SYLLABUS
CONSTITUTIONAL LAW - FALL, 2013
PROFESSOR HOWARD EGLIT

The casebook for this course is Chermersky, Constitutional Law (4th ed., not the now-superseded 3rd ed.) (There is one copy of this excessively expensive book on reserve in the library). We meet on Monday, Wednesday, and Thursday, 11:45 a.m. - 1:00 p.m.

Students are expected to abide by the Student Handbook requirements and the Student Code of Conduct. I specifically call your attention to Section 9.1, which provides as follows:

Each student is expected to attend all classes regularly and punctually, to be prepared, [to] participate in the discussion, and [to] remain throughout the session. An instructor may notify the class of reasonable attendance requirements and may deduct credit or award the grade of WP or Incomplete if a student fails to meet the requirements.

I interpret "expected" in the first line to mean "required." However, I understand that there will be times when a student legitimately cannot attend class, and so I interpret "all" to mean "substantially all." These two emendations, or interpretations, are consistent with the second sentence of section 9.1, which provides that an instructor "may notify the class of reasonable attendance requirements," and are my way of tempering the rigor of the first sentence. As the foregoing language allows, I reserve the right to reduce the grade or award a grade of WP or Incomplete in the case of a student who is excessively absent.

The final exam is scheduled for Tuesday, December 18, at 8:30 a.m. It will be a closed-book, closed-note exam. With regard to the grade for the course, class participation can be taken into account in situations where a student is just on the edge of a higher grade. In other words -- and by way of example -- a B+ may be raised to an A- where the B+ is a high B+ and class participation was particularly good (assuming the computer, which controls grade distributions because this is a required course, allows some flexibility.)
My plan is to try to do between 20 - 30 pages per class. Frankly, I have never yet been able to stick to a firmly defined schedule, and I don't really expect to do so this time around. But at least the following matrix gives you some direction. (Just because in a particular week we do not get to the material supposedly to be addressed in that week, you should not assume (as some have in the past for reasons that escape me) that we will not do that material -- we pick up in class where we left off in the preceding class.)

WEEK 1 (8/26, 8/27, 8/29):

I will provide a brief historical review regarding the genesis of the Constitution, and then we will undertake a very superficial quick overview of the various provisions of the Constitution.

THE FEDERAL JUDICIAL POWER

pp.1- 13 (up to subheading)
pp.33 (starting with “Congressional Limits” subheading)
- 43
pp.44 (starting with “Notes on Advisory Opinions up to Massachusetts”) - 52
pp.59 (starting with subheading) - 64
pp.66 (starting with “Causation and Redressability”) - 80
Hollingsworth v. Perry (distributed through TWEN and my school website)

WEEK 2 (9/3) (no classes on Monday and Thursday):

pp. 81 - 94 (up to end of first complete paragraph on p. 94)

WEEK 3 - 4 (9/9, 9/10, 9/12)

THE FEDERAL LEGISLATIVE POWER

pp. 115 - 129, 151 - 158

Congress' Commerce Power

pp. 158 - 207, 210 - 241

Congress' Taxing and Spending Powers

2
Week 5 (9/16, 9/17, 9/19):

pp. 241 - 245, 248 (starting with subheading) - 250, 129 - 151

Week 6 - 7 (9/23, 9/24, 9/26, 9/30, 10/1, 10/3):

Congress’ Powers Under the Post-Civil War Amendments

pp. 251 - 266; Shelby County, Ala. v. Holder (TWEN and my school website); pp. 266 - 269 (up to subheading 2)

THE FEDERAL EXECUTIVE POWER

pp. 317 - 339, 342 (2d full paragraph), 344 (starting with subheading) - 353, 369 (starting with subheading) - 377, 381 - 429

LIMITS ON STATE REGULATORY AND TAXING POWER

pp. 431 - 434 (up to Lorillard), 441 (starting with “2. Implied Preemption”) - 442 (up to Pacific Gas), 446 (starting with subheading) - 455

Week 8 (10/7, 10/8, 10/10):

pp. 456 - 478, 484 - 516

CIVIL RIGHTS AND CIVIL LIBERTIES

pp. 517 - 530

Week 9 (10/14, 10/16, 10/17):

pp. 530 - 558 (up to Terry), 567 - 570 (up to subheading), 575 (starting with subheading) - 582 (up to Rendell Baker), 593 - 604 (up to subheading), 609 - 614 (up to subheading), 623 - 630 (up to BMW), 711 - 726 (up to second subheading)

