherwise.

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## A

I begin with the evidence on which Congress based its decision to continue the preclearance remedy. The surest way to evaluate whether that remedy remains in order is to see if preclearance is still effectively preventing discriminatory changes to voting laws. See *City of Rome*, 446 U. S., at 181 (identifying “information on the number and types of submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General” as a primary basis for upholding the 1975 reauthorization). On that score, the record before Congress was huge. In fact, Congress found there were *more* DOJ objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490). 1 Voting Rights Act: Evidence of Continued Need, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 2d Sess., p. 172 (2006) (hereinafter Evidence of Continued Need).

All told, between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory. H. R. Rep. No. 109–478, at 21. Congress found that the majority of DOJ objections included findings of discriminatory intent, see 679 F. 3d, at 867, and that the changes blocked by preclearance were “calculated decisions to keep minority voters from fully participating in the political process.” H. R. Rep. 109–478, at 21. On top of that, over the same time period the DOJ and private plaintiffs succeeded in more than 100 actions to enforce the §5 preclearance requirements. 1 Evidence of Continued Need 186, 250.

In addition to blocking proposed voting changes through preclearance, DOJ may request more information from a jurisdiction proposing a change. In turn, the jurisdiction may modify or withdraw the proposed change. The number of such modifications or withdrawals provides an

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indication of how many discriminatory proposals are deterred without need for formal objection. Congress received evidence that more than 800 proposed changes were altered or withdrawn since the last reauthorization in 1982. H. R. Rep. No. 109–478, at 40–41.<sup>4</sup> Congress also received empirical studies finding that DOJ’s requests for more information had a significant effect on the degree to which covered jurisdictions “compl[ied] with their obligation[n]” to protect minority voting rights. 2 Evidence of Continued Need 2555.

Congress also received evidence that litigation under §2 of the VRA was an inadequate substitute for preclearance in the covered jurisdictions. Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency. 1 Evidence of Continued Need 97. An illegal scheme might be in place for several election cycles before a §2 plaintiff can gather sufficient evidence to challenge it. 1 Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., p. 92 (2005) (hereinafter Section 5 Hearing). And litigation places a heavy financial burden on minority voters. See *id.*, at 84. Congress also received evidence

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<sup>4</sup>This number includes only changes actually proposed. Congress also received evidence that many covered jurisdictions engaged in an “informal consultation process” with DOJ before formally submitting a proposal, so that the deterrent effect of preclearance was far broader than the formal submissions alone suggest. The Continuing Need for Section 5 Pre-Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess., pp. 53–54 (2006). All agree that an unsupported assertion about “deterrence” would not be sufficient to justify keeping a remedy in place in perpetuity. See *ante*, at 17. But it was certainly reasonable for Congress to consider the testimony of witnesses who had worked with officials in covered jurisdictions and observed a real-world deterrent effect.

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that preclearance lessened the litigation burden on covered jurisdictions themselves, because the preclearance process is far less costly than defending against a §2 claim, and clearance by DOJ substantially reduces the likelihood that a §2 claim will be mounted. Reauthorizing the Voting Rights Act’s Temporary Provisions: Policy Perspectives and Views From the Field: Hearing before the Subcommittee on the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary, 109th Cong., 2d Sess., pp. 13, 120–121 (2006). See also Brief for States of New York, California, Mississippi, and North Carolina as *Amici Curiae* 8–9 (Section 5 “reduc[es] the likelihood that a jurisdiction will face costly and protracted Section 2 litigation”).

The number of discriminatory changes blocked or deterred by the preclearance requirement suggests that the state of voting rights in the covered jurisdictions would have been significantly different absent this remedy. Surveying the type of changes stopped by the preclearance procedure conveys a sense of the extent to which §5 continues to protect minority voting rights. Set out below are characteristic examples of changes blocked in the years leading up to the 2006 reauthorization:

- In 1995, Mississippi sought to reenact a dual voter registration system, “which was initially enacted in 1892 to disenfranchise Black voters,” and for that reason, was struck down by a federal court in 1987. H. R. Rep. No. 109–478, at 39.
- Following the 2000 census, the City of Albany, Georgia, proposed a redistricting plan that DOJ found to be “designed with the purpose to limit and retrogress the increased black voting strength . . . in the city as a whole.” *Id.*, at 37 (internal quotation marks omitted).

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- In 2001, the mayor and all-white five-member Board of Aldermen of Kilmichael, Mississippi, abruptly canceled the town’s election after “an unprecedented number” of African-American candidates announced they were running for office. DOJ required an election, and the town elected its first black mayor and three black aldermen. *Id.*, at 36–37.
- In 2006, this Court found that Texas’ attempt to redraw a congressional district to reduce the strength of Latino voters bore “the mark of intentional discrimination that could give rise to an equal protection violation,” and ordered the district redrawn in compliance with the VRA. *League of United Latin American Citizens v. Perry*, 548 U. S. 399, 440 (2006). In response, Texas sought to undermine this Court’s order by curtailing early voting in the district, but was blocked by an action to enforce the §5 preclearance requirement. See Order in *League of United Latin American Citizens v. Texas*, No. 06–cv–1046 (WD Tex.), Doc. 8.
- In 2003, after African-Americans won a majority of the seats on the school board for the first time in history, Charleston County, South Carolina, proposed an at-large voting mechanism for the board. The proposal, made without consulting any of the African-American members of the school board, was found to be an “exact replica” of an earlier voting scheme that, a federal court had determined, violated the VRA. 811 F. Supp. 2d 424, 483 (DDC 2011). See also S. Rep. No. 109–295, at 309. DOJ invoked §5 to block the proposal.
- In 1993, the City of Millen, Georgia, proposed to delay the election in a majority-black district by two

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years, leaving that district without representation on the city council while the neighboring majority-white district would have three representatives. 1 Section 5 Hearing 744. DOJ blocked the proposal. The county then sought to move a polling place from a predominantly black neighborhood in the city to an inaccessible location in a predominantly white neighborhood outside city limits. *Id.*, at 816.

- In 2004, Waller County, Texas, threatened to prosecute two black students after they announced their intention to run for office. The county then attempted to reduce the availability of early voting in that election at polling places near a historically black university. 679 F. 3d, at 865–866.
- In 1990, Dallas County, Alabama, whose county seat is the City of Selma, sought to purge its voter rolls of many black voters. DOJ rejected the purge as discriminatory, noting that it would have disqualified many citizens from voting “simply because they failed to pick up or return a voter update form, when there was no valid requirement that they do so.” 1 Section 5 Hearing 356.

These examples, and scores more like them, fill the pages of the legislative record. The evidence was indeed sufficient to support Congress’ conclusion that “racial discrimination in voting in covered jurisdictions [remained] serious and pervasive.” 679 F. 3d, at 865.<sup>5</sup>

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<sup>5</sup>For an illustration postdating the 2006 reauthorization, see *South Carolina v. United States*, 898 F. Supp. 2d 30 (DC 2012), which involved a South Carolina voter-identification law enacted in 2011. Concerned that the law would burden minority voters, DOJ brought a §5 enforcement action to block the law’s implementation. In the course of the litigation, South Carolina officials agreed to binding interpretations that made it “far easier than some might have expected or feared” for South Carolina citizens to vote. *Id.*, at 37. A three-judge panel

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Congress further received evidence indicating that formal requests of the kind set out above represented only the tip of the iceberg. There was what one commentator described as an “avalanche of case studies of voting rights violations in the covered jurisdictions,” ranging from “outright intimidation and violence against minority voters” to “more subtle forms of voting rights deprivations.” Persily 202 (footnote omitted). This evidence gave Congress ever more reason to conclude that the time had not yet come for relaxed vigilance against the scourge of race discrimination in voting.

True, conditions in the South have impressively improved since passage of the Voting Rights Act. Congress noted this improvement and found that the VRA was the driving force behind it. 2006 Reauthorization §2(b)(1). But Congress also found that voting discrimination had evolved into subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made. §§2(b)(2), (9). Concerns of this order, the Court previously found, gave Congress adequate cause to reauthorize the VRA. *City of Rome*, 446 U. S., at 180–182 (congressional reauthorization of the preclearance requirement was justified based on “the number and nature of objections interposed by the Attorney General” since the prior reauthorization; extension was “necessary to preserve the limited and fragile achievements of the Act and to promote further amelioration of voting discrimination”) (internal quotation marks omitted). Facing such evidence then, the Court expressly rejected the argument that disparities in voter turnout and number of elected officials

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precleared the law after adopting both interpretations as an express “condition of preclearance.” *Id.*, at 37–38. Two of the judges commented that the case demonstrated “the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws.” *Id.*, at 54 (opinion of Bates, J.).



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were the only metrics capable of justifying reauthorization of the VRA. *Ibid.*

## B

I turn next to the evidence on which Congress based its decision to reauthorize the coverage formula in §4(b). Because Congress did not alter the coverage formula, the same jurisdictions previously subject to preclearance continue to be covered by this remedy. The evidence just described, of preclearance’s continuing efficacy in blocking constitutional violations in the covered jurisdictions, itself grounded Congress’ conclusion that the remedy should be retained for those jurisdictions.

There is no question, moreover, that the covered jurisdictions have a unique history of problems with racial discrimination in voting. *Ante*, at 12–13. Consideration of this long history, still in living memory, was altogether appropriate. The Court criticizes Congress for failing to recognize that “history did not end in 1965.” *Ante*, at 20. But the Court ignores that “what’s past is prologue.” W. Shakespeare, *The Tempest*, act 2, sc. 1. And “[t]hose who cannot remember the past are condemned to repeat it.” 1 G. Santayana, *The Life of Reason* 284 (1905). Congress was especially mindful of the need to reinforce the gains already made and to prevent backsliding. 2006 Reauthorization §2(b)(9).

Of particular importance, even after 40 years and thousands of discriminatory changes blocked by preclearance, conditions in the covered jurisdictions demonstrated that the formula was still justified by “current needs.” *Northwest Austin*, 557 U. S., at 203.

Congress learned of these conditions through a report, known as the Katz study, that looked at §2 suits between 1982 and 2004. To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcommittee on the Constitution of the House Committee on the

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Judiciary, 109th Cong., 1st Sess., pp. 964–1124 (2005) (hereinafter *Impact and Effectiveness*). Because the private right of action authorized by §2 of the VRA applies nationwide, a comparison of §2 lawsuits in covered and noncovered jurisdictions provides an appropriate yardstick for measuring differences between covered and noncovered jurisdictions. If differences in the risk of voting discrimination between covered and noncovered jurisdictions had disappeared, one would expect that the rate of successful §2 lawsuits would be roughly the same in both areas.<sup>6</sup> The study’s findings, however, indicated that racial discrimination in voting remains “concentrated in the jurisdictions singled out for preclearance.” *Northwest Austin*, 557 U. S., at 203.

Although covered jurisdictions account for less than 25 percent of the country’s population, the Katz study revealed that they accounted for 56 percent of successful §2 litigation since 1982. *Impact and Effectiveness* 974. Controlling for population, there were nearly *four* times as many successful §2 cases in covered jurisdictions as there were in noncovered jurisdictions. 679 F. 3d, at 874. The Katz study further found that §2 lawsuits are more likely to succeed when they are filed in covered jurisdictions than in noncovered jurisdictions. *Impact and Effectiveness* 974. From these findings—ignored by the Court—Congress reasonably concluded that the coverage formula continues to identify the jurisdictions of greatest concern.

The evidence before Congress, furthermore, indicated that voting in the covered jurisdictions was more racially polarized than elsewhere in the country. H. R. Rep. No. 109–478, at 34–35. While racially polarized voting alone

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<sup>6</sup> Because preclearance occurs only in covered jurisdictions and can be expected to stop the most obviously objectionable measures, one would expect a *lower* rate of successful §2 lawsuits in those jurisdictions if the risk of voting discrimination there were the same as elsewhere in the country.

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does not signal a constitutional violation, it is a factor that increases the vulnerability of racial minorities to discriminatory changes in voting law. The reason is twofold. First, racial polarization means that racial minorities are at risk of being systematically outvoted and having their interests underrepresented in legislatures. Second, “when political preferences fall along racial lines, the natural inclinations of incumbents and ruling parties to entrench themselves have predictable racial effects. Under circumstances of severe racial polarization, efforts to gain political advantage translate into race-specific disadvantages.” Ansolabehere, Persily, & Stewart, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 Harv. L. Rev. Forum 205, 209 (2013).

In other words, a governing political coalition has an incentive to prevent changes in the existing balance of voting power. When voting is racially polarized, efforts by the ruling party to pursue that incentive “will inevitably discriminate against a racial group.” *Ibid.* Just as buildings in California have a greater need to be earthquake-proofed, places where there is greater racial polarization in voting have a greater need for prophylactic measures to prevent purposeful race discrimination. This point was understood by Congress and is well recognized in the academic literature. See 2006 Reauthorization §2(b)(3), 120 Stat. 577 (“The continued evidence of racially polarized voting in each of the jurisdictions covered by the [preclearance requirement] demonstrates that racial and language minorities remain politically vulnerable”); H. R. Rep. No. 109–478, at 35; Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, in *Quiet Revolution* 21, 22.

The case for retaining a coverage formula that met needs on the ground was therefore solid. Congress might

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have been charged with rigidity had it afforded covered jurisdictions no way out or ignored jurisdictions that needed superintendence. Congress, however, responded to this concern. Critical components of the congressional design are the statutory provisions allowing jurisdictions to “bail out” of preclearance, and for court-ordered “bail ins.” See *Northwest Austin*, 557 U. S., at 199. The VRA permits a jurisdiction to bail out by showing that it has complied with the Act for ten years, and has engaged in efforts to eliminate intimidation and harassment of voters. 42 U. S. C. §1973b(a) (2006 ed. and Supp. V). It also authorizes a court to subject a noncovered jurisdiction to federal preclearance upon finding that violations of the Fourteenth and Fifteenth Amendments have occurred there. §1973a(c) (2006 ed.).

Congress was satisfied that the VRA’s bailout mechanism provided an effective means of adjusting the VRA’s coverage over time. H. R. Rep. No. 109–478, at 25 (the success of bailout “illustrates that: (1) covered status is neither permanent nor over-broad; and (2) covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so”). Nearly 200 jurisdictions have successfully bailed out of the preclearance requirement, and DOJ has consented to every bailout application filed by an eligible jurisdiction since the current bailout procedure became effective in 1984. Brief for Federal Respondent 54. The bail-in mechanism has also worked. Several jurisdictions have been subject to federal preclearance by court orders, including the States of New Mexico and Arkansas. App. to Brief for Federal Respondent 1a–3a.

This experience exposes the inaccuracy of the Court’s portrayal of the Act as static, unchanged since 1965. Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions. True, many cov-

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ered jurisdictions have not been able to bail out due to recent acts of noncompliance with the VRA, but that truth reinforces the congressional judgment that these jurisdictions were rightfully subject to preclearance, and ought to remain under that regime.

## IV

Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court's opinion today. The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story. See *supra*, at 18–19. Without even identifying a standard of review, the Court dismissively brushes off arguments based on “data from the record,” and declines to enter the “debat[e about] what [the] record shows.” *Ante*, at 20–21. One would expect more from an opinion striking at the heart of the Nation's signal piece of civil-rights legislation.

I note the most disturbing lapses. First, by what right, given its usual restraint, does the Court even address Shelby County's facial challenge to the VRA? Second, the Court veers away from controlling precedent regarding the “equal sovereignty” doctrine without even acknowledging that it is doing so. Third, hardly showing the respect ordinarily paid when Congress acts to implement the Civil War Amendments, and as just stressed, the Court does not even deign to grapple with the legislative record.

## A

Shelby County launched a purely facial challenge to the VRA's 2006 reauthorization. “A facial challenge to a legislative Act,” the Court has other times said, “is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circum-

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stances exists under which the Act would be valid.” *United States v. Salerno*, 481 U. S. 739, 745 (1987).

“[U]nder our constitutional system[,] courts are not roving commissions assigned to pass judgment on the validity of the Nation’s laws.” *Broadrick v. Oklahoma*, 413 U. S. 601, 610–611 (1973). Instead, the “judicial Power” is limited to deciding particular “Cases” and “Controversies.” U. S. Const., Art. III, §2. “Embedded in the traditional rules governing constitutional adjudication is the principle that 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 other situations not before the Court.” *Broadrick*, 413 U. S., at 610. Yet the Court’s opinion in this case contains not a word explaining why Congress lacks the power to subject to preclearance the particular plaintiff that initiated this lawsuit—Shelby County, Alabama. The reason for the Court’s silence is apparent, for as applied to Shelby County, the VRA’s preclearance requirement is hardly contestable.

Alabama is home to Selma, site of the “Bloody Sunday” beatings of civil-rights demonstrators that served as the catalyst for the VRA’s enactment. Following those events, Martin Luther King, Jr., led a march from Selma to Montgomery, Alabama’s capital, where he called for passage of the VRA. If the Act passed, he foresaw, progress could be made even in Alabama, but there had to be a steadfast national commitment to see the task through to completion. In King’s words, “the arc of the moral universe is long, but it bends toward justice.” G. May, *Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy* 144 (2013).

History has proved King right. Although circumstances in Alabama have changed, serious concerns remain. Between 1982 and 2005, Alabama had one of the highest rates of successful §2 suits, second only to its VRA-covered

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neighbor Mississippi. 679 F. 3d, at 897 (Williams, J., dissenting). In other words, even while subject to the restraining effect of §5, Alabama was found to have “deni[ed] or abridge[d]” voting rights “on account of race or color” more frequently than nearly all other States in the Union. 42 U. S. C. §1973(a). This fact prompted the dissenting judge below to concede that “a more narrowly tailored coverage formula” capturing Alabama and a handful of other jurisdictions with an established track record of racial discrimination in voting “might be defensible.” 679 F. 3d, at 897 (opinion of Williams, J.). That is an understatement. Alabama’s sorry history of §2 violations alone provides sufficient justification for Congress’ determination in 2006 that the State should remain subject to §5’s preclearance requirement.<sup>7</sup>

A few examples suffice to demonstrate that, at least in Alabama, the “current burdens” imposed by §5’s preclearance requirement are “justified by current needs.” *Northwest Austin*, 557 U. S., at 203. In the interim between the VRA’s 1982 and 2006 reauthorizations, this Court twice confronted purposeful racial discrimination in Alabama. In *Pleasant Grove v. United States*, 479 U. S. 462 (1987), the Court held that Pleasant Grove—a city in Jefferson County, Shelby County’s neighbor—engaged in purposeful discrimination by annexing all-white areas while rejecting the annexation request of an adjacent black neighborhood. The city had “shown unambiguous opposition to racial

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<sup>7</sup>This lawsuit was filed by Shelby County, a political subdivision of Alabama, rather than by the State itself. Nevertheless, it is appropriate to judge Shelby County’s constitutional challenge in light of instances of discrimination statewide because Shelby County is subject to §5’s preclearance requirement by virtue of *Alabama’s* designation as a covered jurisdiction under §4(b) of the VRA. See *ante*, at 7. In any event, Shelby County’s recent record of employing an at-large electoral system tainted by intentional racial discrimination is by itself sufficient to justify subjecting the county to §5’s preclearance mandate. See *infra*, at 26.

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integration, both before and after the passage of the federal civil rights laws,” and its strategic annexations appeared to be an attempt “to provide for the growth of a monolithic white voting block” for “the impermissible purpose of minimizing future black voting strength.” *Id.*, at 465, 471–472.