Week 10 (10/21, 10/23, 10/2):

pp. 733 - 781, 787 (starting with last paragraph under
subheading) - 791 (up to line), 794 - 824-862

**Week 11** (10/28, 10/30, 10/31):

pp. 824 - 834 (up to end of long indented quote), 837 - 896 (up to Califano), 905 (starting with subheading) - 921 (up to subheading) 924 - 931

**Week 12** (11/4, 11/6, 11/7):

pp. 921 - 931, 933 - 962, 967 - 988

**Week 13** (11/11, 11/13, 11/14):

pp. 988 - 1030

**Week 14** (11/18, 11/20, 11/21):

pp. 1030 - 1058; United States v. Windsor (TWEN and my website)

**Week 15** (11/25, 11/26):

pp. 1058 - 1094, 1135 - 1176, 1182 - 1196

**Week 16** (12/2, 12/3)

Trying to cover the stuff we have not yet gotten to.
Cite as: 570 U. S. ___ (2013)

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

No. 12–144

DENNIS HOLLINGSWORTH, ET AL., PETITIONERS v.
KRISTIN M. PERRY ET AL.

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

[June 26, 2013]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The public is currently engaged in an active political debate over whether same-sex couples should be allowed to marry. That question has also given rise to litigation. In this case, petitioners, who oppose same-sex marriage, ask us to decide whether the Equal Protection Clause “prohibits the State of California from defining marriage as the union of a man and a woman.” Pet. for Cert. i. Respondents, same-sex couples who wish to marry, view the issue in somewhat different terms: For them, it is whether California—having previously recognized the right of same-sex couples to marry—may reverse that decision through a referendum.

Federal courts have authority under the Constitution to answer such questions only if necessary to do so in the course of deciding an actual “case” or “controversy.” As used in the Constitution, those words do not include every sort of dispute, but only those “historically viewed as capable of resolution through the judicial process.” Flast v. Cohen, 392 U. S. 83, 95 (1968). This is an essential
limit on our power: It ensures that we act as judges, and do not engage in policymaking properly left to elected representatives.

For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue. That party must also have "standing," which requires, among other things, that it have suffered a concrete and particularized injury. Because we find that petitioners do not have standing, we have no authority to decide this case on the merits, and neither did the Ninth Circuit.

I

In 2008, the California Supreme Court held that limiting the official designation of marriage to opposite-sex couples violated the equal protection clause of the California Constitution. In re Marriage Cases, 43 Cal. 4th 757, 183 P. 3d 384. Later that year, California voters passed the ballot initiative at the center of this dispute, known as Proposition 8. That proposition amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const., Art. I, §7.5. Shortly thereafter, the California Supreme Court rejected a procedural challenge to the amendment, and held that the Proposition was properly enacted under California law. Strauss v. Horton, 46 Cal. 4th 364, 474–475, 207 P. 3d 48, 122 (2009).

According to the California Supreme Court, Proposition 8 created a "narrow and limited exception" to the state constitutional rights otherwise guaranteed to same-sex couples. Id., at 388, 207 P. 3d, at 61. Under California law, same-sex couples have a right to enter into relationships recognized by the State as "domestic partnerships," which carry "the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law ... as are granted to and
imposed upon spouses.” Cal. Fam. Code Ann. §297.5(a) (West 2004). In In re Marriage Cases, the California Supreme Court concluded that the California Constitution further guarantees same-sex couples “all of the constitutionally based incidents of marriage,” including the right to have that marriage “officially recognized” as such by the State. 43 Cal. 4th, at 829, 183 P. 3d, at 433–434. Proposition 8, the court explained in Strauss, left those rights largely undisturbed, reserving only “the official designation of the term ‘marriage’ for the union of opposite-sex couples as a matter of state constitutional law.” 46 Cal. 4th, at 388, 207 P. 3d, at 61.

Respondents, two same-sex couples who wish to marry, filed suit in federal court, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution. The complaint named as defendants California’s Governor, attorney general, and various other state and local officials responsible for enforcing California’s marriage laws. Those officials refused to defend the law, although they have continued to enforce it throughout this litigation. The District Court allowed petitioners—the official proponents of the initiative, see Cal. Elec. Code Ann. §342 (West 2003)—to intervene to defend it. After a 12-day bench trial, the District Court declared Proposition 8 unconstitutional, permanently enjoining the California officials named as defendants from enforcing the law, and “directing the official defendants that all persons under their control or supervision” shall not enforce it. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1004 (ND Cal. 2010).

Those officials elected not to appeal the District Court order. When petitioners did, the Ninth Circuit asked them to address “why this appeal should not be dismissed for lack of Article III standing.” Perry v. Schwarzenegger, Civ. No. 10–16696 (CA9, Aug. 16, 2010), p. 2. After brief-
ing and argument, the Ninth Circuit certified a question to the California Supreme Court:

"Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so." *Perry v. Schwarzenegger*, 628 F. 3d 1191, 1193 (2011).

The California Supreme Court agreed to decide the certified question, and answered in the affirmative. Without addressing whether the proponents have a particularized interest of their own in an initiative's validity, the court concluded that "[i]n a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so." *Perry v. Brown*, 52 Cal. 4th 1116, 1127, 265 P. 3d 1002, 1007 (2011).

Relying on that answer, the Ninth Circuit concluded that petitioners had standing under federal law to defend the constitutionality of Proposition 8. California, it reasoned, "has standing to defend the constitutionality of its [laws]," and States have the "prerogative, as independent sovereigns, to decide for themselves who may assert their interests." *Perry v. Brown*, 671 F. 3d 1052, 1070, 1071 (2012) (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)). "All a federal court need determine is that the
state has suffered a harm sufficient to confer standing and that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm.” 671 F. 3d, at 1072.

On the merits, the Ninth Circuit affirmed the District Court. The court held the Proposition unconstitutional under the rationale of our decision in Romer v. Evans, 517 U. S. 620 (1996). 671 F. 3d, at 1076, 1095. In the Ninth Circuit’s view, Romer stands for the proposition that “the Equal Protection Clause requires the state to have a legitimate reason for withdrawing a right or benefit from one group but not others, whether or not it was required to confer that right or benefit in the first place.” 671 F. 3d, at 1083–1084. The Ninth Circuit concluded that “taking away the official designation” of “marriage” from same-sex couples, while continuing to afford those couples all the rights and obligations of marriage, did not further any legitimate interest of the State. Id., at 1095. Proposition 8, in the court’s view, violated the Equal Protection Clause because it served no purpose “but to impose on gays and lesbians, through the public law, a majority’s private disapproval of them and their relationships.” Ibid.

We granted certiorari to review that determination, and directed that the parties also brief and argue “Whether petitioners have standing under Article III, §2, of the Constitution in this case.” 568 U. S. ___ (2012).

II

Article III of the Constitution confines the judicial power of federal courts to deciding actual “Cases” or “Controversies.” §2. One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so. This requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial deci-
sion. *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). In other words, for a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III’s requirements." *Diamond, supra*, at 62.

The doctrine of standing, we recently explained, "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int’l USA*, 568 U. S. __, ___ (2013) (slip op., at 9). In light of this "overriding and time-honored concern about keeping the Judiciary’s power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of [an] important dispute and to ‘settle’ it for the sake of convenience and efficiency." *Raines v. Byrd*, 521 U. S. 811, 820 (1997) (footnote omitted).

Most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an "actual controversy" persist throughout all stages of litigation. *Already, LLC v. Nike, Inc.*, 568 U. S. __, ___ (2013) (slip op., at 4) (internal quotation marks omitted). That means that standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English v. Arizona*, 520 U. S. 43, 64 (1997). We therefore must decide whether petitioners had standing to appeal the District Court’s order.

Respondents initiated this case in the District Court against the California officials responsible for enforcing Proposition 8. The parties do not contest that respondents had Article III standing to do so. Each couple expressed a desire to marry and obtain "official sanction" from the State, which was unavailable to them given the declaration in Proposition 8 that "marriage" in California is solely
between a man and a woman. App. 59.

After the District Court declared Proposition 8 unconstitutional and enjoined the state officials named as defendants from enforcing it, however, the inquiry under Article III changed. Respondents no longer had any injury to redress—they had won—and the state officials chose not to appeal.