Two years before *Pleasant Grove*, the Court in *Hunter v. Underwood*, 471 U. S. 222 (1985), struck down a provision of the Alabama Constitution that prohibited individuals convicted of misdemeanor offenses “involving moral turpitude” from voting. *Id.*, at 223 (internal quotation marks omitted). The provision violated the Fourteenth Amendment’s Equal Protection Clause, the Court unanimously concluded, because “its original enactment was motivated by a desire to discriminate against blacks on account of race[,] and the [provision] continues to this day to have that effect.” *Id.*, at 233.

*Pleasant Grove* and *Hunter* were not anomalies. In 1986, a Federal District Judge concluded that the at-large election systems in several Alabama counties violated §2. *Dillard v. Crenshaw Cty.*, 640 F. Supp. 1347, 1354–1363 (MD Ala. 1986). Summarizing its findings, the court stated that “[f]rom the late 1800’s through the present, [Alabama] has consistently erected barriers to keep black persons from full and equal participation in the social, economic, and political life of the state.” *Id.*, at 1360.

The *Dillard* litigation ultimately expanded to include 183 cities, counties, and school boards employing discriminatory at-large election systems. *Dillard v. Baldwin Cty. Bd. of Ed.*, 686 F. Supp. 1459, 1461 (MD Ala. 1988). One of those defendants was Shelby County, which eventually signed a consent decree to resolve the claims against it. See *Dillard v. Crenshaw Cty.*, 748 F. Supp. 819 (MD Ala. 1990).

Although the *Dillard* litigation resulted in overhauls of numerous electoral systems tainted by racial discrimina-



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tion, concerns about backsliding persist. In 2008, for example, the city of Calera, located in Shelby County, requested preclearance of a redistricting plan that “would have eliminated the city’s sole majority-black district, which had been created pursuant to the consent decree in *Dillard*.” 811 F. Supp. 2d 424, 443 (DC 2011). Although DOJ objected to the plan, Calera forged ahead with elections based on the unprecleared voting changes, resulting in the defeat of the incumbent African-American councilman who represented the former majority-black district. *Ibid.* The city’s defiance required DOJ to bring a §5 enforcement action that ultimately yielded appropriate redress, including restoration of the majority-black district. *Ibid.*; Brief for Respondent-Intervenors Earl Cunningham et al. 20.

A recent FBI investigation provides a further window into the persistence of racial discrimination in state politics. See *United States v. McGregor*, 824 F. Supp. 2d 1339, 1344–1348 (MD Ala. 2011). Recording devices worn by state legislators cooperating with the FBI’s investigation captured conversations between members of the state legislature and their political allies. The recorded conversations are shocking. Members of the state Senate derisively refer to African-Americans as “Aborigines” and talk openly of their aim to quash a particular gambling-related referendum because the referendum, if placed on the ballot, might increase African-American voter turnout. *Id.*, at 1345–1346 (internal quotation marks omitted). See also *id.*, at 1345 (legislators and their allies expressed concern that if the referendum were placed on the ballot, “[e]very black, every illiterate’ would be ‘bused [to the polls] on HUD financed buses’”). These conversations occurred not in the 1870’s, or even in the 1960’s, they took place in 2010. *Id.*, at 1344–1345. The District Judge presiding over the criminal trial at which the recorded conversations were introduced commented that the “re-

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cordings represent compelling evidence that political exclusion through racism remains a real and enduring problem” in Alabama. *Id.*, at 1347. Racist sentiments, the judge observed, “remain regrettably entrenched in the high echelons of state government.” *Ibid.*

These recent episodes forcefully demonstrate that §5’s preclearance requirement is constitutional as applied to Alabama and its political subdivisions.<sup>8</sup> And under our case law, that conclusion should suffice to resolve this case. See *United States v. Raines*, 362 U. S. 17, 24–25 (1960) (“[I]f the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality.”). See also *Nevada Dept. of Human Resources v. Hibbs*, 538 U. S. 721, 743 (2003) (SCALIA, J., dissenting) (where, as here, a state or local government raises a facial challenge to a federal statute on the ground that it exceeds Congress’ enforcement powers under the Civil War Amendments, the challenge fails if the opposing party is able to show that the statute “could constitutionally be applied to *some* jurisdictions”).

This Court has consistently rejected constitutional challenges to legislation enacted pursuant to Congress’ enforcement powers under the Civil War Amendments upon finding that the legislation was constitutional as applied to the particular set of circumstances before the Court. See *United States v. Georgia*, 546 U. S. 151, 159 (2006) (Title II of the Americans with Disabilities Act of 1990 (ADA) validly abrogates state sovereign immunity “insofar as [it] creates a private cause of action . . . for conduct that *actually* violates the Fourteenth Amend-

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<sup>8</sup>Congress continued preclearance over Alabama, including Shelby County, *after* considering evidence of current barriers there to minority voting clout. Shelby County, thus, is no “redhead” caught up in an arbitrary scheme. See *ante*, at 22.

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ment”); *Tennessee v. Lane*, 541 U. S. 509, 530–534 (2004) (Title II of the ADA is constitutional “as it applies to the class of cases implicating the fundamental right of access to the courts”); *Raines*, 362 U. S., at 24–26 (federal statute proscribing deprivations of the right to vote based on race was constitutional as applied to the state officials before the Court, even if it could not constitutionally be applied to other parties). A similar approach is warranted here.<sup>9</sup>

The VRA’s exceptionally broad severability provision makes it particularly inappropriate for the Court to allow Shelby County to mount a facial challenge to §§4(b) and 5 of the VRA, even though application of those provisions to the county falls well within the bounds of Congress’ legislative authority. The severability provision states:

“If any provision of [this Act] or the application thereof to any person or circumstances is held invalid, the remainder of [the Act] and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.”  
42 U. S. C. §1973p.

In other words, even if the VRA could not constitutionally be applied to certain States—*e.g.*, Arizona and Alaska, see *ante*, at 8—§1973p calls for those unconstitutional applications to be severed, leaving the Act in place for jurisdictions as to which its application does not transgress constitutional limits.

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<sup>9</sup>The Court does not contest that Alabama’s history of racial discrimination provides a sufficient basis for Congress to require Alabama and its political subdivisions to preclear electoral changes. Nevertheless, the Court asserts that Shelby County may prevail on its facial challenge to §4’s coverage formula because it is subject to §5’s preclearance requirement by virtue of that formula. See *ante*, at 22 (“The county was selected [for preclearance] based on th[e] [coverage] formula.”). This misses the reality that Congress decided to subject Alabama to preclearance based on evidence of continuing constitutional violations in that State. See *supra*, at 28, n. 8.

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Nevertheless, the Court suggests that limiting the jurisdictional scope of the VRA in an appropriate case would be “to try our hand at updating the statute.” *Ante*, at 22. Just last Term, however, the Court rejected this very argument when addressing a materially identical severability provision, explaining that such a provision is “Congress’ explicit textual instruction to leave unaffected the remainder of [the Act]” if any particular “application is unconstitutional.” *National Federation of Independent Business v. Sebelius*, 567 U. S. \_\_\_, \_\_\_ (2012) (plurality opinion) (slip op., at 56) (internal quotation marks omitted); *id.*, at \_\_\_ (GINSBURG, J., concurring in part, concurring in judgment in part, and dissenting in part) (slip op., at 60) (agreeing with the plurality’s severability analysis). See also *Raines*, 362 U. S., at 23 (a statute capable of some constitutional applications may nonetheless be susceptible to a facial challenge only in “that rarest of cases where this Court can justifiably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application”). Leaping to resolve Shelby County’s facial challenge without considering whether application of the VRA to Shelby County is constitutional, or even addressing the VRA’s severability provision, the Court’s opinion can hardly be described as an exemplar of restrained and moderate decisionmaking. Quite the opposite. Hubris is a fit word for today’s demolition of the VRA.

## B

The Court stops any application of §5 by holding that §4(b)’s coverage formula is unconstitutional. It pins this result, in large measure, to “the fundamental principle of equal sovereignty.” *Ante*, at 10–11, 23. In *Katzenbach*, however, the Court held, in no uncertain terms, that the principle “*applies only to the terms upon which States are admitted to the Union*, and not to the remedies for local

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evils which have subsequently appeared.” 383 U. S., at 328–329 (emphasis added).

*Katzenbach*, the Court acknowledges, “rejected the notion that the [equal sovereignty] principle operate[s] as a bar on differential treatment outside [the] context [of the admission of new States].” *Ante*, at 11 (citing 383 U. S., at 328–329) (emphasis omitted). But the Court clouds that once clear understanding by citing dictum from *Northwest Austin* to convey that the principle of equal sovereignty “remains highly pertinent in assessing subsequent disparate treatment of States.” *Ante*, at 11 (citing 557 U. S., at 203). See also *ante*, at 23 (relying on *Northwest Austin*’s “emphasis on [the] significance” of the equal-sovereignty principle). If the Court is suggesting that dictum in *Northwest Austin* silently overruled *Katzenbach*’s limitation of the equal sovereignty doctrine to “the admission of new States,” the suggestion is untenable. *Northwest Austin* cited *Katzenbach*’s holding in the course of *declining to decide* whether the VRA was constitutional or even what standard of review applied to the question. 557 U. S., at 203–204. In today’s decision, the Court ratchets up what was pure dictum in *Northwest Austin*, attributing breadth to the equal sovereignty principle in flat contradiction of *Katzenbach*. The Court does so with nary an explanation of why it finds *Katzenbach* wrong, let alone any discussion of whether *stare decisis* nonetheless counsels adherence to *Katzenbach*’s ruling on the limited “significance” of the equal sovereignty principle.

Today’s unprecedented extension of the equal sovereignty principle outside its proper domain—the admission of new States—is capable of much mischief. Federal statutes that treat States disparately are hardly novelties. See, e.g., 28 U. S. C. §3704 (no State may operate or permit a sports-related gambling scheme, unless that State conducted such a scheme “at any time during the period beginning January 1, 1976, and ending August 31, 1990”);

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26 U. S. C. §142(*l*) (EPA required to locate green building project in a State meeting specified population criteria); 42 U. S. C. §3796bb (at least 50 percent of rural drug enforcement assistance funding must be allocated to States with “a population density of fifty-two or fewer persons per square mile or a State in which the largest county has fewer than one hundred and fifty thousand people, based on the decennial census of 1990 through fiscal year 1997”); §§13925, 13971 (similar population criteria for funding to combat rural domestic violence); §10136 (specifying rules applicable to Nevada’s Yucca Mountain nuclear waste site, and providing that “[n]o State, other than the State of Nevada, may receive financial assistance under this subsection after December 22, 1987”). Do such provisions remain safe given the Court’s expansion of equal sovereignty’s sway?

Of gravest concern, Congress relied on our pathmarking *Katzenbach* decision in each reauthorization of the VRA. It had every reason to believe that the Act’s limited geographical scope would weigh in favor of, not against, the Act’s constitutionality. See, *e.g.*, *United States v. Morrison*, 529 U. S. 598, 626–627 (2000) (confining preclearance regime to States with a record of discrimination bolstered the VRA’s constitutionality). Congress could hardly have foreseen that the VRA’s limited geographic reach would render the Act constitutionally suspect. See Persily 195 (“[S]upporters of the Act sought to develop an evidentiary record for the principal purpose of explaining why the covered jurisdictions should remain covered, rather than justifying the coverage of certain jurisdictions but not others.”).

In the Court’s conception, it appears, defenders of the VRA could not prevail upon showing what the record overwhelmingly bears out, *i.e.*, that there is a need for continuing the preclearance regime in covered States. In addition, the defenders would have to disprove the exist-

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ence of a comparable need elsewhere. See Tr. of Oral Arg. 61–62 (suggesting that proof of egregious episodes of racial discrimination in covered jurisdictions would not suffice to carry the day for the VRA, unless such episodes are shown to be absent elsewhere). I am aware of no precedent for imposing such a double burden on defenders of legislation.

## C

The Court has time and again declined to upset legislation of this genre unless there was no or almost no evidence of unconstitutional action by States. See, e.g., *City of Boerne v. Flores*, 521 U. S. 507, 530 (1997) (legislative record “mention[ed] no episodes [of the kind the legislation aimed to check] occurring in the past 40 years”). No such claim can be made about the congressional record for the 2006 VRA reauthorization. Given a record replete with examples of denial or abridgment of a paramount federal right, the Court should have left the matter where it belongs: in Congress’ bailiwick.

Instead, the Court strikes §4(b)’s coverage provision because, in its view, the provision is not based on “current conditions.” *Ante*, at 17. It discounts, however, that one such condition was the preclearance remedy in place in the covered jurisdictions, a remedy Congress designed both to catch discrimination before it causes harm, and to guard against return to old ways. 2006 Reauthorization §2(b)(3), (9). Volumes of evidence supported Congress’ determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.

But, the Court insists, the coverage formula is no good; it is based on “decades-old data and eradicated practices.” *Ante*, at 18. Even if the legislative record shows, as engaging with it would reveal, that the formula accurately

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identifies the jurisdictions with the worst conditions of voting discrimination, that is of no moment, as the Court sees it. Congress, the Court decrees, must “star[t] from scratch.” *Ante*, at 23. I do not see why that should be so.

Congress’ chore was different in 1965 than it was in 2006. In 1965, there were a “small number of States . . . which in most instances were familiar to Congress by name,” on which Congress fixed its attention. *Katzenbach*, 383 U. S., at 328. In drafting the coverage formula, “Congress began work with reliable evidence of actual voting discrimination in a great majority of the States” it sought to target. *Id.*, at 329. “The formula [Congress] eventually evolved to describe these areas” also captured a few States that had not been the subject of congressional factfinding. *Ibid.* Nevertheless, the Court upheld the formula in its entirety, finding it fair “to infer a significant danger of the evil” in all places the formula covered. *Ibid.*

The situation Congress faced in 2006, when it took up reauthorization of the coverage formula, was not the same. By then, the formula had been in effect for many years, and *all* of the jurisdictions covered by it were “familiar to Congress by name.” *Id.*, at 328. The question before Congress: Was there still a sufficient basis to support continued application of the preclearance remedy in each of those already-identified places? There was at that point no chance that the formula might inadvertently sweep in new areas that were not the subject of congressional findings. And Congress could determine from the record whether the jurisdictions captured by the coverage formula still belonged under the preclearance regime. If they did, there was no need to alter the formula. That is why the Court, in addressing prior reauthorizations of the VRA, did not question the continuing “relevance” of the formula.

Consider once again the components of the record before Congress in 2006. The coverage provision identified a



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known list of places with an undisputed history of serious problems with racial discrimination in voting. Recent evidence relating to Alabama and its counties was there for all to see. Multiple Supreme Court decisions had upheld the coverage provision, most recently in 1999. There was extensive evidence that, due to the preclearance mechanism, conditions in the covered jurisdictions had notably improved. And there was evidence that preclearance was still having a substantial real-world effect, having stopped hundreds of discriminatory voting changes in the covered jurisdictions since the last reauthorization. In addition, there was evidence that racial polarization in voting was higher in covered jurisdictions than elsewhere, increasing the vulnerability of minority citizens in those jurisdictions. And countless witnesses, reports, and case studies documented continuing problems with voting discrimination in those jurisdictions. In light of this record, Congress had more than a reasonable basis to conclude that the existing coverage formula was not out of sync with conditions on the ground in covered areas. And certainly Shelby County was no candidate for release through the mechanism Congress provided. See *supra*, at 22–23, 26–28.

The Court holds §4(b) invalid on the ground that it is “irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time.” *Ante*, at 23. But the Court disregards what Congress set about to do in enacting the VRA. That extraordinary legislation scarcely stopped at the particular tests and devices that happened to exist in 1965. The grand aim of the Act is to secure to all in our polity equal citizenship stature, a voice in our democracy undiluted by race. As the record for the 2006 reauthorization makes abundantly clear, second-generation barriers to minority voting rights have emerged in the covered jurisdictions as attempted *substitutes* for the first-generation barriers that

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originally triggered preclearance in those jurisdictions. See *supra*, at 5–6, 8, 15–17.

The sad irony of today’s decision lies in its utter failure to grasp why the VRA has proven effective. The Court appears to believe that the VRA’s success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed. *Ante*, at 21–22, 23–24. With that belief, and the argument derived from it, history repeats itself. The same assumption—that the problem could be solved when particular methods of voting discrimination are identified and eliminated—was indulged and proved wrong repeatedly prior to the VRA’s enactment. Unlike prior statutes, which singled out particular tests or devices, the VRA is grounded in Congress’ recognition of the “variety and persistence” of measures designed to impair minority voting rights. *Katzenbach*, 383 U. S., at 311; *supra*, at 2. In truth, the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding.

Beyond question, the VRA is no ordinary legislation. It is extraordinary because Congress embarked on a mission long delayed and of extraordinary importance: to realize the purpose and promise of the Fifteenth Amendment. For a half century, a concerted effort has been made to end racial discrimination in voting. Thanks to the Voting Rights Act, progress once the subject of a dream has been achieved and continues to be made.

The record supporting the 2006 reauthorization of the VRA is also extraordinary. It was described by the Chairman of the House Judiciary Committee as “one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27½ years” he had served in the House. 152 Cong. Rec. H5143 (July 13, 2006) (statement of Rep. Sensenbrenner).

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After exhaustive evidence-gathering and deliberative process, Congress reauthorized the VRA, including the coverage provision, with overwhelming bipartisan support. It was the judgment of Congress that “40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution.” 2006 Reauthorization §2(b)(7), 120 Stat. 577. That determination of the body empowered to enforce the Civil War Amendments “by appropriate legislation” merits this Court’s utmost respect. In my judgment, the Court errs egregiously by overriding Congress’ decision.

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For the reasons stated, I would affirm the judgment of the Court of Appeals.

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

**SUPREME COURT OF THE UNITED STATES**

## Syllabus

TEXAS DEPARTMENT OF HOUSING AND  
COMMUNITY AFFAIRS ET AL. *v.* INCLUSIVE  
COMMUNITIES PROJECT, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT

No. 13–1371. Argued January 21, 2015—Decided June 25, 2015

The Federal Government provides low-income housing tax credits that are distributed to developers by designated state agencies. In Texas, the Department of Housing and Community Affairs (Department) distributes the credits. The Inclusive Communities Project, Inc. (ICP), a Texas-based nonprofit corporation that assists low-income families in obtaining affordable housing, brought a disparate-impact claim under §§804(a) and 805(a) of the Fair Housing Act (FHA), alleging that the Department and its officers had caused continued segregated housing patterns by allocating too many tax credits to housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods. Relying on statistical evidence, the District Court concluded that the ICP had established a *prima facie* showing of disparate impact. After assuming the Department’s proffered non-discriminatory interests were valid, it found that the Department failed to meet its burden to show that there were no less discriminatory alternatives for allocating the tax credits. While the Department’s appeal was pending, the Secretary of Housing and Urban Development issued a regulation interpreting the FHA to encompass disparate-impact liability and establishing a burden-shifting framework for adjudicating such claims. The Fifth Circuit held that disparate-impact claims are cognizable under the FHA, but reversed and remanded on the merits, concluding that, in light of the new regulation, the District Court had improperly required the Department to prove less discriminatory alternatives.

The FHA was adopted shortly after the assassination of Dr. Martin Luther King, Jr. Recognizing that persistent racial segregation had

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left predominantly black inner cities surrounded by mostly white suburbs, the Act addresses the denial of housing opportunities on the basis of “race, color, religion, or national origin.” In 1988, Congress amended the FHA, and, as relevant here, created certain exemptions from liability.

*Held:* Disparate-impact claims are cognizable under the Fair Housing Act. Pp. 7–24.

(a) Two antidiscrimination statutes that preceded the FHA are relevant to its interpretation. Both §703(a)(2) of Title VII of the Civil Rights Act of 1964 and §4(a)(2) of the Age Discrimination in Employment Act of 1967 (ADEA) authorize disparate-impact claims. Under *Griggs v. Duke Power Co.*, 401 U. S. 424, and *Smith v. City of Jackson*, 544 U. S. 228, the cases announcing the rule for Title VII and for the ADEA, respectively, antidiscrimination laws should be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. Disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain the free-enterprise system. Before rejecting a business justification—or a governmental entity’s analogous public interest—a court must determine that a plaintiff has shown that there is “an available alternative . . . practice that has less disparate impact and serves the [entity’s] legitimate needs.” *Ricci v. DeStefano*, 557 U. S. 557, 578. These cases provide essential background and instruction in the case at issue. Pp. 7–10.

(b) Under the FHA it is unlawful to “refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to a person because of race” or other protected characteristic, §804(a), or “to discriminate against any person in” making certain real-estate transactions “because of race” or other protected characteristic, §805(a). The logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims. The results-oriented phrase “otherwise make unavailable” refers to the consequences of an action rather than the actor’s intent. See *United States v. Giles*, 300 U. S. 41, 48. And this phrase is equivalent in function and purpose to Title VII’s and the ADEA’s “otherwise adversely affect” language. In all three statutes the operative text looks to results and plays an identical role: as a catchall phrase, located at the end of a lengthy sentence that begins with prohibitions on disparate treatment. The introductory word “otherwise” also signals a shift in emphasis from an actor’s intent to the consequences of his actions. This similarity in text and structure is even more compelling because Congress passed the FHA only four years after Title VII and four months after the

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ADEA. Although the FHA does not reiterate Title VII's exact language, Congress chose words that serve the same purpose and bear the same basic meaning but are consistent with the FHA's structure and objectives. The FHA contains the phrase "because of race," but Title VII and the ADEA also contain that wording and this Court nonetheless held that those statutes impose disparate-impact liability.

The 1988 amendments signal that Congress ratified such liability. Congress knew that all nine Courts of Appeals to have addressed the question had concluded the FHA encompassed disparate-impact claims, and three exemptions from liability in the 1988 amendments would have been superfluous had Congress assumed that disparate-impact liability did not exist under the FHA.

Recognition of disparate-impact claims is also consistent with the central purpose of the FHA, which, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of the Nation's economy. Suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability. See, e.g., *Huntington v. Huntington Branch, NAACP*, 488 U. S. 15, 16–18. Recognition of disparate-impact liability under the FHA plays an important role in uncovering discriminatory intent: it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.

But disparate-impact liability has always been properly limited in key respects to avoid serious constitutional questions that might arise under the FHA, e.g., if such liability were imposed based solely on a showing of a statistical disparity. Here, the underlying dispute involves a novel theory of liability that may, on remand, be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in allocating tax credits for low-income housing. An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest their policies serve, an analysis that is analogous to Title VII's business necessity standard. It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in the Nation's cities merely because some other priority might seem preferable. A disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas. Courts must

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therefore examine with care whether a plaintiff has made out a *prima facie* showing of disparate impact, and prompt resolution of these cases is important. Policies, whether governmental or private, are not contrary to the disparate-impact requirement unless they are “artificial, arbitrary, and unnecessary barriers.” *Griggs*, 401 U. S., at 431. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision. These limitations are also necessary to protect defendants against abusive disparate-impact claims.

And when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice, and courts should strive to design race-neutral remedies. Remedial orders that impose racial targets or quotas might raise difficult constitutional questions.

While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers, race may be considered in certain circumstances and in a proper fashion. This Court does not impugn local housing authorities’ race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. These authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset. Pp. 10–23.

747 F. 3d 275, affirmed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined.

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**SUPREME COURT OF THE UNITED STATES**

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No. 13–1371

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TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, ET AL., PETITIONERS *v.* THE INCLUSIVE COMMUNITIES PROJECT, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 25, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

The underlying dispute in this case concerns where housing for low-income persons should be constructed in Dallas, Texas—that is, whether the housing should be built in the inner city or in the suburbs. This dispute comes to the Court on a disparate-impact theory of liability. In contrast to a disparate-treatment case, where a “plaintiff must establish that the defendant had a discriminatory intent or motive,” a plaintiff bringing a disparate-impact claim challenges practices that have a “disproportionately adverse effect on minorities” and are otherwise unjustified by a legitimate rationale. *Ricci v. DeStefano*, 557 U. S. 557, 577 (2009) (internal quotation marks omitted). The question presented for the Court’s determination is whether disparate-impact claims are cognizable under the Fair Housing Act (or FHA), 82 Stat. 81, as amended, 42 U. S. C. §3601 *et seq.*

I  
A

Before turning to the question presented, it is necessary



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to discuss a different federal statute that gives rise to this dispute. The Federal Government provides low-income housing tax credits that are distributed to developers through designated state agencies. 26 U. S. C. §42. Congress has directed States to develop plans identifying selection criteria for distributing the credits. §42(m)(1). Those plans must include certain criteria, such as public housing waiting lists, §42(m)(1)(C), as well as certain preferences, including that low-income housing units “contribut[e] to a concerted community revitalization plan” and be built in census tracts populated predominantly by low-income residents. §§42(m)(1)(B)(ii)(III), 42(d)(5)(ii)(I). Federal law thus favors the distribution of these tax credits for the development of housing units in low-income areas.

In the State of Texas these federal credits are distributed by the Texas Department of Housing and Community Affairs (Department). Under Texas law, a developer’s application for the tax credits is scored under a point system that gives priority to statutory criteria, such as the financial feasibility of the development project and the income level of tenants. Tex. Govt. Code Ann. §§2306.6710(a)–(b) (West 2008). The Texas Attorney General has interpreted state law to permit the consideration of additional criteria, such as whether the housing units will be built in a neighborhood with good schools. Those criteria cannot be awarded more points than statutorily mandated criteria. Tex. Op. Atty. Gen. No. GA–0208, pp. 2–6 (2004), 2004 WL 1434796, \*4–\*6.

The Inclusive Communities Project, Inc. (ICP), is a Texas-based nonprofit corporation that assists low-income families in obtaining affordable housing. In 2008, the ICP brought this suit against the Department and its officers in the United States District Court for the Northern District of Texas. As relevant here, it brought a disparate-impact claim under §§804(a) and 805(a) of the FHA. The

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ICP alleged the Department has caused continued segregated housing patterns by its disproportionate allocation of the tax credits, granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods. The ICP contended that the Department must modify its selection criteria in order to encourage the construction of low-income housing in suburban communities.

The District Court concluded that the ICP had established a *prima facie* case of disparate impact. It relied on two pieces of statistical evidence. First, it found “from 1999–2008, [the Department] approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas.” 749 F. Supp. 2d 486, 499 (ND Tex. 2010) (footnote omitted). Second, it found “92.29% of [low-income housing tax credit] units in the city of Dallas were located in census tracts with less than 50% Caucasian residents.” *Ibid.*

The District Court then placed the burden on the Department to rebut the ICP’s *prima facie* showing of disparate impact. 860 F. Supp. 2d 312, 322–323 (2012). After assuming the Department’s proffered interests were legitimate, *id.*, at 326, the District Court held that a defendant—here the Department—must prove “that there are no other less discriminatory alternatives to advancing their proffered interests,” *ibid.* Because, in its view, the Department “failed to meet [its] burden of proving that there are no less discriminatory alternatives,” the District Court ruled for the ICP. *Id.*, at 331.

The District Court’s remedial order required the addition of new selection criteria for the tax credits. For instance, it awarded points for units built in neighborhoods with good schools and disqualified sites that are located adjacent to or near hazardous conditions, such as high crime areas or landfills. See 2012 WL 3201401 (Aug. 7,

2012). The remedial order contained no explicit racial targets or quotas.

While the Department's appeal was pending, the Secretary of Housing and Urban Development (HUD) issued a regulation interpreting the FHA to encompass disparate-impact liability. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (2013). The regulation also established a burden-shifting framework for adjudicating disparate-impact claims. Under the regulation, a plaintiff first must make a prima facie showing of disparate impact. That is, the plaintiff "has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect." 24 CFR §100.500(c)(1) (2014). If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability. After a plaintiff does establish a prima facie showing of disparate impact, the burden shifts to the defendant to "prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, non-discriminatory interests." §100.500(c)(2). HUD has clarified that this step of the analysis "is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related." 78 Fed. Reg. 11470. Once a defendant has satisfied its burden at step two, a plaintiff may "prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." §100.500(c)(3).

The Court of Appeals for the Fifth Circuit held, consistent with its precedent, that disparate-impact claims are cognizable under the FHA. 747 F.3d 275, 280 (2014). On the merits, however, the Court of Appeals reversed and remanded. Relying on HUD's regulation, the Court of Appeals held that it was improper for the District Court to

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have placed the burden on the Department to prove there were no less discriminatory alternatives for allocating low-income housing tax credits. *Id.*, at 282–283. In a concurring opinion, Judge Jones stated that on remand the District Court should reexamine whether the ICP had made out a *prima facie* case of disparate impact. She suggested the District Court incorrectly relied on bare statistical evidence without engaging in any analysis about causation. She further observed that, if the federal law providing for the distribution of low-income housing tax credits ties the Department’s hands to such an extent that it lacks a meaningful choice, then there is no disparate-impact liability. See *id.*, at 283–284 (specially concurring opinion).

The Department filed a petition for a writ of certiorari on the question whether disparate-impact claims are cognizable under the FHA. The question was one of first impression, see *Huntington v. Huntington Branch, NAACP*, 488 U. S. 15 (1988) (*per curiam*), and certiorari followed, 573 U. S. \_\_\_\_ (2014). It is now appropriate to provide a brief history of the FHA’s enactment and its later amendment.

## B

*De jure* residential segregation by race was declared unconstitutional almost a century ago, *Buchanan v. Warley*, 245 U. S. 60 (1917), but its vestiges remain today, intertwined with the country’s economic and social life. Some segregated housing patterns can be traced to conditions that arose in the mid-20th century. Rapid urbanization, concomitant with the rise of suburban developments accessible by car, led many white families to leave the inner cities. This often left minority families concentrated in the center of the Nation’s cities. During this time, various practices were followed, sometimes with governmental support, to encourage and maintain the separation

of the races: Racially restrictive covenants prevented the conveyance of property to minorities, see *Shelley v. Kraemer*, 334 U. S. 1 (1948); steering by real-estate agents led potential buyers to consider homes in racially homogenous areas; and discriminatory lending practices, often referred to as redlining, precluded minority families from purchasing homes in affluent areas. See, e.g., M. Klarman, *Unfinished Business: Racial Equality in American History* 140–141 (2007); Brief for Housing Scholars as *Amici Curiae* 22–23. By the 1960’s, these policies, practices, and prejudices had created many predominantly black inner cities surrounded by mostly white suburbs. See K. Clark, *Dark Ghetto: Dilemmas of Social Power* 11, 21–26 (1965).

The mid-1960’s was a period of considerable social unrest; and, in response, President Lyndon Johnson established the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission. Exec. Order No. 11365, 3 CFR 674 (1966–1970 Comp.). After extensive factfinding the Commission identified residential segregation and unequal housing and economic conditions in the inner cities as significant, underlying causes of the social unrest. See Report of the National Advisory Commission on Civil Disorders 91 (1968) (Kerner Commission Report). The Commission found that “[n]early two-thirds of all nonwhite families living in the central cities today live in neighborhoods marked by substandard housing and general urban blight.” *Id.*, at 13. The Commission further found that both open and covert racial discrimination prevented black families from obtaining better housing and moving to integrated communities. *Ibid.* The Commission concluded that “[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.” *Id.*, at 1. To reverse “[t]his deepening racial division,” *ibid.*, it recommended enactment of “a comprehensive and enforceable open-occupancy law making it an offense to discriminate in the sale or rental of

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any housing . . . on the basis of race, creed, color, or national origin.” *Id.*, at 263.

In April 1968, Dr. Martin Luther King, Jr., was assassinated in Memphis, Tennessee, and the Nation faced a new urgency to resolve the social unrest in the inner cities. Congress responded by adopting the Kerner Commission’s recommendation and passing the Fair Housing Act. The statute addressed the denial of housing opportunities on the basis of “race, color, religion, or national origin.” Civil Rights Act of 1968, §804, 82 Stat. 83. Then, in 1988, Congress amended the FHA. Among other provisions, it created certain exemptions from liability and added “familial status” as a protected characteristic. See Fair Housing Amendments Act of 1988, 102 Stat. 1619.

## II

The issue here is whether, under a proper interpretation of the FHA, housing decisions with a disparate impact are prohibited. Before turning to the FHA, however, it is necessary to consider two other antidiscrimination statutes that preceded it.

The first relevant statute is §703(a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255. The Court addressed the concept of disparate impact under this statute in *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971). There, the employer had a policy requiring its manual laborers to possess a high school diploma and to obtain satisfactory scores on two intelligence tests. The Court of Appeals held the employer had not adopted these job requirements for a racially discriminatory purpose, and the plaintiffs did not challenge that holding in this Court. Instead, the plaintiffs argued §703(a)(2) covers the discriminatory effect of a practice as well as the motivation behind the practice. Section 703(a), as amended, provides as follows:

“It shall be an unlawful employer practice for an employer—

“(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

“(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” 42 U. S. C. §2000e–2(a).

The Court did not quote or cite the full statute, but rather relied solely on §703(a)(2). *Griggs*, 401 U. S., at 426, n. 1.

In interpreting §703(a)(2), the Court reasoned that disparate-impact liability furthered the purpose and design of the statute. The Court explained that, in §703(a)(2), Congress “proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” *Id.*, at 431. For that reason, as the Court noted, “Congress directed the thrust of [§703(a)(2)] to the consequences of employment practices, not simply the motivation.” *Id.*, at 432. In light of the statute’s goal of achieving “equality of employment opportunities and remov[ing] barriers that have operated in the past” to favor some races over others, the Court held §703(a)(2) of Title VII must be interpreted to allow disparate-impact claims. *Id.*, at 429–430.

The Court put important limits on its holding: namely, not all employment practices causing a disparate impact impose liability under §703(a)(2). In this respect, the Court held that “business necessity” constitutes a defense to disparate-impact claims. *Id.*, at 431. This rule provides, for example, that in a disparate-impact case,

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§703(a)(2) does not prohibit hiring criteria with a “manifest relationship” to job performance. *Id.*, at 432; see also *Ricci*, 557 U. S., at 587–589 (emphasizing the importance of the business necessity defense to disparate-impact liability). On the facts before it, the Court in *Griggs* found a violation of Title VII because the employer could not establish that high school diplomas and general intelligence tests were related to the job performance of its manual laborers. See 401 U. S., at 431–432.

The second relevant statute that bears on the proper interpretation of the FHA is the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602 *et seq.*, as amended. Section 4(a) of the ADEA provides:

“It shall be unlawful for an employer—

“(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age;

“(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age; or

“(3) to reduce the wage rate of any employee in order to comply with this chapter.” 29 U. S. C. §623(a).

The Court first addressed whether this provision allows disparate-impact claims in *Smith v. City of Jackson*, 544 U. S. 228 (2005). There, a group of older employees challenged their employer’s decision to give proportionately greater raises to employees with less than five years of experience.

Explaining that *Griggs* “represented the better reading of [Title VII’s] statutory text,” 544 U. S., at 235, a plurality of the Court concluded that the same reasoning pertained



to §4(a)(2) of the ADEA. The *Smith* plurality emphasized that both §703(a)(2) of Title VII and §4(a)(2) of the ADEA contain language “prohibit[ing] such actions that ‘deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual’s race or age.” 544 U. S., at 235. As the plurality observed, the text of these provisions “focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer” and therefore compels recognition of disparate-impact liability. *Id.*, at 236. In a separate opinion, JUSTICE SCALIA found the ADEA’s text ambiguous and thus deferred under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), to an Equal Employment Opportunity Commission regulation interpreting the ADEA to impose disparate-impact liability, see 544 U. S., at 243–247 (opinion concurring in part and concurring in judgment).

Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. These cases also teach that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system. And before rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is “an available . . . practice that has less disparate impact and serves the [entity’s] legitimate needs.” *Ricci, supra*, at 578. The cases interpreting Title VII and the ADEA provide essential background and instruction in the case now before the Court.

Turning to the FHA, the ICP relies on two provisions.

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Section 804(a) provides that it shall be unlawful:

“To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” 42 U. S. C. §3604(a).

Here, the phrase “otherwise make unavailable” is of central importance to the analysis that follows.

Section 805(a), in turn, provides:

“It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.” §3605(a).

Applied here, the logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims. Congress’ use of the phrase “otherwise make unavailable” refers to the consequences of an action rather than the actor’s intent. See *United States v. Giles*, 300 U. S. 41, 48 (1937) (explaining that the “word ‘make’ has many meanings, among them ‘[t]o cause to exist, appear or occur’” (quoting Webster’s New International Dictionary 1485 (2d ed. 1934))). This results-oriented language counsels in favor of recognizing disparate-impact liability. See *Smith, supra*, at 236. The Court has construed statutory language similar to §805(a) to include disparate-impact liability. See, e.g., *Board of Ed. of City School Dist. of New York v. Harris*, 444 U. S. 130, 140–141 (1979) (holding the term “discriminat[e]” encompassed disparate-impact liability in the context of a statute’s text, history, purpose, and structure).

A comparison to the antidiscrimination statutes examined in *Griggs* and *Smith* is useful. Title VII's and the ADEA's "otherwise adversely affect" language is equivalent in function and purpose to the FHA's "otherwise make unavailable" language. In these three statutes the operative text looks to results. The relevant statutory phrases, moreover, play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with prohibitions on disparate treatment, they serve as catchall phrases looking to consequences, not intent. And all three statutes use the word "otherwise" to introduce the results-oriented phrase. "Otherwise" means "in a different way or manner," thus signaling a shift in emphasis from an actor's intent to the consequences of his actions. Webster's Third New International Dictionary 1598 (1971). This similarity in text and structure is all the more compelling given that Congress passed the FHA in 1968—only four years after passing Title VII and only four months after enacting the ADEA.

It is true that Congress did not reiterate Title VII's exact language in the FHA, but that is because to do so would have made the relevant sentence awkward and unclear. A provision making it unlawful to "refuse to sell[,] . . . or otherwise [adversely affect], a dwelling to any person" because of a protected trait would be grammatically obtuse, difficult to interpret, and far more expansive in scope than Congress likely intended. Congress thus chose words that serve the same purpose and bear the same basic meaning but are consistent with the structure and objectives of the FHA.

Emphasizing that the FHA uses the phrase "because of race," the Department argues this language forecloses disparate-impact liability since "[a]n action is not taken 'because of race' unless race is a *reason* for the action." Brief for Petitioners 26. *Griggs* and *Smith*, however,

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dispose of this argument. Both Title VII and the ADEA contain identical “because of” language, see 42 U. S. C. §2000e–2(a)(2); 29 U. S. C. §623(a)(2), and the Court nonetheless held those statutes impose disparate-impact liability.