The only individuals who sought to appeal that order were petitioners, who had intervened in the District Court. But the District Court had not ordered them to do or refrain from doing anything. To have standing, a litigant must seek relief for an injury that affects him in a "personal and individual way." Defenders of Wildlife, supra, at 560, n. 1. He must possess a "direct stake in the outcome" of the case. Arizonans for Official English, supra, at 64 (internal quotation marks omitted). Here, however, petitioners had no "direct stake" in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.

We have repeatedly held that such a "generalized grievance," no matter how sincere, is insufficient to confer standing. A litigant "raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." Defenders of Wildlife, supra, at 573–574; see Lance v. Coffman, 549 U.S. 437, 439 (2007) (per curiam) ("Our refusal to serve as a forum for generalized grievances has a lengthy pedigree."); Allen v. Wright, 468 U.S. 737, 754 (1984) ("an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court"); Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) ("The party who invokes
the [judicial] power must be able to show . . . that he has
sustained or is immediately in danger of sustaining some
direct injury . . . and not merely that he suffers in some
indefinite way in common with people generally.").

Petitioners argue that the California Constitution and
its election laws give them a “unique,’ ‘special,’ and ‘dis-
tinct’ role in the initiative process—one ‘involving both
authority and responsibilities that differ from other sup-
porters of the measure.’’” Reply Brief 5 (quoting 52 Cal.
4th, at 1126, 1142, 1160, 265 P. 3d, at 1006, 1017–1018,
1030). True enough—but only when it comes to the pro-
cess of enacting the law. Upon submitting the proposed
initiative to the attorney general, petitioners became the
§342 (West 2003). As such, they were responsible for
collecting the signatures required to qualify the measure
for the ballot. §§9607–9609.:
After those signatures were
collected, the proponents alone had the right to file the
measure with election officials to put it on the ballot.
§9032. Petitioners also possessed control over the argu-
ments in favor of the initiative that would appear in Cali-
ifornia’s ballot pamphlets. §§9064, 9065, 9067, 9069.

But once Proposition 8 was approved by the voters, the
measure became “a duly enacted constitutional amend-
ment or statute.” 52 Cal. 4th, at 1147, 265 P. 3d, at 1021.
Petitioners have no role—special or otherwise—in the
enforcement of Proposition 8. See id., at 1159, 265 P. 3d,
at 1029 (petitioners do not “possess any official authority
. . . to directly enforce the initiative measure in question”).
They therefore have no “personal stake” in defending its
enforcement that is distinguishable from the general
interest of every citizen of California. Defenders of Wild-
life, supra, at 560–561.

Article III standing “is not to be placed in the hands of
‘concerned bystanders,’ who will use it simply as a ‘vehicle
for the vindication of value interests.’” Diamond, 476
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U. S., at 62. No matter how deeply committed petitioners may be to upholding Proposition 8 or how "zealous [their] advocacy," post, at 4 (KENNEDY, J., dissenting), that is not a "particularized" interest sufficient to create a case or controversy under Article III. Defenders of Wildlife, 504 U. S., at 560, and n. 1; see Arizonans for Official English, 520 U. S., at 65 ("Nor has this Court ever identified initiative proponents as Article-III-qualified defenders of the measures they advocated."); Don't Bankrupt Washington Committee v. Continental Ill. Nat. Bank & Trust Co. of Chicago, 460 U. S. 1077 (1983) (summarily dismissing, for lack of standing, appeal by an initiative proponent from a decision holding the initiative unconstitutional).

III

A

Without a judicially cognizable interest of their own, petitioners attempt to invoke that of someone else. They assert that even if they have no cognizable interest in appealing the District Court's judgment, the State of California does, and they may assert that interest on the State's behalf. It is, however, a "fundamental restriction on our authority" that "[i]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." Powers v. Ohio, 499 U. S. 400, 410 (1991). There are "certain, limited exceptions" to that rule. Ibid. But even when we have allowed litigants to assert the interests of others, the litigants themselves still "must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute." Id., at 411 (internal quotation marks omitted).

In Diamond v. Charles, for example, we refused to allow Diamond, a pediatrician engaged in private practice in Illinois, to defend the constitutionality of the State's abortion law. In that case, a group of physicians filed a con-
stitutional challenge to the Illinois statute in federal court. The State initially defended the law, and Diamond, a professed "conscientious objector to abortions," intervened to defend it alongside the State. 476 U. S., at 57–58.