In addition, it is of crucial importance that the existence of disparate-impact liability is supported by amendments to the FHA that Congress enacted in 1988. By that time, all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims. See *Huntington Branch, NAACP v. Huntington*, 844 F. 2d 926, 935–936 (CA2 1988); *Resident Advisory Bd. v. Rizzo*, 564 F. 2d 126, 146 (CA3 1977); *Smith v. Clarkton*, 682 F. 2d 1055, 1065 (CA4 1982); *Hanson v. Veterans Administration*, 800 F. 2d 1381, 1386 (CA5 1986); *Arthur v. Toledo*, 782 F. 2d 565, 574–575 (CA6 1986); *Metropolitan Housing Development Corp. v. Arlington Heights*, 558 F. 2d 1283, 1290 (CA7 1977); *United States v. Black Jack*, 508 F. 2d 1179, 1184–1185 (CA8 1974); *Halet v. Wend Investment Co.*, 672 F. 2d 1305, 1311 (CA9 1982); *United States v. Marengo Cty. Comm’n*, 731 F. 2d 1546, 1559, n. 20 (CA11 1984).

When it amended the FHA, Congress was aware of this unanimous precedent. And with that understanding, it made a considered judgment to retain the relevant statutory text. See H. R. Rep. No. 100–711, p. 21, n. 52 (1988) (H. R. Rep.) (discussing suits premised on disparate-impact claims and related judicial precedent); 134 Cong. Rec. 23711 (1988) (statement of Sen. Kennedy) (noting unanimity of Federal Courts of Appeals concerning disparate impact); Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 100th Cong., 1st Sess., 529 (1987) (testimony of Professor Robert Schwemm) (describing consensus judicial view that the FHA imposed disparate-impact liability). Indeed, Con-

gress rejected a proposed amendment that would have eliminated disparate-impact liability for certain zoning decisions. See H. R. Rep., at 89–93.

Against this background understanding in the legal and regulatory system, Congress’ decision in 1988 to amend the FHA while still adhering to the operative language in §§804(a) and 805(a) is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability. “If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.” A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012); see also *Forest Grove School Dist. v. T. A.*, 557 U. S. 230, 244, n. 11 (2009) (“When Congress amended [the Act] without altering the text of [the relevant provision], it implicitly adopted [this Court’s] construction of the statute”); *Manhattan Properties, Inc. v. Irving Trust Co.*, 291 U. S. 320, 336 (1934) (explaining, where the Courts of Appeals had reached a consensus interpretation of the Bankruptcy Act and Congress had amended the Act without changing the relevant provision, “[t]his is persuasive that the construction adopted by the [lower federal] courts has been acceptable to the legislative arm of the government”).

Further and convincing confirmation of Congress’ understanding that disparate-impact liability exists under the FHA is revealed by the substance of the 1988 amendments. The amendments included three exemptions from liability that assume the existence of disparate-impact claims. The most logical conclusion is that the three amendments were deemed necessary because Congress presupposed disparate impact under the FHA as it had been enacted in 1968.

The relevant 1988 amendments were as follows. First,

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Congress added a clarifying provision: “Nothing in [the FHA] prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.” 42 U. S. C. §3605(c). Second, Congress provided: “Nothing in [the FHA] prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance.” §3607(b)(4). And finally, Congress specified: “Nothing in [the FHA] limits the applicability of any reasonable . . . restrictions regarding the maximum number of occupants permitted to occupy a dwelling.” §3607(b)(1).

The exemptions embodied in these amendments would be superfluous if Congress had assumed that disparate-impact liability did not exist under the FHA. See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (“[T]he Court will avoid a reading which renders some words altogether redundant”). Indeed, none of these amendments would make sense if the FHA encompassed only disparate-treatment claims. If that were the sole ground for liability, the amendments merely restate black-letter law. If an actor makes a decision based on reasons other than a protected category, there is no disparate-treatment liability. See, e.g., *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). But the amendments do constrain disparate-impact liability. For instance, certain criminal convictions are correlated with sex and race. See, e.g., *Kimbrough v. United States*, 552 U.S. 85, 98 (2007) (discussing the racial disparity in convictions for crack cocaine offenses). By adding an exemption from liability for exclusionary practices aimed at individuals with drug convictions, Congress ensured disparate-impact liability would not lie if a landlord excluded tenants with such convictions. The same is true of the provision allowing for reasonable restrictions on occupancy. And the

exemption from liability for real-estate appraisers is in the same section as §805(a)'s prohibition of discriminatory practices in real-estate transactions, thus indicating Congress' recognition that disparate-impact liability arose under §805(a). In short, the 1988 amendments signal that Congress ratified disparate-impact liability.

A comparison to *Smith*'s discussion of the ADEA further demonstrates why the Department's interpretation would render the 1988 amendments superfluous. Under the ADEA's reasonable-factor-other-than-age (RFOA) provision, an employer is permitted to take an otherwise prohibited action where "the differentiation is based on reasonable factors other than age." 29 U. S. C. §623(f)(1). In other words, if an employer makes a decision based on a reasonable factor other than age, it cannot be said to have made a decision on the basis of an employee's age. According to the *Smith* plurality, the RFOA provision "plays its principal role" "in cases involving disparate-impact claims" "by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'" 544 U. S., at 239. The plurality thus reasoned that the RFOA provision would be "simply unnecessary to avoid liability under the ADEA" if liability were limited to disparate-treatment claims. *Id.*, at 238.

A similar logic applies here. If a real-estate appraiser took into account a neighborhood's schools, one could not say the appraiser acted because of race. And by embedding 42 U. S. C. §3605(c)'s exemption in the statutory text, Congress ensured that disparate-impact liability would not be allowed either. Indeed, the inference of disparate-impact liability is even stronger here than it was in *Smith*. As originally enacted, the ADEA included the RFOA provision, see §4(f)(1), 81 Stat. 603, whereas here Congress added the relevant exemptions in the 1988 amendments against the backdrop of the uniform view of the Courts of Appeals that the FHA imposed disparate-impact liability.

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Recognition of disparate-impact claims is consistent with the FHA’s central purpose. See *Smith, supra*, at 235 (plurality opinion); *Griggs*, 401 U. S., at 432. The FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation’s economy. See 42 U. S. C. §3601 (“It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States”); H. R. Rep., at 15 (explaining the FHA “provides a clear national policy against discrimination in housing”).

These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability. See, e.g., *Huntington*, 488 U. S., at 16–18 (invalidating zoning law preventing construction of multifamily rental units); *Black Jack*, 508 F. 2d, at 1182–1188 (invalidating ordinance prohibiting construction of new multifamily dwellings); *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*, 641 F. Supp. 2d 563, 569, 577–578 (E.D. La. 2009) (invalidating post-Hurricane Katrina ordinance restricting the rental of housing units to only “blood relative[s]” in an area of the city that was 88.3% white and 7.6% black); see also Tr. of Oral Arg. 52–53 (discussing these cases). The availability of disparate-impact liability, furthermore, has allowed private developers to vindicate the FHA’s objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units. See, e.g., *Huntington, supra*, at 18. Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this



way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.

But disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity. Disparate-impact liability mandates the “removal of artificial, arbitrary, and unnecessary barriers,” not the displacement of valid governmental policies. *Griggs, supra*, at 431. The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.

Unlike the heartland of disparate-impact suits targeting artificial barriers to housing, the underlying dispute in this case involves a novel theory of liability. See Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev. 357, 360–363 (2013) (noting the rarity of this type of claim). This case, on remand, may be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in the sound exercise of its discretion in allocating tax credits for low-income housing.

An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. This step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability. See 78 Fed. Reg. 11470 (explaining that HUD did not use the phrase “business necessity” because that “phrase may not be easily under-

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stood to cover the full scope of practices covered by the Fair Housing Act, which applies to individuals, businesses, nonprofit organizations, and public entities”). As the Court explained in *Ricci*, an entity “could be liable for disparate-impact discrimination only if the [challenged practices] were not job related and consistent with business necessity.” 557 U. S., at 587. Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a “reasonable measure[ment] of job performance,” *Griggs, supra*, at 436, so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest. To be sure, the Title VII framework may not transfer exactly to the fair-housing context, but the comparison suffices for present purposes.

It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation’s cities merely because some other priority might seem preferable. Entrepreneurs must be given latitude to consider market factors. Zoning officials, moreover, must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute to a community’s quality of life and are legitimate concerns for housing authorities. The FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities. As HUD itself recognized in its recent rulemaking, disparate-impact liability “does not mandate that affordable housing be located in neighborhoods with any particular characteristic.” 78 Fed. Reg. 11476.

In a similar vein, a disparate-impact claim that relies on

a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that "[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact" and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co. v. Atonio*, 490 U. S. 642, 653 (1989), superseded by statute on other grounds, 42 U. S. C. §2000e–2(k). Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and "would almost inexorably lead" governmental or private entities to use "numerical quotas," and serious constitutional questions then could arise. 490 U. S., at 653.

The litigation at issue here provides an example. From the standpoint of determining advantage or disadvantage to racial minorities, it seems difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa. If those sorts of judgments are subject to challenge without adequate safeguards, then there is a danger that potential defendants may adopt racial quotas—a circumstance that itself raises serious constitutional concerns.

Courts must therefore examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important. A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact. For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all. It may also be difficult to establish causation because of the mul-

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multiple factors that go into investment decisions about where to construct or renovate housing units. And as Judge Jones observed below, if the ICP cannot show a causal connection between the Department's policy and a disparate impact—for instance, because federal law substantially limits the Department's discretion—that should result in dismissal of this case. 747 F. 3d, at 283–284 (specially concurring opinion).

The FHA imposes a command with respect to disparate-impact liability. Here, that command goes to a state entity. In other cases, the command will go to a private person or entity. Governmental or private policies are not contrary to the disparate-impact requirement unless they are “artificial, arbitrary, and unnecessary barriers.” *Griggs*, 401 U. S., at 431. Difficult questions might arise if disparate-impact liability under the FHA caused race to be used and considered in a pervasive and explicit manner to justify governmental or private actions that, in fact, tend to perpetuate race-based considerations rather than move beyond them. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.

The limitations on disparate-impact liability discussed here are also necessary to protect potential defendants against abusive disparate-impact claims. If the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system. And as to governmental entities, they must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes. The Department's *amici*, in addition to the well-stated principal dissenting opinion in this case, see *post*, at 1–2, 29–30 (opinion of ALITO, J.), call attention to the decision by the Court of Appeals for the Eighth Circuit in *Gallagher v. Magner*,

619 F. 3d 823 (2010). Although the Court is reluctant to approve or disapprove a case that is not pending, it should be noted that *Magner* was decided without the cautionary standards announced in this opinion and, in all events, the case was settled by the parties before an ultimate determination of disparate-impact liability.

Were standards for proceeding with disparate-impact suits not to incorporate at least the safeguards discussed here, then disparate-impact liability might displace valid governmental and private priorities, rather than solely “remov[ing] . . . artificial, arbitrary, and unnecessary barriers.” *Griggs*, 401 U. S., at 431. And that, in turn, would set our Nation back in its quest to reduce the salience of race in our social and economic system.

It must be noted further that, even when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that “arbitrar[ily] . . . operate[s] invidiously to discriminate on the basis of race.” *Ibid.* If additional measures are adopted, courts should strive to design them to eliminate racial disparities through race-neutral means. See *Richmond v. J. A. Croson Co.*, 488 U. S. 469, 510 (1989) (plurality opinion) (“[T]he city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races”). Remedial orders that impose racial targets or quotas might raise more difficult constitutional questions.

While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers, it is also true that race may be considered in certain circumstances and in a proper fashion. Cf. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U. S. 701, 789 (2007) (KENNEDY, J., concurring in part and concurring in judgment) (“School

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boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; [and] drawing attendance zones with general recognition of the demographics of neighborhoods”). Just as this Court has not “question[ed] an employer’s affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the [promotion] process,” *Ricci*, 557 U. S., at 585, it likewise does not impugn housing authorities’ race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.

The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court’s interpretation of similar language in Title VII and the ADEA, Congress’ ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.

## III

In light of the longstanding judicial interpretation of the FHA to encompass disparate-impact claims and congressional reaffirmation of that result, residents and policymakers have come to rely on the availability of disparate-impact claims. See Brief for Massachusetts et al. as *Amici Curiae* 2 (“Without disparate impact claims, States and others will be left with fewer crucial tools to combat the kinds of systemic discrimination that the FHA was intended to address”). Indeed, many of our Nation’s largest cities—entities that are potential defendants in disparate-

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impact suits—have submitted an *amicus* brief in this case supporting disparate-impact liability under the FHA. See Brief for City of San Francisco et al. as *Amici Curiae* 3–6. The existence of disparate-impact liability in the substantial majority of the Courts of Appeals for the last several decades “has not given rise to . . . dire consequences.” *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U. S. \_\_\_, \_\_\_ (2012) (slip op., at 21).

Much progress remains to be made in our Nation’s continuing struggle against racial isolation. In striving to achieve our “historic commitment to creating an integrated society,” *Parents Involved*, *supra*, at 797 (KENNEDY, J., concurring in part and concurring in judgment), we must remain wary of policies that reduce homeowners to nothing more than their race. But since the passage of the Fair Housing Act in 1968 and against the backdrop of disparate-impact liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the Kerner Commission’s grim prophecy that “[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.” Kerner Commission Report 1. The Court acknowledges the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.

The judgment of the Court of Appeals for the Fifth Circuit is affirmed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

THOMAS, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

No. 13–1371

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, ET AL., PETITIONERS *v.* THE INCLUSIVE COMMUNITIES PROJECT, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 25, 2015]

JUSTICE THOMAS, dissenting.

I join JUSTICE ALITO’s dissent in full. I write separately to point out that the foundation on which the Court builds its latest disparate-impact regime—*Griggs v. Duke Power Co.*, 401 U. S. 424 (1971)—is made of sand. That decision, which concluded that Title VII of the Civil Rights Act of 1964 authorizes plaintiffs to bring disparate-impact claims, *id.*, at 429–431, represents the triumph of an agency’s preferences over Congress’ enactment and of assumption over fact. Whatever respect *Griggs* merits as a matter of *stare decisis*, I would not amplify its error by importing its disparate-impact scheme into yet another statute.

I  
A

We should drop the pretense that *Griggs*’ interpretation of Title VII was legitimate. “The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact.” *Ricci v. DeStefano*, 557 U. S. 557, 577 (2009). It did not include an implicit one either. Instead, Title VII’s operative provision, 42 U. S. C. §2000e–2(a) (1964 ed.), addressed only employer decisions motivated by a protected characteristic. That



provision made it “an unlawful employment practice for an employer—

“(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s race, color, religion, sex, or national origin; or

“(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual’s race, color, religion, sex, or national origin.” §703, 78 Stat. 255 (emphasis added).<sup>1</sup>

Each paragraph in §2000e–2(a) is limited to actions taken “because of” a protected trait, and “the ordinary meaning of ‘because of’ is ‘by reason of’ or ‘on account of,’” *University of Tex. Southwestern Medical Center v. Nassar*, 570 U. S. \_\_\_, \_\_\_ (2013) (slip op., at 9) (some internal quotation marks omitted). Section 2000e–2(a) thus applies only when a protected characteristic “was the ‘reason’ that the employer decided to act.” *Id.*, at \_\_\_ (slip op., at 10) (some internal quotation marks omitted).<sup>2</sup> In other words, “to

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<sup>1</sup>The current version of §2000e–2(a) is almost identical, except that §2000e–2(a)(2) makes it unlawful for an employer “to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” (Emphasis added.) This change, which does not impact my analysis, was made in 1972. 86 Stat. 109.

<sup>2</sup>In 1991, Congress added §2000e–2(m) to Title VII, which permits a plaintiff to establish that an employer acted “because of” a protected characteristic by showing that the characteristic was “a motivating factor” in the employer’s decision. Civil Rights Act of 1991, §107(a), 105 Stat. 1075. That amended definition obviously does not legitimize disparate-impact liability, which is distinguished from disparate-

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take action against an individual *because of* a protected trait “plainly requires discriminatory intent.” See *Smith v. City of Jackson*, 544 U. S. 228, 249 (2005) (O’Connor, J., joined by KENNEDY and THOMAS, JJ., concurring in judgment) (internal quotation marks omitted); accord, *e.g.*, *Gross v. FBL Financial Services, Inc.*, 557 U. S. 167, 176 (2009).

No one disputes that understanding of §2000e–2(a)(1). We have repeatedly explained that a plaintiff bringing an action under this provision “must establish ‘that the defendant had a discriminatory intent or motive’ for taking a job-related action.” *Ricci, supra*, at 577 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U. S. 977, 986 (1988)). The only dispute is whether the same language—“because of”—means something different in §2000e–2(a)(2) than it does in §2000e–2(a)(1).

The answer to that question *should* be obvious. We ordinarily presume that “identical words used in different parts of the same act are intended to have the same meaning,” *Desert Palace, Inc. v. Costa*, 539 U. S. 90, 101 (2003) (internal quotation marks omitted), and §2000e–2(a)(2) contains nothing to warrant a departure from that presumption. That paragraph “uses the phrase ‘because of . . . [a protected characteristic]’ in precisely the same manner as does the preceding paragraph—to make plain that an employer is liable only if its adverse action against an individual is *motivated by* the individual’s [protected characteristic].” *Smith, supra*, at 249 (opinion of O’Connor, J.) (interpreting nearly identical provision of the Age Discrimination in Employment Act of 1967 (ADEA)).

The only difference between §2000e–2(a)(1) and §2000e–2(a)(2) is the type of employment decisions they address.

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treatment liability precisely because the former does not require any discriminatory motive.

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See *Smith, supra*, at 249 (opinion of O'Connor, J.). Section 2000e–2(a)(1) addresses hiring, firing, and setting the terms of employment, whereas §2000e–2(a)(2) generally addresses limiting, segregating, or classifying employees. But *no* decision is an unlawful employment practice under these paragraphs unless it occurs “*because of* such individual’s race, color, religion, sex, or national origin.” §§2000e–2(a)(1), (2) (emphasis added).

Contrary to the majority’s assumption, see *ante*, at 10–13, the fact that §2000e–2(a)(2) uses the phrase “otherwise adversely affect” in defining the employment decisions targeted by that paragraph does not eliminate its mandate that the prohibited decision be made “because of” a protected characteristic. Section 2000e–2(a)(2) does not make unlawful all employment decisions that “limit, segregate, or classify . . . employees . . . in any way which would . . . otherwise adversely affect [an individual’s] status as an employee,” but those that “otherwise adversely affect [an individual’s] status as an employee, *because of such individual’s race, color, religion, sex, or national origin.*” (Emphasis added); accord, 78 Stat. 255. Reading §2000e–2(a)(2) to sanction employers solely on the basis of the effects of their decisions would delete an entire clause of this provision, a result we generally try to avoid. Under any fair reading of the text, there can be no doubt that the Title VII enacted by Congress did not permit disparate-impact claims.<sup>3</sup>

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<sup>3</sup> Even “[f]ans . . . of *Griggs* [v. *Duke Power Co.*, 401 U. S. 424 (1971),] tend to agree that the decision is difficult to square with the available indications of congressional intent.” Lemos, The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII, 63 Vand. L. Rev. 363, 399, n. 155 (2010). In the words of one of the decision’s defenders, *Griggs* “was poorly reasoned and vulnerable to the charge that it represented a significant leap away from the expectations of the enacting Congress.” W. Eskridge, Dynamic Statutory Interpretation 78 (1994).