After the Seventh Circuit affirmed a permanent injunction against enforcing several provisions of the law, the State chose not to pursue an appeal to this Court. But when Diamond did, the state attorney general filed a "letter of interest," explaining that the State's interest in the proceeding was "essentially co-terminous with the position on the issues set forth by [Diamond]." Id., at 61. That was not enough, we held, to allow the appeal to proceed. As the Court explained, "[e]ven if there were circumstances in which a private party would have standing to defend the constitutionality of a challenged statute, this [was] not one of them," because Diamond was not able to assert an injury in fact of his own. Id., at 65 (footnote omitted). And without "any judicially cognizable interest," Diamond could not "maintain the litigation abandoned by the State." Id., at 71.

For the reasons we have explained, petitioners have likewise not suffered an injury in fact, and therefore would ordinarily have no standing to assert the State's interests.

B

Petitioners contend that this case is different, because the California Supreme Court has determined that they are "authorized under California law to appear and assert the state's interest" in the validity of Proposition 8. 52 Cal. 4th, at 1127, 265 P. 3d, at 1007. The court below agreed: "All a federal court need determine is that the state has suffered a harm sufficient to confer standing and that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm." 671 F. 3d, at 1072. As petitioners
put it, they "need no more show a personal injury, separate from the State's indisputable interest in the validity of its law, than would California's Attorney General or did the legislative leaders held to have standing in Karcher v. May, 484 U. S. 72 (1987)." Reply Brief 6.

In Karcher, we held that two New Jersey state legislators—Speaker of the General Assembly Alan Karcher and President of the Senate Carmen Orechio—could intervene in a suit against the State to defend the constitutionality of a New Jersey law, after the New Jersey attorney general had declined to do so. 484 U. S., at 75, 81–82. "Since the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals," we held that the Speaker and the President, in their official capacities, could vindicate that interest in federal court on the legislature's behalf. Id., at 82.

Far from supporting petitioners' standing, however, Karcher is compelling precedent against it. The legislators in that case intervened in their official capacities as Speaker and President of the legislature. No one doubts that a State has a cognizable interest "in the continued enforceability" of its laws that is harmed by a judicial decision declaring a state law unconstitutional. Maine v. Taylor, 477 U. S. 131, 137 (1986). To vindicate that interest or any other, a State must be able to designate agents to represent it in federal court. See Poindexter v. Greenhow, 114 U. S. 270, 288 (1885) ("The State is a political corporate body [that] can act only through agents"). That agent is typically the State's attorney general. But state law may provide for other officials to speak for the State in federal court, as New Jersey law did for the State's presiding legislative officers in Karcher. See 484 U. S., at 81–82.

What is significant about Karcher is what happened after the Court of Appeals decision in that case. Karcher and Orechio lost their positions as Speaker and President,
but nevertheless sought to appeal to this Court. We held that they could not do so. We explained that while they were able to participate in the lawsuit in their official capacities as presiding officers of the incumbent legislature, “since they no longer hold those offices, they lack authority to pursue this appeal.” *Id.*, at 81.

The point of *Karcher* is not that a State could authorize *private parties* to represent its interests; Karcher and Orechio were permitted to proceed only because they were state officers, acting in an official capacity. As soon as they lost that capacity, they lost standing. Petitioners here hold no office and have always participated in this litigation solely as private parties.

The cases relied upon by the dissent, see *post*, at 11–12, provide petitioners no more support. The dissent’s primary authorities, in fact, do not discuss standing at all. See *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787 (1987); *United States v. Providence Journal Co.*, 485 U. S. 693 (1988). And none comes close to establishing that mere authorization to represent a third party’s interests is sufficient to confer Article III standing on private parties with no injury of their own.

The dissent highlights the discretion exercised by special prosecutors appointed by federal courts to pursue contempt charges. See *post*, at 11 (citing *Young*, supra, at 807). Such prosecutors do enjoy a degree of independence in carrying out their appointed role, but no one would suppose that they are not subject to the ultimate authority of the court that appointed them. See also *Providence Journal*, supra, at 698–707 (recognizing further control exercised by the Solicitor General over special prosecutors).

The dissent’s remaining cases, which at least consider standing, are readily distinguishable. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U. S. 765, 771–778 (2000) (justifying *qui tam* actions
based on a partial assignment of the Government's damages claim and a "well nigh conclusive" tradition of such actions in English and American courts dating back to the 13th century); Whitmore v. Arkansas, 495 U. S. 149, 162–164 (1989) (justifying "next friend" standing based on a similar history dating back to the 17th century, requiring the next friend to prove a disability of the real party in interest and a "significant relationship" with that party); Goldust v. Mendell, 501 U. S. 115, 124–125 (1990) (requiring plaintiff in shareholder-derivative suit to maintain a financial stake in the outcome of the litigation, to avoid "serious constitutional doubt whether that plaintiff could demonstrate the standing required by Article III's case-or-controversy limitation").

C

Both petitioners and respondents seek support from dicta in Arizonans for Official English v. Arizona, 520 U. S. 43. The plaintiff in Arizonans for Official English filed a constitutional challenge to an Arizona ballot initiative declaring English "the official language of the State of Arizona." Id., at 48. After the District Court declared the initiative unconstitutional, Arizona's Governor announced that she would not pursue an appeal. Instead, the principal sponsor of the ballot initiative—the Arizonans for Official English Committee—sought to defend the measure in the Ninth Circuit. Id., at 55–56, 58. Analogizing the sponsors to the Arizona Legislature, the Ninth Circuit held that the Committee was "qualified to defend [the initiative] on appeal," and affirmed the District Court. Id., at 58, 61.

Before finding the case mooted by other events, this Court expressed "grave doubts" about the Ninth Circuit's standing analysis. Id., at 66. We reiterated that "[s]tanding to defend on appeal in the place of an original defendant . . . demands that the litigant possess 'a direct
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stake in the outcome.’’  Id., at 64 (quoting Diamond, 476 U. S., at 62). We recognized that a legislator authorized by state law to represent the State’s interest may satisfy standing requirements, as in Karcher, supra, at 82, but noted that the Arizona committee and its members were “not elected representatives, and we [we]re aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.” Arizonaans for Official English, supra, at 65.

Petitioners argue that, by virtue of the California Supreme Court’s decision, they are authorized to act “as agents of the people’ of California.” Brief for Petitioners 15 (quoting Arizonaans for Official English, supra, at 65). But that Court never described petitioners as “agents of the people,” or of anyone else. Nor did the Ninth Circuit. The Ninth Circuit asked—and the California Supreme Court answered—only whether petitioners had “the authority to assert the State’s interest in the initiative’s validity.” 628 F. 3d, at 1193; 52 Cal. 4th, at 1124, 265 P. 3d, at 1005. All that the California Supreme Court decision stands for is that, so far as California is concerned, petitioners may argue in defense of Proposition 8. This “does not mean that the proponents become de facto public officials”; the authority they enjoy is “simply the authority to participate as parties in a court action and to assert legal arguments in defense of the state’s interest in the validity of the initiative measure.” Id., at 1159, 265 P. 3d, at 1029. That interest is by definition a generalized one, and it is precisely because proponents assert such an interest that they lack standing under our precedents.

And petitioners are plainly not agents of the State—“formal” or otherwise, see post, at 7. As an initial matter, petitioners’ newfound claim of agency is inconsistent with their representations to the District Court. When the proponents sought to intervene in this case, they did not
purport to be agents of California. They argued instead that “no other party in this case w[ould] adequately rep-
resent their interests as official proponents.” Motion to Intervene in No. 09–2292 (ND Cal.), p. 6 (emphasis added). It was their “unique legal status” as official proponents—not an agency relationship with the people of California—that petitioners claimed “endow[ed] them with a significantly protectable interest” in ensuring that the District Court not “undo[ ] all that they ha[d] done in obtaining . . . enactment” of Proposition 8. Id., at 10, 11.

More to the point, the most basic features of an agency relationship are missing here. Agency requires more than mere authorization to assert a particular interest. “An essential element of agency is the principal’s right to control the agent’s actions.” 1 Restatement (Third) of Agency §1.01, Comment f (2005) (hereinafter Restatement). Yet petitioners answer to no one; they decide for themselves, with no review, what arguments to make and how to make them. Unlike California’s attorney general, they are not elected at regular intervals—or elected at all. See Cal. Const., Art. V, §11. No provision provides for their removal. As one amicus explains, “the proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however and to whatever extent they choose to defend it.” Brief for Walter Dellinger 23.