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## B

The author of disparate-impact liability under Title VII was not Congress, but the Equal Employment Opportunity Commission (EEOC). EEOC's "own official history of these early years records with unusual candor the commission's fundamental disagreement with its founding charter, especially Title VII's literal requirement that the discrimination be intentional." H. Graham, *The Civil Rights Era: Origins and Development of National Policy 1960–1972*, p. 248 (1990). The Commissioners and their legal staff thought that "discrimination" had become "less often an individual act of disparate treatment flowing from an evil state of mind" and "more institutionalized." Jackson, *EEOC vs. Discrimination, Inc.*, 75 *The Crisis* 16 (1968). They consequently decided they should target employment practices "which prove to have a demonstrable racial effect without a clear and convincing business motive." *Id.*, at 16–17 (emphasis deleted). EEOC's "legal staff was aware from the beginning that a normal, traditional, and literal interpretation of Title VII could blunt their efforts" to penalize employers for practices that had a disparate impact, yet chose "to defy Title VII's restrictions and attempt to build a body of case law that would justify [their] focus on effects and [their] disregard of intent." Graham, *supra*, at 248, 250.

The lack of legal authority for their agenda apparently did not trouble them much. For example, Alfred Blumrosen, one of the principal creators of disparate-impact liability at EEOC, rejected what he described as a "defeatist view of Title VII" that saw the statute as a "compromise" with a limited scope. A. Blumrosen, *Black Employment and the Law* 57–58 (1971). Blumrosen "felt that most of the problems confronting the EEOC could be solved by creative interpretation of Title VII which would be upheld by the courts, partly out of deference to the administrators." *Id.*, at 59.

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EEOC's guidelines from those years are a case study in Blumrosen's "creative interpretation." Although EEOC lacked substantive rulemaking authority, see *Faragher v. Boca Raton*, 524 U. S. 775, 811, n. 1 (1998) (THOMAS, J., dissenting), it repeatedly issued guidelines on the subject of disparate impact. In 1966, for example, EEOC issued guidelines suggesting that the use of employment tests in hiring decisions could violate Title VII based on disparate impact, notwithstanding the statute's express statement that "it shall not be an unlawful employment practice . . . to give and to act upon the results of any professionally developed ability test provided that such test . . . is not *designed, intended, or used* to discriminate because of race, color, religion, sex, or national origin," §2000e-2(h) (emphasis added). See EEOC, Guidelines on Employment Testing Procedures 2-4 (Aug. 24, 1966). EEOC followed this up with a 1970 guideline that was even more explicit, declaring that, unless certain criteria were met, "[t]he use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII constitutes discrimination." 35 Fed. Reg. 12334 (1970).

EEOC was initially hesitant to take its approach to this Court, but the *Griggs* plaintiffs forced its hand. After they lost on their disparate-impact argument in the Court of Appeals, EEOC's deputy general counsel urged the plaintiffs not to seek review because he believed "that the record in the case present[ed] a most unappealing situation for finding tests unlawful," even though he found the lower court's adherence to an intent requirement to be "tragic." Graham, *supra*, at 385. The plaintiffs ignored his advice. Perhaps realizing that a ruling on its disparate-impact theory was inevitable, EEOC filed an *amicus* brief in this Court seeking deference for its position.<sup>4</sup>

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<sup>4</sup> Efforts by Executive Branch officials to influence this Court's dis-

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EEOC's strategy paid off. The Court embraced EEOC's theory of disparate impact, concluding that the agency's position was "entitled to great deference." See *Griggs*, 401 U. S., at 433–434. With only a brief nod to the text of §2000e–2(a)(2) in a footnote, *id.*, at 426, n. 1, the Court tied this novel theory of discrimination to "the statute's perceived *purpose*" and EEOC's view of the best way of effectuating it, *Smith*, 544 U. S., at 262 (opinion of O'Connor, J.); see *id.*, at 235 (plurality opinion). But statutory provisions—not purposes—go through the process of bicameralism and presentment mandated by our Constitution. We should not replace the former with the latter, see *Wyeth v. Levine*, 555 U. S. 555, 586 (2009) (THOMAS, J., concurring in judgment), nor should we transfer our responsibility for interpreting those provisions to administrative agencies, let alone ones lacking substantive rulemaking authority, see *Perez v. Mortgage Bankers Assn.*, 575 U. S. \_\_\_\_, \_\_\_\_–\_\_\_\_ (2015) (THOMAS, J., concurring in judgment) (slip op., at 8–13).

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parate-impact jurisprudence may not be a thing of the past. According to a joint congressional staff report, after we granted a writ of certiorari in *Magner v. Gallagher*, 564 U. S. \_\_\_\_ (2011), to address whether the Fair Housing Act created disparate-impact liability, then-Assistant Attorney General Thomas E. Perez—now Secretary of Labor—entered into a secret deal with the petitioners in that case, various officials of St. Paul, Minnesota, to prevent this Court from answering the question. Perez allegedly promised the officials that the Department of Justice would not intervene in two *qui tam* complaints then pending against St. Paul in exchange for the city's dismissal of the case. See House Committee on Oversight and Government Reform, Senate Committee on the Judiciary, and House Committee on the Judiciary, DOJ's *Quid Pro Quo* With St. Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Rule of Law, Joint Staff Report, 113th Cong., 1st Sess., pp. 1–2 (2013). Additionally, just nine days after we granted a writ of certiorari in *Magner*, and before its dismissal, the Department of Housing and Urban Development proposed the disparate-impact regulation at issue in this case. See 76 Fed. Reg. 70921 (2011).

## II

*Griggs*’ disparate-impact doctrine defies not only the statutory text, but reality itself. In their quest to eradicate what they view as institutionalized discrimination, disparate-impact proponents doggedly assume that a given racial disparity at an institution is a product of that institution rather than a reflection of disparities that exist outside of it. See T. Sowell, *Intellectuals and Race* 132 (2013) (Sowell). That might be true, or it might not. Standing alone, the fact that a practice has a disparate impact is not conclusive evidence, as the *Griggs* Court appeared to believe, that a practice is “discriminatory,” 401 U. S., at 431. “Although presently observed racial imbalance *might* result from past [discrimination], racial imbalance can also result from any number of innocent private decisions.” *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U. S. 701, 750 (2007) (THOMAS, J., concurring) (emphasis added).<sup>5</sup> We should not automatically presume that any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination until proved innocent.

As best I can tell, the reason for this wholesale inversion of our law’s usual approach is the unstated—and unsubstantiated—assumption that, in the absence of discrimination, an institution’s racial makeup would mirror that of society. But the absence of racial disparities in multi-

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<sup>5</sup>It takes considerable audacity for today’s majority to describe the origins of racial imbalances in housing, *ante*, at 5–6, without acknowledging this Court’s role in the development of this phenomenon. In the past, we have admitted that the sweeping desegregation remedies of the federal courts contributed to “‘white flight’” from our Nation’s cities, see *Missouri v. Jenkins*, 515 U. S. 70, 95, n. 8 (1995); *id.*, at 114 (THOMAS, J., concurring), in turn causing the racial imbalances that make it difficult to avoid disparate impact from housing development decisions. Today’s majority, however, apparently is as content to rewrite history as it is to rewrite statutes.

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ethnic societies has been the exception, not the rule. When it comes to “proportiona[l] represent[ation]” of ethnic groups, “few, if any, societies have ever approximated this description.” D. Horowitz, *Ethnic Groups in Conflict* 677 (1985). “All multi-ethnic societies exhibit a tendency for ethnic groups to engage in different occupations, have different levels (and, often, types) of education, receive different incomes, and occupy a different place in the social hierarchy.” Weiner, *The Pursuit of Ethnic Equality Through Preferential Policies: A Comparative Public Policy Perspective*, in *From Independence to Statehood* 64 (R. Goldmann & A. Wilson eds. 1984).

Racial imbalances do not always disfavor minorities. At various times in history, “racial or ethnic minorities . . . have owned or directed more than half of whole industries in particular nations.” Sowell 8. These minorities “have included the Chinese in Malaysia, the Lebanese in West Africa, Greeks in the Ottoman Empire, Britons in Argentina, Belgians in Russia, Jews in Poland, and Spaniards in Chile—among many others.” *Ibid.* (footnotes omitted). “In the seventeenth century Ottoman Empire,” this phenomenon was seen in the palace itself, where the “medical staff consisted of 41 Jews and 21 Muslims.” *Ibid.* And in our own country, for roughly a quarter-century now, over 70 percent of National Basketball Association players have been black. R. Lapchick, D. Donovan, E. Loomer, & L. Martinez, *Institute for Diversity and Ethics in Sport*, U. of Central Fla., *The 2014 Racial and Gender Report Card: National Basketball Association* 21 (June 24, 2014). To presume that these and all other measurable disparities are products of racial discrimination is to ignore the complexities of human existence.

Yet, if disparate-impact liability is not based on this assumption and is instead simply a way to correct for imbalances that do not result from any unlawful conduct, it is even less justifiable. This Court has repeatedly reaf-



firmed that “‘racial balancing’” by state actors is “‘patently unconstitutional,’” even when it supposedly springs from good intentions. *Fisher v. University of Tex. at Austin*, 570 U. S. \_\_\_, \_\_\_ (2013) (slip op., at 9). And if that “racial balancing” is achieved through disparate-impact claims limited to only some groups—if, for instance, white basketball players cannot bring disparate-impact suits—then we as a Court have constructed a scheme that parcels out legal privileges to individuals on the basis of skin color. A problem with doing so should be obvious: “Government action that classifies individuals on the basis of race is inherently suspect.” *Schuette v. BAMN*, 572 U. S. \_\_\_, \_\_\_ (2014) (plurality opinion) (slip op., at 12); accord, *id.*, at \_\_\_ (SCALIA, J., concurring in judgment) (slip op., at 9). That is no less true when judges are the ones doing the classifying. See *id.*, at \_\_\_ (plurality opinion) (slip op., at 12); *id.*, at \_\_\_ (SCALIA, J., concurring in judgment) (slip op., at 9). Disparate-impact liability is thus a rule without a reason, or at least without a legitimate one.

### III

The decision in *Griggs* was bad enough, but this Court’s subsequent decisions have allowed it to move to other areas of the law. In *Smith*, for example, a plurality of this Court relied on *Griggs* to include disparate-impact liability in the ADEA. See 544 U. S., at 236. As both I and the author of today’s majority opinion recognized at the time, that decision was as incorrect as it was regrettable. See *id.*, at 248–249 (O’Connor, J., joined by KENNEDY and THOMAS, JJ., concurring in judgment). Because we knew that Congress did not create disparate-impact liability under Title VII, we explained that “there [wa]s no reason to suppose that Congress in 1967”—four years before *Griggs*—“could have foreseen the interpretation of Title VII that was to come.” *Smith, supra*, at 260 (opinion of O’Connor, J.). It made little sense to repeat *Griggs*’ error

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in a new context.

My position remains the same. Whatever deference is due *Griggs* as a matter of *stare decisis*, we should at the very least confine it to Title VII. We should not incorporate it into statutes such as the Fair Housing Act and the ADEA, which were passed years before Congress had any reason to suppose that this Court would take the position it did in *Griggs*. See *Smith, supra*, at 260 (opinion of O'Connor, J.). And we should certainly not allow it to spread to statutes like the Fair Housing Act, whose operative text, unlike that of the ADEA's, does not even mirror Title VII's.

Today, however, the majority inexplicably declares that “the logic of *Smith* and *Griggs*” leads to the conclusion that “the FHA encompasses disparate-impact claims.” *Ante*, at 11. JUSTICE ALITO ably dismantles this argument. *Post*, at 21–28 (dissenting opinion). But, even if the majority were correct, I would not join it in following that “logic” here. “[E]rroneous precedents need not be extended to their logical end, even when dealing with related provisions that normally would be interpreted in lockstep. Otherwise, *stare decisis*, designed to be a principle of stability and repose, would become a vehicle of change . . . distorting the law.” *CBOCS West, Inc. v. Humphries*, 553 U. S. 442, 469–470 (2008) (THOMAS, J., dissenting) (footnote omitted). Making the same mistake in different areas of the law furthers neither certainty nor judicial economy. It furthers error.

That error will take its toll. The recent experience of the Houston Housing Authority (HHA) illustrates some of the many costs of disparate-impact liability. HHA, which provides affordable housing developments to low-income residents of Houston, has over 43,000 families on its waiting lists. The overwhelming majority of those families are black. Because Houston is a majority-minority city with minority concentrations in all but the more affluent areas,

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any HHA developments built outside of those areas will increase the concentration of racial minorities. Unsurprisingly, the threat of disparate-impact suits based on those concentrations has hindered HHA's efforts to provide affordable housing. State and federal housing agencies have refused to approve all but two of HHA's eight proposed development projects over the past two years out of fears of disparate-impact liability. Brief for Houston Housing Authority as *Amicus Curiae* 8–12. That the majority believes that these are not “dire consequences,” see *ante*, at 24, is cold comfort for those who actually need a home.

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I agree with the majority that *Griggs* “provide[s] essential background” in this case, *ante*, at 10: It shows that our disparate-impact jurisprudence was erroneous from its inception. Divorced from text and reality, driven by an agency with its own policy preferences, *Griggs* bears little relationship to the statutory interpretation we should expect from a court of law. Today, the majority repeats that error.

I respectfully dissent.

ALITO, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 25, 2015]

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

No one wants to live in a rat’s nest. Yet in *Gallagher v. Magner*, 619 F. 3d 823 (2010), a case that we agreed to review several Terms ago, the Eighth Circuit held that the Fair Housing Act (or FHA), 42 U. S. C. §3601 *et seq.*, could be used to attack St. Paul, Minnesota’s efforts to combat “rodent infestation” and other violations of the city’s housing code. 619 F. 3d, at 830. The court agreed that there was no basis to “infer discriminatory intent” on the part of St. Paul. *Id.*, at 833. Even so, it concluded that the city’s “aggressive enforcement of the Housing Code” was actionable because making landlords respond to “rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, broken or missing doors,” and the like increased the price of rent. *Id.*, at 830, 835. Since minorities were statistically more likely to fall into “the bottom bracket for household adjusted median family income,” they were disproportionately affected by those rent increases, *i.e.*, there was a “disparate impact.” *Id.*, at 834. The upshot was that even St. Paul’s good-faith attempt to ensure minimally acceptable housing for its poorest residents could not ward off a disparate-impact lawsuit.

Today, the Court embraces the same theory that drove the decision in *Magner*.<sup>1</sup> This is a serious mistake. The Fair Housing Act does not create disparate-impact liability, nor do this Court’s precedents. And today’s decision will have unfortunate consequences for local government, private enterprise, and those living in poverty. Something has gone badly awry when a city can’t even make slumlords kill rats without fear of a lawsuit. Because Congress did not authorize any of this, I respectfully dissent.

I

Everyone agrees that the FHA punishes intentional discrimination. Treating someone “less favorably than others because of a protected trait” is “the most easily understood type of discrimination.” *Ricci v. DeStefano*, 557 U. S. 557, 577 (2009) (quoting *Teamsters v. United States*, 431 U. S. 324, 335, n. 15 (1977); some internal quotation marks omitted). Indeed, this classic form of discrimination—called disparate treatment—is the only one prohibited by the Constitution itself. See, e.g., *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 264–265 (1977). It is obvious that Congress intended the FHA to cover disparate treatment.

The question presented here, however, is whether the FHA also punishes “practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities.” *Ricci*, *supra*, at 577. The answer is equally clear. The FHA does not authorize disparate-impact claims. No such liability was created when the law was enacted in 1968. And nothing has happened since then to change the law’s meaning.

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<sup>1</sup>We granted certiorari in *Magner v. Gallagher*, 565 U. S. \_\_\_\_ (2011). Before oral argument, however, the parties settled. 565 U. S. \_\_\_\_ (2012). The same thing happened again in *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 571 U. S. \_\_\_\_ (2013).

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## A

I begin with the text. Section 804(a) of the FHA makes it unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of* race, color, religion, sex, familial status, or national origin.” 42 U. S. C. §3604(a) (emphasis added). Similarly, §805(a) prohibits any party “whose business includes engaging in residential real estate-related transactions” from “discriminat[ing] against any person in making available such a transaction, or in the terms or conditions of such a transaction, *because of* race, color, religion, sex, handicap, familial status, or national origin.” §3605(a) (emphasis added).

In both sections, the key phrase is “because of.” These provisions list covered actions (“refus[ing] to sell or rent . . . a dwelling,” “refus[ing] to negotiate for the sale or rental of . . . a dwelling,” “discriminat[ing]” in a residential real estate transaction, etc.) and protected characteristics (“race,” “religion,” etc.). The link between the actions and the protected characteristics is “because of.”

What “because of” means is no mystery. Two Terms ago, we held that “the ordinary meaning of ‘because of’ is ‘by reason of’ or ‘on account of.’” *University of Tex. Southwestern Medical Center v. Nassar*, 570 U. S. \_\_\_\_, \_\_\_\_ (2013) (slip op., at 9) (quoting *Gross v. FBL Financial Services, Inc.*, 557 U. S. 167, 176 (2009); some internal quotation marks omitted). A person acts “because of” something else, we explained, if that something else “‘was the “reason” that the [person] decided to act.’” 570 U. S., at \_\_\_\_ (slip op., at 10).

Indeed, just weeks ago, the Court made this same point in interpreting a provision of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e–2(m), that makes it unlawful for an employer to take a variety of adverse employment actions (such as failing or refusing to hire a job

applicant or discharging an employee) “because of” religion. See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U. S. \_\_\_, \_\_\_ (2015) (slip op., at 4). The Court wrote: “‘Because of’ in §2000e–2(a)(1) links the forbidden consideration to each of the verbs preceding it.” *Ibid.*

Nor is this understanding of “because of” an arcane feature of legal usage. When English speakers say that someone did something “because of” a factor, what they mean is that the factor was a reason for what was done. For example, on the day this case was argued, January 21, 2015, Westlaw and Lexis searches reveal that the phrase “because of” appeared in 14 Washington Post print articles. In every single one, the phrase linked an action and a reason for the action.<sup>2</sup>

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<sup>2</sup>See al-Mujahed & Naylor, *Rebels Assault Key Sites in Yemen*, pp. A1, A12 (“A government official . . . spoke on the condition of anonymity because of concern for his safety”); Berman, *Jury Selection Starts in Colo. Shooting Trial*, p. A2 (“Jury selection is expected to last four to five months because of a massive pool of potential jurors”); Davidson, *Some VA Whistleblowers Get Relief From Retaliation*, p. A18 (“In April, they moved to fire her because of an alleged ‘lack of collegiality’”); Hicks, *Post Office Proposes Hikes in Postage Rates*, p. A19 (“The Postal Service lost \$5.5 billion in 2014, in large part because of continuing declines in first-class mail volume”); Editorial, *Last Responders*, p. A20 (“Metro’s initial emergency call mentioned only smoke but no stuck train [in part] . . . because of the firefighters’ uncertainty that power had been shut off to the third rail”); Letter to the Editor, *Metro’s Safety Flaws*, p. A20 (“[A] circuit breaker automatically opened because of electrical arcing”); Bernstein, *He Formed Swingle Singers and Made Bach Swing*, p. B6 (“The group retained freshness because of the ‘stunning musicianship of these singers’”); Schudel, *TV Producer, Director Invented Instant Replay*, p. B7 (“[The 1963 Army-Navy football game was] [d]elayed one week because of the assassination of President John F. Kennedy”); Contrera & Thompson, *50 Years On, Cheering a Civil Rights Matriarch*, pp. C1, C5 (“[T]he first 1965 protest march from Selma to Montgomery . . . became known as ‘Bloody Sunday’ because of state troopers’ violent assault on the marchers”); Pressley, *‘Life Sucks’: Aaron Posner’s Latest Raging Riff on Chekhov*, pp. C1, C9 (“‘The Seagull’ gave Posner ample license to experiment because of

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Without torturing the English language, the meaning of these provisions of the FHA cannot be denied. They make it unlawful to engage in any of the covered actions “because of”—meaning “by reason of” or “on account of,” *Nassar, supra*, at \_\_\_\_ (slip op., at 9)—race, religion, etc. Put another way, “the terms [after] the ‘because of’ clauses in the FHA supply the prohibited motivations for the intentional acts . . . that the Act makes unlawful.” *American Ins. Assn. v. Department of Housing and Urban Development*, \_\_\_\_ F. Supp. 3d \_\_\_\_, \_\_\_\_, n. 20, 2014 WL 5802283, at \*8, n. 20 (DC 2014). Congress accordingly outlawed the covered actions only when they are motivated by race or one of the other protected characteristics.