“If the relationship between two persons is one of agency . . . , the agent owes a fiduciary obligation to the principal.” 1 Restatement §1.01, Comment e. But petitioners owe nothing of the sort to the people of California. Unlike California’s elected officials, they have taken no oath of office. E.g., Cal. Const., Art. XX, §3 (prescribing the oath for “all public officers and employees, executive, legisla-
tive, and judicial”). As the California Supreme Court explained, petitioners are bound simply by “the same ethical constraints that apply to all other parties in a legal
proceeding.” 52 Cal. 4th, at 1159, 265 P. 3d, at 1029. They are free to pursue a purely ideological commitment to the law’s constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities.

Finally, the California Supreme Court stated that “[t]he question of who should bear responsibility for any attorney fee award . . . is entirely distinct from the question” before it. Id., at 1161, 265 P. 3d, at 1031. (emphasis added). But it is hornbook law that “a principal has a duty to indemnify the agent against expenses and other losses incurred by the agent in defending against actions brought by third parties if the agent acted with actual authority in taking the action challenged by the third party’s suit.” 2 Restatement §8.14, Comment d. If the issue of fees is entirely distinct from the authority question, then authority cannot be based on agency.

Neither the California Supreme Court nor the Ninth Circuit ever described the proponents as agents of the State, and they plainly do not qualify as such.

IV

The dissent eloquently recounts the California Supreme Court’s reasons for deciding that state law authorizes petitioners to defend Proposition 8. See post, at 3–5. We do not “disrespect[]” or “disparage[]” those reasons. Post, at 12. Nor do we question California’s sovereign right to maintain an initiative process, or the right of initiative proponents to defend their initiatives in California courts, where Article III does not apply. But as the dissent acknowledges, see post, at 1, standing in federal court is a question of federal law, not state law. And no matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary.
Opinion of the Court

The Article III requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in our system of separated powers. "Refusing to entertain generalized grievances ensures that ... courts exercise power that is judicial in nature," Lance, 549 U. S., at 441, and ensures that the Federal Judiciary respects "the proper—and properly limited—role of the courts in a democratic society," DaimlerChrysler Corp. v. Cuno, 547 U. S. 332, 341 (2006) (internal quotation marks omitted). States cannot alter that role simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse.

*   *   *

We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.

Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal. The judgment of the Ninth Circuit is vacated, and the case is remanded with instructions to dismiss the appeal for lack of jurisdiction.

It is so ordered.
Cite as: 570 U. S. ____ (2013)

KENNEDY, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 12–144

DENNIS HOLLINGSWORTH, ET AL., PETITIONERS v.
KRISTIN M. PERRY ET AL.

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

[June 26, 2013]

JUSTICE KENNEDY, with whom JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE SOTOMAYOR join, dissenting.

The Court’s opinion is correct to state, and the Supreme Court of California was careful to acknowledge, that a proponent’s standing to defend an initiative in federal court is a question of federal law. Proper resolution of the justiciability question requires, in this case, a threshold determination of state law. The state-law question is how California defines and elaborates the status and authority of an initiative’s proponents who seek to intervene in court to defend the initiative after its adoption by the electorate. Those state-law issues have been addressed in a meticulous and unanimous opinion by the Supreme Court of California.

Under California law, a proponent has the authority to appear in court and assert the State’s interest in defending an enacted initiative when the public officials charged with that duty refuse to do so. The State deems such an appearance essential to the integrity of its initiative process. Yet the Court today concludes that this state-defined status and this state-conferred right fall short of meeting federal requirements because the proponents cannot point to a formal delegation of authority that tracks the requirements of the Restatement of Agency. But the State Supreme Court’s definition of proponents’ powers is bind-
ing on this Court. And that definition is fully sufficient to establish the standing and adversity that are requisites for justiciability under Article III of the United States Constitution.

In my view Article III does not require California, when deciding who may appear in court to defend an initiative on its behalf, to comply with the Restatement of Agency or with this Court’s view of how a State should make its laws or structure its government. The Court’s reasoning does not take into account the fundamental principles or the practical dynamics of the initiative system in California, which uses this mechanism to control and to bypass public officials—the same officials who would not defend the initiative, an injury the Court now leaves unremedied. The Court’s decision also has implications for the 26 other States that use an initiative or popular referendum system and which, like California, may choose to have initiative proponents stand in for the State when public officials decline to defend an initiative in litigation. See M. Waters, Initiative and Referendum Almanac 12 (2003). In my submission, the Article III requirement for a justiciable case or controversy does not prevent proponents from having their day in court.