It follows that the FHA does not authorize disparate-impact suits. Under a statute like the FHA that prohibits actions taken “because of” protected characteristics, intent makes all the difference. Disparate impact, however, does not turn on “subjective intent.” *Raytheon Co. v. Hernandez*, 540 U. S. 44, 53 (2003). Instead, “‘treat[ing] [a] particular person less favorably than others *because of*’ a protected trait” is “‘disparate treatment,’” *not disparate impact*. *Ricci*, 557 U. S., at 577 (emphasis added). See also, *e.g.*, *Personnel Administrator of Mass. v. Feeney*, 442 U. S. 256, 279 (1979) (explaining the difference between “because of” and “in spite of”); *Hernandez v. New York*,

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its writer and actress characters and its pronouncements on art”); A Rumpus on ‘The Bachelor,’ p. C2 (“Anderson has stood out from the pack . . . mostly because of that post-production censoring of her nether regions” (ellipsis in original)); Steinberg, KD2DC, Keeping Hype Alive, pp. D1, D4 (explaining that a commenter “asked that his name not be used because of his real job”); Boren, Former FSU Boss Bowden Wants 12 Wins to Be Restored, p. D2 (“[T]he NCAA restored the 111 victories that were taken from the late Joe Paterno because of the Jerry Sandusky child sex-abuse scandal”); Oklahoma City Finally Moves Past .500 Mark, p. D4 (“Trail Blazers all-star LaMarcus Aldridge won’t play in Wednesday night’s game against the Phoenix Suns because of a left thumb injury”).



500 U. S. 352, 359–360 (1991) (plurality opinion) (same); *Alexander v. Sandoval*, 532 U. S. 275, 278, 280 (2001) (holding that it is “beyond dispute” that banning discrimination “‘on the ground of race’” “prohibits only intentional discrimination”).

This is precisely how Congress used the phrase “because of” elsewhere in the FHA. The FHA makes it a crime to willfully “interfere with . . . any person because of his race” (or other protected characteristic) who is engaging in a variety of real-estate-related activities, such as “selling, purchasing, [or] renting” a dwelling. 42 U. S. C. §3631(a). No one thinks a defendant could be convicted of this crime without proof that he acted “because of,” *i.e.*, on account of or by reason of, one of the protected characteristics. But the critical language in this section—“because of”—is identical to the critical language in the sections at issue in this case. “One ordinarily assumes” Congress means the same words in the same statute to mean the same thing. *Utility Air Regulatory Group v. EPA*, 573 U. S. \_\_\_, \_\_\_ (2014) (slip op., at 15). There is no reason to doubt that ordinary assumption here.

Like the FHA, many other federal statutes use the phrase “because of” to signify what that phrase means in ordinary speech. For instance, the federal hate crime statute, 18 U. S. C. §249, authorizes enhanced sentences for defendants convicted of committing certain crimes “because of” race, color, religion, or other listed characteristics. Hate crimes require bad intent—indeed, that is the whole point of these laws. See, *e.g.*, *Wisconsin v. Mitchell*, 508 U. S. 476, 484–485 (1993) (“[T]he same criminal conduct may be more heavily punished if the victim is selected because of his race or other protected status”). All of this confirms that “because of” in the FHA should be read to mean what it says.

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## B

In an effort to find at least a sliver of support for disparate-impact liability in the text of the FHA, the principal respondent, the Solicitor General, and the Court pounce on the phrase “make unavailable.” Under §804(a), it is unlawful “[t]o . . . make unavailable . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” 42 U.S.C. §3604(a). See also §3605(a) (barring “discriminat[ion] against any person in making available such a [housing] transaction . . . because of race, color, religion, sex, handicap, familial status, or national origin”). The Solicitor General argues that “[t]he plain meaning of the phrase ‘make unavailable’ includes actions that *have the result* of making housing or transactions unavailable, regardless of whether the actions were intended to have that result.” Brief for United States as *Amicus Curiae* 18 (emphasis added). This argument is not consistent with ordinary English usage.

It is doubtful that the Solicitor General’s argument accurately captures the “plain meaning” of the phrase “make unavailable” even when that phrase is not linked to the phrase “because of.” “[M]ake unavailable” must be viewed together with the rest of the actions covered by §804(a), which applies when a party “*refuse[s]* to sell or rent” a dwelling, “*refuse[s]* to negotiate for the sale or rental” of a dwelling, “*denfies* a dwelling to any person,” “or otherwise *make[s] unavailable*” a dwelling. §3604(a) (emphasis added). When a statute contains a list like this, we “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving ‘unintended breadth to the Acts of Congress.’” *Gustafson v. Alloyd Co.*, 513 U. S. 561, 575 (1995) (quoting *Jarecki v. G. D. Searle & Co.*, 367 U. S. 303, 307 (1961)). See also, e.g., *Yates v. United States*, 574 U. S. \_\_\_, \_\_\_ (2015) (plurality opinion) (slip op., at 14); *id.*, at \_\_\_ (ALITO, J., concurring in judgment) (slip op., at 1). Here, the phrases

that precede “make unavailable” unmistakably describe *intentional* deprivations of equal treatment, not merely actions that happen to have a disparate effect. See *American Ins. Assn.*, \_\_\_ F. Supp. 3d, at \_\_\_, 2014 WL 5802283, at \*8 (citing Webster’s Third New International Dictionary 603, 848, 1363, 1910 (1966)). Section 804(a), moreover, prefaces “make unavailable” with “or otherwise,” thus creating a catchall. Catchalls must be read “restrictively” to be “like” the listed terms. *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Kefauver*, 537 U. S. 371, 384–385 (2003). The result of these ordinary rules of interpretation is that even without “because of,” the phrase “make unavailable” likely would require intentionality.

The FHA’s inclusion of “because of,” however, removes any doubt. Sections 804(a) and 805(a) apply only when a party makes a dwelling or transaction unavailable “because of” race or another protected characteristic. In ordinary English usage, when a person makes something unavailable “because of” some factor, that factor must be a reason for the act.

Here is an example. Suppose that Congress increases the minimum wage. Some economists believe that such legislation reduces the number of jobs available for “unskilled workers,” Fuller & Geide-Stevenson, *Consensus Among Economists: Revisited*, 34 J. Econ. Educ. 369, 378 (2003), and minorities tend to be disproportionately represented in this group, see, e.g., Dept. of Commerce, Bureau of Census, *Detailed Years of School Completed by People 25 Years and Over by Sex, Age Groups, Race and Hispanic Origin*: 2014, online at <http://www.census.gov/hhes/socdemo/education/data/cps/2014/tables.html> (all Internet materials as visited June 23, 2015, and available in Clerk of Court’s case file). Assuming for the sake of argument that these economists are correct, would it be fair to say that Congress made jobs unavailable to African-

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Americans or Latinos “because of” their race or ethnicity?

A second example. Of the 32 college players selected by National Football League (NFL) teams in the first round of the 2015 draft, it appears that the overwhelming majority were members of racial minorities. See Draft 2015, <http://www.nfl.com/draft/2015>. See also Miller, Powerful Sports Agents Representing Color, *Los Angeles Sentinel*, Feb. 6, 2014, p. B3 (noting “there are 96 players (76 of whom are African-American) chosen in the first rounds of the 2009, 2010, and 2011 NFL drafts”). Teams presumably chose the players they think are most likely to help them win games. Would anyone say the NFL teams made draft slots unavailable to white players “because of” their race?

A third example. During the present Court Term, of the 21 attorneys from the Solicitor General’s Office who argued cases in this Court, it appears that all but 5 (76%) were under the age of 45. Would the Solicitor General say he made argument opportunities unavailable to older attorneys “because of” their age?

The text of the FHA simply cannot be twisted to authorize disparate-impact claims. It is hard to imagine how Congress could have more clearly stated that the FHA prohibits only intentional discrimination than by forbidding acts done “because of race, color, religion, sex, familial status, or national origin.”

## II

The circumstances in which the FHA was enacted only confirm what the text says. In 1968, “the predominant focus of antidiscrimination law was on intentional discrimination.” *Smith v. City of Jackson*, 544 U. S. 228, 258 (2005) (O’Connor, J., concurring in judgment). The very “concept of disparate impact liability, by contrast, was quite novel.” *Ibid.* (collecting citations). See also Tr. of Oral Arg. 15 (“JUSTICE GINSBURG: . . . If we’re going to

be realistic about this, . . . in 1968, when the Fair Housing Act passed, nobody knew anything about disparate impact”). It is anachronistic to think that Congress authorized disparate-impact claims in 1968 but packaged that striking innovation so imperceptibly in the FHA’s text.

Eradicating intentional discrimination was and is the FHA’s strategy for providing fair housing opportunities for all. The Court recalls the country’s shameful history of segregation and *de jure* housing discrimination and then jumps to the conclusion that the FHA authorized disparate-impact claims as a method of combatting that evil. *Ante*, at 5–7. But the fact that the 1968 Congress sought to end housing discrimination says nothing about the means it devised to achieve that end. The FHA’s text plainly identifies the weapon Congress chose—outlawing disparate treatment “because of race” or another protected characteristic. 42 U. S. C. §§3604(a), 3605(a). Accordingly, in any FHA claim, “[p]roof of discriminatory motive is critical.” *Teamsters*, 431 U. S., at 335, n. 15.

### III

Congress has done nothing since 1968 to change the meaning of the FHA prohibitions at issue in this case. In 1968, those prohibitions forbade certain housing practices if they were done “because of” protected characteristics. Today, they still forbid certain housing practices if done “because of” protected characteristics. The meaning of the unaltered language adopted in 1968 has not evolved.

Rather than confronting the plain text of §§804(a) and 805(a), the Solicitor General and the Court place heavy reliance on certain amendments enacted in 1988, but those amendments did not modify the meaning of the provisions now before us. In the Fair Housing Amendments Act of 1988, 102 Stat. 1619, Congress expanded the list of protected characteristics. See 42 U. S. C. §§3604(a), (f)(1). Congress also gave the Department of Housing and

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Urban Development (HUD) rulemaking authority and the power to adjudicate certain housing claims. See §§3612, 3614a. And, what is most relevant for present purposes, Congress added three safe-harbor provisions, specifying that “[n]othing in [the FHA]” prohibits (a) certain actions taken by real property appraisers, (b) certain occupancy requirements, and (c) the treatment of persons convicted of manufacturing or distributing illegal drugs.<sup>3</sup>

According to the Solicitor General and the Court, these amendments show that the FHA authorizes disparate-impact claims. Indeed, the Court says that they are “of crucial importance.” *Ante*, at 13. This “crucial” argument, however, cannot stand.

## A

The Solicitor General and the Court contend that the 1988 Congress implicitly authorized disparate-impact liability by adopting the amendments just noted while leaving the operative provisions of the FHA untouched. Congress knew at that time, they maintain, that the Courts of Appeals had held that the FHA sanctions disparate-impact claims, but Congress failed to enact bills that would have rejected that theory of liability. Based on this, they submit that Congress silently ratified those

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<sup>3</sup>These new provisions state:

“Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.” §3605(c).

“Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.” §3607(b)(1).

“Nothing in this subchapter prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 802 of title 21.” §3607(b)(4).

decisions. See *ante*, at 13–14; Brief for United States as *Amicus Curiae* 23–24. This argument is deeply flawed.

Not the greatest of its defects is its assessment of what Congress must have known about the judiciary’s interpretation of the FHA. The Court writes that by 1988, “all nine *Courts of Appeals* to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims.” *Ante*, at 13 (emphasis added). See also Brief for United States as *Amicus Curiae* 12. But *this Court* had not addressed that question. While we always give respectful consideration to interpretations of statutes that garner wide acceptance in other courts, this Court has “no warrant to ignore clear statutory language on the ground that other courts have done so,” even if they have “‘consistently’” done so for “‘30 years.’” *Milner v. Department of Navy*, 562 U. S. 562, 575–576 (2011). See also, e.g., *CSX Transp., Inc. v. McBride*, 564 U. S. \_\_\_, \_\_\_ (2011) (ROBERTS, C. J., dissenting) (slip op., at 11) (explaining that this Court does not interpret statutes by asking for “a show of hands” (citing *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U. S. 598 (2001); *McNally v. United States*, 483 U. S. 350 (1987))).

In any event, there is no need to ponder whether it would have been reasonable for the 1988 Congress, without considering the clear meaning of §§804(a) and 805(a), to assume that the decisions of the lower courts effectively settled the matter. While the Court highlights the decisions of the Courts of Appeals, it fails to mention something that is of at least equal importance: The official view of the United States in 1988.

Shortly *before* the 1988 amendments were adopted, the United States formally argued in this Court that the FHA prohibits only intentional discrimination. See Brief for United States as *Amicus Curiae* in *Huntington v. Huntington Branch, NAACP*, O. T. 1988, No. 87–1961, p. 15

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(“An action taken because of some factor other than race, *i.e.*, financial means, even if it causes a discriminatory effect, is not an example of the intentional discrimination outlawed by the statute”); *id.*, at 14 (“The words ‘because of’ plainly connote a causal connection between the housing-related action and the person’s race or color”).<sup>4</sup> This was the same position that the United States had taken in lower courts for years. See, *e.g.*, *United States v. Birmingham*, 538 F. Supp. 819, 827, n. 9 (ED Mich. 1982) (noting positional change), *aff’d*, 727 F.2d 560, 565–566 (CA6 1984) (adopting United States’ “concession” that there must be a “‘discriminatory motive’”). It is implausible that the 1988 Congress was aware of certain lower court decisions but oblivious to the United States’ considered and public view that those decisions were wrong.

This fact is fatal to any notion that Congress implicitly ratified disparate impact in 1988. The canon of interpretation on which the Court and the Solicitor General purport to rely—the so-called “prior-construction canon”—does not apply where lawyers cannot “justifiably regard the point as settled” or when “other sound rules of interpretation” are implicated. A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 324, 325 (2012). That was the case here. Especially after the United States began repudiating disparate impact, no one could have reasonably thought that the question was settled.

Nor can such a faulty argument be salvaged by pointing to Congress’ failure in 1988 to enact language that would have made it clear that the FHA does not authorize disparate-impact suits based on zoning decisions. See *ante*,

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<sup>4</sup>In response to the United States’ argument, we reserved decision on the question. See *Huntington v. Huntington Branch, NAACP*, 488 U. S. 15, 18 (1988) (*per curiam*) (“Since appellants conceded the applicability of the disparate-impact test . . . we do not reach the question whether that test is the appropriate one”).



at 13–14.<sup>5</sup> To change the meaning of language in an already enacted law, Congress must pass a new law amending that language. See, e.g., *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U. S. 83, 100, 101, and n. 7 (1991). Intent that finds no expression in a statute is irrelevant. See, e.g., *New York Telephone Co. v. New York State Dept. of Labor*, 440 U. S. 519, 544–545 (1979); Easterbrook, *Statutes’ Domains*, 50 U. Chi. L. Rev. 533, 538–540 (1983). Hence, “we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.” *Helvering v. Hallock*, 309 U. S. 106, 121 (1940).

Unsurprisingly, we have rejected *identical* arguments about implicit ratification in other cases. For example, in *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U. S. 164 (1994), a party argued that §10(b) of the Securities Exchange Act of 1934 imposes liability on aiders and abettors because “Congress ha[d] amended the securities laws on various occasions since 1966, when courts first began to interpret §10(b) to cover aiding and abetting, but ha[d] done so without providing that aiding and abetting liability is not available under §10(b).” *Id.*, at 186. “From that,” a party asked the Court

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<sup>5</sup>In any event, the Court overstates the importance of that failed amendment. The amendment’s sponsor disavowed that it had anything to do with the broader question whether the FHA authorizes disparate-impact suits. Rather, it “left to caselaw and eventual Supreme Court resolution whether a discriminatory intent or discriminatory effects standard is appropriate . . . [in] all situations but zoning.” H. R. Rep. No. 100–711, p. 89 (1988). Some in Congress, moreover, supported the amendment *and* the House bill. Compare *ibid.* with 134 Cong. Rec. 16511 (1988). It is hard to believe they thought the bill—which was silent on disparate impact—nonetheless decided the broader question. It is for such reasons that failed amendments tell us “little” about what a statute means. *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 187 (1994). Footnotes in House Reports and law professor testimony tell us even less. *Ante*, at 13–14.

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to “infer that these Congresses, by silence, ha[d] acquiesced in the judicial interpretation of §10(b).” *Ibid.* The Court dismissed this argument in words that apply almost verbatim here:

“It does not follow that Congress’ failure to overturn a statutory precedent is reason for this Court to adhere to it. It is “impossible to assert with any degree of assurance that congressional failure to act represents” affirmative congressional approval of the courts’ statutory interpretation. Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. See U. S. Const., Art. I, §7, cl. 2. Congressional inaction cannot amend a duly enacted statute.’ *Patterson v. McLean Credit Union*, 491 U. S. 164, 175, n. 1 (1989) (quoting *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U. S. 616, 672 (1987) (SCALIA, J., dissenting)).” *Ibid.* (alterations omitted).

We made the same point again in *Sandoval*, 532 U. S. 275. There it was argued that amendments to Title VI of the Civil Rights Act of 1964 implicitly ratified lower court decisions upholding a private right of action. We rejected that argument out of hand. See *id.*, at 292–293.

Without explanation, the Court ignores these cases.

## B

The Court contends that the 1988 amendments provide “convincing confirmation of Congress’ understanding that disparate-impact liability exists under the FHA” because the three safe-harbor provisions included in those amendments “would be superfluous if Congress had assumed that disparate-impact liability did not exist under the FHA.” *Ante*, at 14, 15. As just explained, however, what matters is what Congress *did*, not what it might have “assumed.” And although the Court characterizes

these provisions as “exemptions,” that characterization is inaccurate. They make no reference to §804(a) or §805(a) or any other provision of the FHA; nor do they state that they apply to conduct that would otherwise be prohibited. Instead, they simply make clear that certain conduct is not forbidden by the Act. *E.g.*, 42 U. S. C. §3607(b)(4) (“Nothing in this subchapter prohibits . . .”). The Court should read these amendments to mean what they say.

In 1988, policymakers were not of one mind about disparate-impact housing suits. Some favored the theory and presumably would have been happy to have it enshrined in the FHA. See *ante*, at 13–14; 134 Cong. Rec. 23711 (1988) (statement of Sen. Kennedy). Others worried about disparate-impact liability and recognized that this Court had not decided whether disparate-impact claims were authorized under the 1968 Act. See H. R. Rep. No. 100–711, pp. 89–93 (1988). Still others disapproved of disparate-impact liability and believed that the 1968 Act did not authorize it. That was the view of President Reagan when he signed the amendments. See Remarks on Signing the Fair Housing Amendments Act of 1988, 24 Weekly Comp. of Pres. Doc. 1140, 1141 (1988) (explaining that the amendments did “not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that [FHA] violations may be established by a showing of disparate impact” because the FHA “speaks only to intentional discrimination”).<sup>6</sup>

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<sup>6</sup>At the same hearings to which the Court refers, *ante*, at 13, Senator Hatch stated that if the “intent test versus the effects test” were to “becom[e] an issue,” a “fair housing law” might not be enacted at all, and he noted that failed legislation in the past had gotten “bogged down” because of that “battle.” Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 100th Cong., 1st Sess., 5 (1987). He also noted that the bill under consideration did “not really go one way or the other” on disparate impact since the sponsors were content to “rely” on the lower court opinions. *Ibid.* And he emphasized that

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The 1988 safe-harbor provisions have all the hallmarks of a compromise among these factions. These provisions neither authorize nor bar disparate-impact claims, but they do provide additional protection for persons and entities engaging in certain practices that Congress especially wished to shield. We “must respect and give effect to these sorts of compromises.” *Ragsdale v. Wolverine World Wide, Inc.*, 535 U. S. 81, 93–94 (2002).

It is not hard to see why such a compromise was attractive. For Members of Congress who supported disparate impact, the safe harbors left the favorable lower court decisions in place. And for those who hoped that this Court would ultimately agree with the position being urged by the United States, those provisions were not surplusage. In the Circuits in which disparate-impact FHA liability had been accepted, the safe-harbor provisions furnished a measure of interim protection until the question was resolved by this Court. They also provided partial protection in the event that this Court ultimately rejected the United States’ argument. Neither the Court, the principal respondent, nor the Solicitor General has cited any case in which the canon against surplusage has been applied in circumstances like these.<sup>7</sup>

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“the issue of intent versus effect—I am afraid that is going to have to be decided by the Supreme Court.” *Ibid.* See also *id.*, at 10 (“It is not always a violation to refuse to sell, but only to refuse to sell ‘because of’ another’s race. This language made clear that the 90th Congress meant only to outlaw acts taken with the intent to discriminate . . . . To use any standard other than discriminatory intent . . . would jeopardize many kinds of beneficial zoning and local ordinances” (statement of Sen. Hatch)).

<sup>7</sup>In any event, even in disparate-treatment suits, the safe harbors are not superfluous. For instance, they affect “the burden-shifting framework” in disparate-treatment cases. *American Ins. Assn. v. Department of Housing and Urban Development*, \_\_ Supp. 3d \_\_, 2014 WL 5802283, \*10 (DC 2014). Under the second step of the burden-shifting scheme from *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973),

On the contrary, we have previously refused to interpret enactments like the 1988 safe-harbor provisions in such a way. Our decision in *O’Gilvie v. United States*, 519 U. S. 79 (1996)—also ignored by the Court today—is instructive. In that case, the question was whether a provision of the Internal Revenue Code excluding a recovery for personal injury from gross income applied to punitive damages. Well after the critical provision was enacted, Congress adopted an amendment providing that punitive damages for nonphysical injuries were not excluded. Pointing to this amendment, a taxpayer argued: “Why . . . would Congress have enacted this amendment removing punitive damages (in nonphysical injury cases) unless Congress believed that, in the amendment’s absence, punitive damages did fall within the provision’s coverage?” *Id.*, at 89. This argument, of course, is precisely the same as the argument made in this case. To paraphrase *O’Gilvie*, the Court today asks: Why would Congress have enacted the 1988 amendments, providing safe harbors from three types of disparate-impact claims, unless Congress believed

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which some courts have applied in disparate-treatment housing cases, see, e.g., *2922 Sherman Avenue Tenants’ Assn. v. District of Columbia*, 444 F. 3d 673, 682 (CA DC 2006) (collecting cases), a defendant must proffer a legitimate reason for the challenged conduct, and the safe-harbor provisions set out reasons that are necessarily legitimate. Moreover, while a factfinder in a disparate-treatment case can sometimes infer bad intent based on facially neutral conduct, these safe harbors protect against such inferences. Without more, conduct within a safe harbor is insufficient to support such an inference as a matter of law. And finally, even if there is additional evidence, these safe harbors make it harder to show pretext. See *Fair Housing Advocates Assn., Inc. v. Richmond Heights*, 209 F. 3d 626, 636–637, and n. 7 (CA 6 2000).

Even if they were superfluous, moreover, our “preference for avoiding surplusage constructions is not absolute.” *Lamie v. United States Trustee*, 540 U. S. 526, 536 (2004). We “presume that a legislature says in a statute what it means,” notwithstanding “[r]edundanc[y].” *Connecticut Nat. Bank v. Germain*, 503 U. S. 249, 253–254 (1992).

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that, in the amendments’ absence, disparate-impact claims did fall within the FHA’s coverage?

The Court rejected the argument in *O’Gilvie*. “The short answer,” the Court wrote, is that Congress might have simply wanted to “clarify the matter in respect to non-physical injuries” while otherwise “leav[ing] the law where it found it.” *Ibid.* Although other aspects of *O’Gilvie* triggered a dissent, see *id.*, at 94–101 (opinion of SCALIA, J.), no one quarreled with this self-evident piece of the Court’s analysis. Nor was the *O’Gilvie* Court troubled that Congress’ amendment regarding nonphysical injuries turned out to have been unnecessary because punitive damages for any injuries were not excluded all along.

The Court saw the flaw in the argument in *O’Gilvie*, and the same argument is no better here. It is true that *O’Gilvie* involved a dry question of tax law while this case involves a controversial civil rights issue. But how we read statutes should not turn on such distinctions.

In sum, as the principal respondent’s attorney candidly admitted, the 1988 amendments did not create disparate-impact liability. See Tr. of Oral Arg. 36 (“[D]id the things that [Congress] actually did in 1988 expand the coverage of the Act? MR. DANIEL: No, Justice”).

### C

The principal respondent and the Solicitor General—but not the Court—have one final argument regarding the text of the FHA. They maintain that even if the FHA does not unequivocally authorize disparate-impact suits, it is at least ambiguous enough to permit HUD to adopt that interpretation. Even if the FHA were ambiguous, however, we do not defer “when there is reason to suspect that the agency’s interpretation ‘does not reflect the agency’s fair and considered judgment on the matter in question.’” *Christopher v. SmithKline Beecham Corp.*, 567 U. S. \_\_\_\_, \_\_\_\_ (2012) (slip op., at 10).

Here, 43 years after the FHA was enacted and nine days after the Court granted certiorari in *Magner* (the “rodent infestation” case), HUD proposed “to prohibit housing practices with a discriminatory effect, even where there has been no intent to discriminate.” Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 76 Fed. Reg. 70921 (2011). After *Magner* settled, the Court called for the views of the Solicitor General in *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 568 U. S. \_\_\_\_ (2012), another case raising the same question. Before the Solicitor General filed his brief, however, HUD adopted disparate-impact regulations. See Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460 (2013). The Solicitor General then urged HUD’s rule as a reason to deny certiorari. We granted certiorari anyway, 570 U. S. \_\_\_\_ (2013), and shortly thereafter *Mount Holly* also unexpectedly settled. Given this unusual pattern, there is an argument that deference may be unwarranted. Cf. *Young v. United Parcel Service, Inc.*, 575 U. S. \_\_\_, \_\_\_\_ (2015) (slip op., at 16–17) (refusing to defer where “[t]he EEOC promulgated its 2014 guidelines only recently, after this Court had granted certiorari” (discussing *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944))).<sup>8</sup>

There is no need to dwell on these circumstances, however, because deference is inapt for a more familiar reason: The FHA is not ambiguous. The FHA prohibits only disparate treatment, not disparate impact. It is a bedrock rule that an agency can never “rewrite clear statutory terms to suit its own sense of how the statute should

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<sup>8</sup>At argument, the Government assured the Court that HUD did not promulgate its proposed rule because of *Magner*. See Tr. of Oral Arg. 46 (“[I]t overestimates the efficiency of the government to think that you could get, you know, a supposed rule-making on an issue like this out within seven days”). The Government also argued that HUD had recognized disparate-impact liability in adjudications for years. *Ibid.*

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operate.” *Utility Air Regulatory Group*, 573 U. S., at \_\_\_\_ (slip op., at 23). This rule makes even more sense where the agency’s view would open up a deeply disruptive avenue of liability that Congress never contemplated.

## IV

Not only does disparate-impact liability run headlong into the text of the FHA, it also is irreconcilable with our precedents. The Court’s decision today reads far too much into *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971), and far too little into *Smith v. City of Jackson*, 544 U. S. 228 (2005). In *Smith*, the Court explained that the statutory justification for the decision in *Griggs* depends on language that has no parallel in the FHA. And when the *Smith* Court addressed a provision that does have such a parallel in the FHA, the Court concluded—*unanimously*—that it does not authorize disparate-impact liability. The same result should apply here.

## A

Rather than focusing on the text of the FHA, much of the Court’s reasoning today turns on *Griggs*. In *Griggs*, the Court held that black employees who sued their employer under §703(a)(2) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e–2(a)(2), could recover without proving that the employer’s conduct—requiring a high school diploma or a qualifying grade on a standardized test as a condition for certain jobs—was motivated by a discriminatory intent. Instead, the Court held that, unless it was proved that the requirements were “job related,” the plaintiffs could recover by showing that the requirements “operated to render ineligible a markedly disproportionate number of Negroes.” 401 U. S., at 429.

*Griggs* was a case in which an intent to discriminate might well have been inferred. The company had “openly discriminated on the basis of race” prior to the date on



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which the 1964 Civil Rights Act took effect. *Id.*, at 427. Once that date arrived, the company imposed new educational requirements for those wishing to transfer into jobs that were then being performed by white workers who did not meet those requirements. *Id.*, at 427–428. These new hurdles disproportionately burdened African-Americans, who had “long received inferior education in segregated schools.” *Id.*, at 430. Despite all this, the lower courts found that the company lacked discriminatory intent. See *id.*, at 428. By convention, we do not overturn a finding of fact accepted by two lower courts, see, e.g., *Rogers v. Lodge*, 458 U. S. 613, 623 (1982); *Blau v. Lehman*, 368 U. S. 403, 408–409 (1962); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U. S. 271, 275 (1949), so the Court was confronted with the question whether Title VII always demands intentional discrimination.

Although *Griggs* involved a question of statutory interpretation, the body of the Court’s opinion—quite remarkably—does not even cite the provision of Title VII on which the plaintiffs’ claims were based. The only reference to §703(a)(2) of the 1964 Civil Rights Act appears in a single footnote that reproduces the statutory text but makes no effort to explain how it encompasses a disparate-impact claim. See 401 U. S., at 426, n. 1. Instead, the Court based its decision on the “objective” of Title VII, which the Court described as “achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of white employees over other employees.” *Id.*, at 429–430.

That text-free reasoning caused confusion, see, e.g., *Smith*, *supra*, at 261–262 (O’Connor, J., concurring in judgment), and undoubtedly led to the pattern of Court of Appeals decisions in FHA cases upon which the majority now relies. Those lower courts, like the *Griggs* Court, often made little effort to ground their decisions in the statutory text. For example, in one of the earliest cases in

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this line, *United States v. Black Jack*, 508 F. 2d 1179 (CA8 1974), the heart of the court’s analysis was this: “Just as Congress requires ‘the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification,’ such barriers must also give way in the field of housing.” *Id.*, at 1184 (quoting *Griggs, supra*, at 430–431; citation omitted).

Unlike these lower courts, however, this Court has never interpreted *Griggs* as imposing a rule that applies to all antidiscrimination statutes. See, e.g., *Guardians Assn. v. Civil Serv. Comm’n of New York City*, 463 U. S. 582, 607, n. 27 (1983) (holding that Title VI, 42 U. S. C. §2000d *et seq.*, does “not allow compensatory relief in the absence of proof of discriminatory intent”); *Sandoval*, 532 U. S., at 280 (similar). Indeed, we have never held that *Griggs* even establishes a rule for all *employment* discrimination statutes. In *Teamsters*, the Court rejected “the *Griggs* rationale” in evaluating a company’s seniority rules. 431 U. S., at 349–350. And because *Griggs* was focused on a particular problem, the Court had held that its rule does not apply where, as here, the context is different. In *Los Angeles Dept. of Water and Power v. Manhart*, 435 U. S. 702 (1978), for instance, the Court refused to apply *Griggs* to pensions under the Equal Pay Act of 1963, 29 U. S. C. §206(d) or Title VII, even if a plan has a “disproportionately heavy impact on male employees.” 435 U. S. at 711, n. 20. We explained that “[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences.” *Ibid.*

## B

Although the opinion in *Griggs* did not grapple with the text of the provision at issue, the Court was finally re-

quired to face that task in *Smith*, 544 U. S. 228, which addressed whether the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §621 *et seq.*, authorizes disparate-impact suits. The Court considered two provisions of the ADEA, §§4(a)(1) and 4(a)(2), 29 U. S. C. §§623(a)(1) and (a)(2).

The Court unanimously agreed that the first of these provisions, §4(a)(1), does not authorize disparate-impact claims. See 544 U. S., at 236, n. 6 (plurality opinion); *id.*, at 243 (SCALIA, J., concurring in part and concurring in judgment) (agreeing with the plurality’s reasoning); *id.*, at 249 (O’Connor, J., concurring in judgment) (reasoning that this provision “obvious[ly]” does not allow disparate-impact claims).

By contrast, a majority of the Justices found that the terms of §4(a)(2) either clearly authorize disparate-impact claims (the position of the plurality) or at least are ambiguous enough to provide a basis for deferring to such an interpretation by the Equal Employment Opportunity Commission (the position of JUSTICE SCALIA). See 544 U. S., at 233–240 (plurality opinion); *id.*, at 243–247 (opinion of SCALIA, J.).

In reaching this conclusion, these Justices reasoned that §4(a)(2) of the ADEA was modeled on and is virtually identical to the provision in *Griggs*, 42 U. S. C. §2000e–2(a)(2). Section 4(a)(2) provides as follows:

“It shall be unlawful for an employer—

“(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s *age*.” 29 U. S. C. §623(a) (emphasis added).

The provision of Title VII at issue in *Griggs* says this:

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“It shall be an unlawful employment practice for an employer—

“(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s *race, color, religion, sex, or national origin*.” 42 U. S. C. §2000e–2(a)(2) (emphasis added).

For purposes here, the only relevant difference between these provisions is that the ADEA provision refers to “age” and the Title VII provision refers to “race, color, religion, or national origin.” Because identical language in two statutes having similar purposes should generally be presumed to have the same meaning, the plurality in *Smith*, echoed by JUSTICE SCALIA, saw *Griggs* as “compelling” support for the conclusion that §4(a)(2) of the ADEA authorizes disparate-impact claims. 544 U. S., at 233–234 (plurality opinion) (citing *Northcross v. Board of Ed. of Memphis City Schools*, 412 U. S. 427, 428 (1973) (*per curiam*)).

When it came to the other ADEA provision addressed in *Smith*, namely, §4(a)(1), the Court unanimously reached the opposite conclusion. Section 4(a)(1) states:

“It shall be unlawful for an employer—

“(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual’s age*.” 29 U. S. C. §623(a)(1) (emphasis added).

The plurality opinion’s reasoning, with which JUSTICE SCALIA agreed, can be summarized as follows. Under §4(a)(1), *the employer* must act because of age, and thus

must have discriminatory intent. See 544 U. S., at 236, n. 6.<sup>9</sup> Under §4(a)(2), on the other hand, it is enough if the *employer's actions* “adversely affect” an individual “because of . . . age.” 29 U. S. C. §623(a).

This analysis of §§4(a)(1) and (a)(2) of the ADEA confirms that the FHA does not allow disparate-impact claims. Sections 804(a) and 805(a) of the FHA resemble §4(a)(1) of the ADEA, which the *Smith* Court unanimously agreed does not encompass disparate-impact liability. Under these provisions of the FHA, like §4(a)(1) of the ADEA, a defendant must act “because of” race or one of the other prohibited grounds. That is, it is unlawful for a person or entity to “[t]o refuse to sell or rent,” “refuse to negotiate,” “otherwise make unavailable,” etc. for a forbidden reason. These provisions of the FHA, unlike the Title VII provision in *Griggs* or §4(a)(2) of the ADEA, do not make it unlawful to take an action that happens to adversely affect a person because of race, religion, etc.

The *Smith* plurality’s analysis, moreover, also depended on other language, unique to the ADEA, declaring that “it shall not be unlawful for an employer ‘to take any action *otherwise prohibited* . . . where the differentiation is based

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<sup>9</sup>The plurality stated:

“Paragraph (a)(1) makes it unlawful for an employer ‘to fail or refuse to hire . . . *any individual* . . . because of *such individual’s* age.’ (Emphasis added.) The focus of the paragraph is on the employer’s actions with respect to the targeted individual. Paragraph (a)(2), however, makes it unlawful for an employer ‘to limit . . . his *employees* in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an employee, because of *such individual’s* age.’ (Emphasis added.) Unlike in paragraph (a)(1), there is thus an incongruity between the employer’s actions—which are focused on his employees generally—and the individual employee who adversely suffers because of those actions. Thus, an employer who classifies his employees without respect to age may still be liable under the terms of this paragraph if such classification adversely affects the employee because of that employee’s age—the very definition of disparate impact.” 544 U. S., at 236, n. 6.

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on reasonable factors other than age.” 544 U. S., at 238 (quoting 81 Stat. 603; emphasis added). This “otherwise prohibited” language was key to the plurality opinion’s reading of the statute because it arguably suggested disparate-impact liability. See 544 U. S., at 238. This language, moreover, was *essential* to JUSTICE SCALIA’s controlling opinion. Without it, JUSTICE SCALIA would have agreed with Justices O’Connor, KENNEDY, and THOMAS that *nothing* in the ADEA authorizes disparate-impact suits. See *id.*, at 245–246. In fact, even with this “otherwise prohibited” language, JUSTICE SCALIA merely concluded that §4(a)(2) was ambiguous—*not* that disparate-impacts suits are required. *Id.*, at 243.

The FHA does not contain any phrase like “otherwise prohibited.” Such language certainly is nowhere to be found in §§804(a) and 805(a). And for all the reasons already explained, the 1988 amendments do not presuppose disparate-impact liability. To the contrary, legislative enactments declaring only that certain actions are *not* grounds for liability do not implicitly create a new theory of liability that all other facets of the statute foreclose.

## C

This discussion of our cases refutes any notion that “[t]ogether, *Griggs* holds<sup>[10]</sup> and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is con-

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<sup>10</sup>*Griggs*, of course, “holds” nothing of the sort. Indeed, even the plurality opinion in *Smith* (to say nothing of JUSTICE SCALIA’s controlling opinion or Justice O’Connor’s opinion concurring in the judgment) did not understand *Griggs* to create such a rule. See 544 U. S., at 240 (plurality opinion) (relying on multiple considerations). If *Griggs* already answered the question for all statutes (even those that do not use effects language), *Smith* is inexplicable.

sistent with statutory purpose.” *Ante*, at 10. The Court stumbles in concluding that §804(a) of the FHA is more like §4(a)(2) of the ADEA than §4(a)(1). The operative language in §4(a)(1) of the ADEA—which, per *Smith*, does not authorize disparate-impact claims—is materially indistinguishable from the operative language in §804(a) of the FHA.

Even more baffling, neither alone nor in combination do *Griggs* and *Smith* support the Court’s conclusion that §805(a) of the FHA allows disparate-impact suits. The action forbidden by that provision is “*discriminat[ion]* . . . because of” race, religion, etc. 42 U. S. C. §3605(a) (emphasis added). This is precisely the formulation used in §4(a)(1) of the ADEA, which prohibits “*discriminat[ion]* . . . because of such individual’s age,” 29 U. S. C. §623(a)(1) (emphasis added), and which *Smith* holds *does not* authorize disparate-impact claims.

In an effort to explain why §805(a)’s reference to “discrimination” allows disparate-impact suits, the Court argues that in *Board of Ed. of City School Dist. of New York v. Harris*, 444 U. S. 130 (1979), “statutory language similar to §805(a) [was construed] to include disparate-impact liability.” *Ante*, at 11. In fact, the statutory language in *Harris* was quite different. The law there was §706(d)(1)(B) of the 1972 Emergency School Aid Act, which barred assisting education agencies that “‘had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation . . . or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees.’” 444 U. S., at 132–133, 142 (emphasis added).

After stating that the first clause in that unusual statute referred to a “disparate-impact test,” the *Harris* Court concluded that “a similar standard” should apply to the

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textually “closely connected” second clause. *Id.*, at 143. This was so, the Court thought, even though the second clause, standing alone, may very well have required discriminatory “intent.” *Id.*, at 139. The Court explained that the Act’s “less than careful draftsmanship” regarding the relationship between the clauses made the “wording of the statute . . . ambiguous” about teacher assignments, thus forcing the Court to “look closely at the structure and context of the statute and to review its legislative history.” *Id.*, at 138–140. It was the combined force of all those markers that persuaded the Court that disparate impact applied to the second clause too.

*Harris*, in other words, has nothing to do with §805(a) of the FHA. The “wording” is different; the “structure” is different; the “context” is different; and the “legislative history” is different. *Id.*, at 140. Rather than digging up a 36-year-old case that Justices of this Court have cited all of twice, and never once for the proposition offered today, the Court would do well to recall our many cases explaining what the phrase “because of” means.

## V

Not only is the decision of the Court inconsistent with what the FHA says and our precedents, it will have unfortunate consequences. Disparate-impact liability has very different implications in housing and employment cases.

Disparate impact puts housing authorities in a very difficult position because programs that are designed and implemented to help the poor can provide the grounds for a disparate-impact claim. As *Magner* shows, when disparate impact is on the table, even a city’s good-faith attempt to remedy deplorable housing conditions can be branded “discriminatory.” 619 F. 3d, at 834. Disparate-impact claims thus threaten “a whole range of tax, welfare, public service, regulatory, and licensing statutes.” *Washington v. Davis*, 426 U. S. 229, 248 (1976).



This case illustrates the point. The Texas Department of Housing and Community Affairs (the Department) has only so many tax credits to distribute. If it gives credits for housing in lower income areas, many families—including many minority families—will obtain better housing. That is a good thing. But if the Department gives credits for housing in higher income areas, some of those families will be able to afford to move into more desirable neighborhoods. That is also a good thing. Either path, however, might trigger a disparate-impact suit.<sup>11</sup>

This is not mere speculation. Here, one respondent has sued the Department for not allocating enough credits to higher income areas. See Brief for Respondent Inclusive Communities Project, Inc., 23. But *another* respondent argues that giving credits to wealthy neighborhoods violates “the moral imperative to improve the substandard and inadequate affordable housing in many of our inner cities.” Reply Brief for Respondent Frazier Revitalization Inc. 1. This latter argument has special force because a city can build more housing where property is least expensive, thus benefiting more people. In fact, federal law often favors projects that revitalize low-income communities. See *ante*, at 2.

No matter what the Department decides, one of these respondents will be able to bring a disparate-impact case. And if the Department opts to compromise by dividing the credits, both respondents might be able to sue. Congress surely did not mean to put local governments in such a position.

The Solicitor General’s answer to such problems is that HUD will come to the rescue. In particular, HUD regula-

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<sup>11</sup>Tr. of Oral Arg. 44–45 (“Community A wants the development to be in the suburbs. And the next state, the community wants it to be in the poor neighborhood. Is it your position . . . that in either case, step one has been satisfied[?] GENERAL VERRILLI: That may be right”).

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tions provide a defense against disparate-impact liability if a defendant can show that its actions serve “substantial, legitimate, nondiscriminatory interests” that “neces[sar]ily” cannot be met by “another practice that has a less discriminatory effect.” 24 CFR §100.500(b) (2014). (There is, of course, no hint of anything like this defense in the text of the FHA. But then, there is no hint of disparate-impact liability in the text of the FHA either.)

The effect of these regulations, not surprisingly, is to confer enormous discretion on HUD—without actually solving the problem. What is a “substantial” interest? Is there a difference between a “legitimate” interest and a “nondiscriminatory” interest? To what degree must an interest be met for a practice to be “necessary”? How are parties and courts to measure “discriminatory effect”?

These questions are not answered by the Court’s assurance that the FHA’s disparate-impact “analysis ‘is analogous to the Title VII requirement that an employer’s interest in an employment practice with a disparate impact be job related.’” *Ante*, at 4 (quoting 78 Fed. Reg. 11470). See also *ante*, at 18 (likening the defense to “the business necessity standard”). The business-necessity defense is complicated enough in employment cases; what it means when plopped into the housing context is anybody’s guess. What is the FHA analogue of “job related”? Is it “housing related”? But a vast array of municipal decisions affect property values and thus relate (at least indirectly) to housing. And what is the FHA analogue of “business necessity”? “Housing-policy necessity”? What does that mean?

Compounding the problem, the Court proclaims that “governmental entities . . . must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes.” *Ante*, at 21. But what does the Court mean by a “legitimate” objective? And does the Court mean to say that there can be no disparate-

impact lawsuit if the objective is “legitimate”? That is certainly not the view of the Government, which takes the position that a disparate-impact claim may be brought to challenge actions taken with such worthy objectives as improving housing in poor neighborhoods and making financially sound lending decisions. See Brief for United States as *Amicus Curiae* 30, n. 7.

Because HUD’s regulations and the Court’s pronouncements are so “hazy,” *Central Bank*, 511 U. S., at 188–189, courts—lacking expertise in the field of housing policy—may inadvertently harm the very people that the FHA is meant to help. Local governments make countless decisions that may have some disparate impact related to housing. See *ante*, at 19–20. Certainly Congress did not intend to “engage the federal courts in an endless exercise of second-guessing” local programs. *Canton v. Harris*, 489 U. S. 378, 392 (1989).

Even if a city or private entity named in a disparate-impact suit believes that it is likely to prevail if a disparate-impact suit is fully litigated, the costs of litigation, including the expense of discovery and experts, may “push cost-conscious defendants to settle even anemic cases.” *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544, 559 (2007). Defendants may feel compelled to “abandon substantial defenses and . . . pay settlements in order to avoid the expense and risk of going to trial.” *Central Bank*, *supra*, at 189. And parties fearful of disparate-impact claims may let race drive their decisionmaking in hopes of avoiding litigation altogether. Cf. *Ricci*, 557 U. S., at 563. All the while, similar dynamics may drive litigation against private actors. *Ante*, at 19.

This is not the Fair Housing Act that Congress enacted.

## VI

Against all of this, the Court offers several additional counterarguments. None is persuasive.

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## A

The Court is understandably worried about pretext. No one thinks that those who harm others because of protected characteristics should escape liability by conjuring up neutral excuses. Disparate-treatment liability, however, is attuned to this difficulty. Disparate impact can be *evidence* of disparate treatment. *E.g.*, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 541–542 (1993) (opinion of KENNEDY, J.); *Hunter v. Underwood*, 471 U. S. 222, 233 (1985). As noted, the facially neutral requirements in *Griggs* created a strong inference of discriminatory intent. Nearly a half century later, federal judges have decades of experience sniffing out pretext.

## B

The Court also stresses that “many of our Nation’s largest cities—entities that are potential defendants in disparate-impact suits—have submitted an *amicus* brief in this case supporting disparate-impact liability under the FHA.” *Ante*, at 23–24.

This nod to federalism is puzzling. Only a minority of the States and only a small fraction of the Nation’s municipalities have urged us to hold that the FHA allows disparate-impact suits. And even if a majority supported the Court’s position, that would not be a relevant consideration for a court. In any event, nothing prevents States and local government from enacting their own fair housing laws, including laws creating disparate-impact liability. See 42 U. S. C. §3615 (recognizing local authority).

The Court also claims that “[t]he existence of disparate-impact liability in the substantial majority of the Courts of Appeals for the last several decades” has not created “dire consequences.” *Ante*, at 24. But the Court concedes that disparate impact can be dangerous. See *ante*, at 18–22. Compare *Magner*, 619 F. 3d, at 833–838 (holding that efforts to prevent violations of the housing code may vio-

late the FHA), with 114 Cong. Rec. 2528 (1968) (remarks of Sen. Tydings) (urging enactment of the FHA to help combat violations of the housing code, including “rat problem[s]”). In the Court’s words, it is “paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing.” *Ante*, at 19. Our say-so, however, will not stop such costly cases from being filed—or from getting past a motion to dismiss (and so into settlement).

C

At last I come to the “purpose” driving the Court’s analysis: The desire to eliminate the “vestiges” of “residential segregation by race.” *Ante*, at 5, 23. We agree that all Americans should be able “to buy decent houses without discrimination . . . *because of* the color of their skin.” 114 Cong. Rec. 2533 (remarks of Sen. Tydings) (emphasis added). See 42 U. S. C. §§3604(a), 3605(a) (“because of race”). But this Court has no license to expand the scope of the FHA to beyond what Congress enacted.

When interpreting statutes, “[w]hat the legislative intention was, can be derived only from the words . . . used; and we cannot speculate beyond the reasonable import of these words.” *Nassar*, 570 U. S., at \_\_\_ (slip op., at 13) (quoting *Gardner v. Collins*, 2 Pet. 58, 93 (1829)). “[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.” *Rodriguez v. United States*, 480 U. S. 522, 526 (1987) (*per curiam*). See also, e.g., *Board of Governors, FRS v. Dimension Financial Corp.*, 474 U. S. 361, 373–374 (1986) (explaining that “‘broad purposes’” arguments “ignor[e] the complexity of the problems Congress is called upon to address”).

Here, privileging purpose over text also creates constitutional uncertainty. The Court acknowledges the risk that disparate impact may be used to “perpetuate race-based

ALITO, J., dissenting

considerations rather than move beyond them.” *Ante*, at 21. And it agrees that “racial quotas . . . rais[e] serious constitutional concerns.” *Ante*, at 20. Yet it still reads the FHA to authorize disparate-impact claims. We should avoid, rather than invite, such “difficult constitutional questions.” *Ante*, at 22. By any measure, the Court today makes a serious mistake.

\* \* \*

I would interpret the Fair Housing Act as written and so would reverse the judgment of the Court of Appeals.

## **Voting Rights Advancement Act of 2015 – Section by Section**

### **Section 2. Voting on Indian Lands**

Provides protections for Native Americans and Alaska Native voters by allowing for: (a) more accessible polling locations; (b) absentee voting where polling locations are too remote; and (c) more accessible voter registration agencies.

### **Section 3. Violations Triggering Authority of Court to Retain Jurisdiction**

Currently, Section 3(c) of the Voting Rights Act (VRA) contains a judicial “bail-in” process for a State or political subdivisions whose voting changes are found to be intentionally discriminatory in violation of the 14th and 15th Amendments of the Constitution. This provision amends 3(c) to also allow a State or political subdivision to be bailed in by a Federal court where the court has found voting changes that are discriminatory in effect in violation of VRA Section 2 or Federal voting rights laws.

### **Section 4. Criteria for Coverage of States and Political Subdivisions**

Sets forth a new nationwide coverage formula that provides that a State or political subdivision will be subject to preclearance under Section 5 of the VRA as follows:

#### **Statewide Coverage Criteria**

An entire State can be covered if:

- (1) 15 or more voting violations occurred in the State in the most recent 25-year period;
- or
- (2) 10 or more voting violations occurred in the State in the most recent 25-year period, with at least 1 of the violations being committed by the State itself.

#### **Political Subdivision Coverage Criteria**

A political subdivision within a State can be covered if it commits 3 or more voting violations in the most recent 25-year period.

#### **Period of Coverage**

A State or political subdivision will continue to be covered for 10 years starting on January 1 of the year of the most recent voting rights violations in the State or subdivision, unless the State or subdivision obtains a “bail-out” under Section 4(a).

#### **Definition of “Voting Rights Violation”**

Under the new VRA, a voting rights violation includes:

- (A) a final judgment from a court that the State or subdivision violated the 14th or 15th Amendment of the Constitution;
- (B) a final judgment of a court that a State or political subdivision violated federal voting laws based on racial discrimination or discrimination of a language minority group;
- (C) a failure or denial of preclearance by a court under section 5 or 3(c) of the VRA;
- (D) a failure or denial of preclearance by the Attorney General under section 5 or 3(c) of the VRA that is not overturned by a court; or
- (E) a consent decree, settlement, or other agreement was entered by a Federal court which resulted in the alteration or abandonment of a voting practice by a State or political subdivision because of a violation of the federal voting laws based on racial

discrimination or discrimination of a language minority group, or a violation of the 14th or 15th Amendments of the Constitution.

## **Section 5. Determination of States and Political Subdivisions Subject to Preclearance for Covered Practices**

Sets forth a separate coverage formula requiring jurisdictions nationwide to obtain preclearance for a limited universe of voting changes that have historically been found to be discriminatory.

### **Covered Practices**

1. Changes to methods of election: Any change to a State or political subdivision's method of election that either adds seats elected at-large or converts one or more seats elected by a single-member district to one or more at-large or multi-member seats. The State or political subdivision must include:
  - (a) 2 or more racial groups or language minority groups each representing 20 percent or more of the political subdivision's voting-age population; or
  - (b) A single language minority group representing 20 percent or more of the voting-age population on an Indian reservation located in whole or in part in the political subdivision.
2. Changes to jurisdiction boundaries: Any change or series of changes within a year to the boundaries of a jurisdiction that reduces by 3 or more percentage points the proportion of the jurisdiction's citizen voting-age population that is comprised of members of a single racial group or language minority group in the jurisdiction. The State or political subdivision must include:
  - (a) 2 or more racial groups or language minority groups each representing 20 percent or more of the political subdivision's voting-age population; or
  - (b) A single language minority group representing 20 percent or more of the voting-age population on an Indian reservation located in whole or in part in the political subdivision.
3. Changes through redistricting: Any change to the boundaries of election districts where any racial group or language minority group experiences a population increase of at least 10,000 or 20 percent of voting-age population over the preceding decade.
4. Changes in documentation or qualifications to vote: Any change to requirements for documentation or proof of identity to vote that exceed or are more stringent than the requirements described in section 303(b) of the Help America Vote Act of 2002; or any change to the requirements for voter registration such that exceed or are more stringent than the requirements under State law on the day of enactment of this Act.
5. Changes to multilanguage voting materials: Any change that reduces multilingual voting materials or alters the manner in which such materials are provided or distributed, where no similar reduction or alteration occurred in materials provided in English for such election.



6. Changes that reduce, consolidate, or relocate voting locations: Any change that reduces, consolidates, or relocates voting locations, including early, absentee, and election-day voting locations, where the State or political subdivision includes:
  - (a) 2 or more racial groups or language minority groups each representing 20 percent or more of the political subdivision's voting-age population; or
  - (b) A single language minority group representing 20 percent or more of the voting-age population on an Indian reservation located in whole or in part in the political subdivision.

#### **Section 6. Promoting Transparency to Enforce The Voting Rights Act**

Creates a new Section of the VRA providing for notice and disclosure by States and political subdivisions for three voting-related matters:

1. late breaking voting changes involving federal elections (*e.g.*, changes in voting standards or procedures enacted 180 days before a federal election);
2. polling resources involving federal elections (*e.g.*, information concerning precincts/polling places, number of voting age and registered voters, voting machines, and poll workers, including whether the polling places are accessible to persons with disabilities); and
3. demographic and electoral data for voting districts involving federal, state and local elections.

#### **Section 7. Authority to Assign Observers**

Amends the VRA to allow the Attorney General the authority to certify and request federal observers nationwide. Further amends the VRA to allow the Attorney General to certify and request federal observers on tribal lands where there are written requests or complaints concerning voting rights violations.

#### **Section 8. Preliminary Injunctive Relief**

Clarifies that preliminary injunctive relief applies to all provisions of the VRA. It also specifies that such relief shall be granted if the complainant raises a "serious question" and that, on balance, granting relief will be less of a hardship to the defendant than to the plaintiff if relief were not granted.

#### **Section 9. Definitions**

Defines certain terms in the bill.

#### **Section 10. Bilingual Election Requirements**

Amends the VRA to mandate that where the VRA already requires bilingual voting materials, ballots must be translated into all written Native languages.

#### **Section 11. Technical and Conforming Requirements**

Technical changes.

#### **Section 12. Tribal voting consultation**

Requires the Attorney General to consult annually with tribal organizations regarding voting rights issues for Indian tribes.

114TH CONGRESS  
1ST SESSION

# H. J. RES. 25

Proposing an amendment to the Constitution of the United States regarding  
the right to vote.

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## IN THE HOUSE OF REPRESENTATIVES

JANUARY 21, 2015

Mr. POCAN (for himself, Mr. ELLISON, Mr. CUMMINGS, Ms. ROYBAL-ALLARD, Mr. CARTWRIGHT, Ms. NORTON, Mr. TAKANO, Mr. CONYERS, Ms. BROWN of Florida, Mr. RANGEL, Mr. LOWENTHAL, Ms. SCHAKOWSKY, Mr. COHEN, Ms. EDWARDS, Mr. MCGOVERN, Ms. CHU of California, Ms. SLAUGHTER, Mr. GRIJALVA, Ms. CLARK of Massachusetts, Mr. HASTINGS, Ms. BASS, Ms. KAPTUR, Ms. MOORE, Mr. SERRANO, and Mr. HONDA) introduced the following joint resolution; which was referred to the Committee on the Judiciary

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## JOINT RESOLUTION

Proposing an amendment to the Constitution of the United  
States regarding the right to vote.

1       *Resolved by the Senate and House of Representatives*  
2       *of the United States of America in Congress assembled*  
3       *(two-thirds of each House concurring therein),* That the fol-  
4       lowing article is proposed as an amendment to the Con-  
5       stitution of the United States, which shall be valid to all  
6       intents and purposes as part of the Constitution when

1 ratified by the legislatures of three-fourths of the several  
2 States after the date of its submission for ratification:

3 “ARTICLE —

4 “SECTION 1. Every citizen of the United States, who  
5 is of legal voting age, shall have the fundamental right  
6 to vote in any public election held in the jurisdiction in  
7 which the citizen resides.

8 “SECTION 2. Congress shall have the power to en-  
9 force and implement this article by appropriate legisla-  
10 tion.”.