These are the premises for this respectful dissent.

I

As the Court explains, the State of California sustained a concrete injury, sufficient to satisfy the requirements of Article III, when a United States District Court nullified a portion of its State Constitution. See ante, at 11 (citing Maine v. Taylor, 477 U.S. 131, 137 (1986)). To determine whether justiciability continues in appellate proceedings after the State Executive acquiesced in the District Court’s adverse judgment, it is necessary to ascertain what persons, if any, have “authority under state law to represent the State’s interests” in federal court. Karcher v. May, 484
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As the Court notes, the California Elections Code does not on its face prescribe in express terms the duties or rights of proponents once the initiative becomes law. Ante, at 8. If that were the end of the matter, the Court's analysis would have somewhat more force. But it is not the end of the matter. It is for California, not this Court, to determine whether and to what extent the Elections Code provisions are instructive and relevant in determining the authority of proponents to assert the State's interest in postenactment judicial proceedings. And it is likewise not for this Court to say that a State must determine the substance and meaning of its laws by statute, or by judicial decision, or by a combination of the two. See Sweezy v. New Hampshire, 354 U. S. 234, 255 (1957) (plurality opinion); Dreyer v. Illinois, 187 U. S. 71, 84 (1902). That, too, is for the State to decide.

This Court, in determining the substance of state law, is "bound by a state court's construction of a state statute." Wisconsin v. Mitchell, 508 U. S. 476, 483 (1993). And the Supreme Court of California, in response to the certified question submitted to it in this case, has determined that State Elections Code provisions directed to initiative proponents do inform and instruct state law respecting the rights and status of proponents in postelection judicial proceedings. Here, in reliance on these statutes and the California Constitution, the State Supreme Court has held that proponents do have authority "under California law to appear and assert the state's interest in the initiative's validity and appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so." Perry v. Brown, 52 Cal. 4th 1116, 1127, 265 P. 3d 1002, 1007 (2011).

The reasons the Supreme Court of California gave for its
holding have special relevance in the context of determining whether proponents have the authority to seek a federal-court remedy for the State's concrete, substantial, and continuing injury. As a class, official proponents are a small, identifiable group. See Cal. Elec. Code Ann. §9001(a) (West Cum. Supp. 2013). Because many of their decisions must be unanimous, see §§9001(b)(1), 9002(b), they are necessarily few in number. Their identities are public. §9001(b)(2). Their commitment is substantial. See §§9607–9609 (West Cum. Supp. 2013) (obtaining petition signatures); §9001(c) (monetary fee); §§9065(d), 9067, 9069 (West 2003) (drafting arguments for official ballot pamphlet). They know and understand the purpose and operation of the proposed law, an important requisite in defending initiatives on complex matters such as taxation and insurance. Having gone to great lengths to convince voters to enact an initiative, they have a stake in the outcome and the necessary commitment to provide zealous advocacy.

Thus, in California, proponents play a “unique role . . . in the initiative process.” 52 Cal. 4th, at 1152, 265 P. 3d, at 1024. They “have a unique relationship to the voter-approved measure that makes them especially likely to be reliable and vigorous advocates for the measure and to be so viewed by those whose votes secured the initiative’s enactment into law.” Ibid.; see also id., at 1160, 265 P. 3d, at 1030 (because of “their special relationship to the initiative measure,” proponents are “the most obvious and logical private individuals to ably and vigorously defend the validity of the challenged measure on behalf of the interests of the voters who adopted the initiative into law”). Proponents’ authority under state law is not a contrivance. It is not a fictional construct. It is the product of the California Constitution and the California Elections Code. There is no basis for this Court to set aside the California Supreme Court’s determination of state
law.

The Supreme Court of California explained that its holding was consistent with recent decisions from other States. *Id.*, at 1161–1165, 265 P. 3d, at 1031–1033. In *Sportsmen for I–143 v. Fifteenth Jud. Ct.*, 2002 MT 18, 308 Mont. 189, 40 P. 3d 400, the Montana Supreme Court unanimously held that because initiative sponsors “may be in the best position to defend their interpretation” of the initiative and had a “direct, substantial, legally protectable interest in” the lawsuit challenging that interpretation, they were “entitled to intervene as a matter of right.” *Id.*, at 194–195, 40 P. 3d, at 403. The Alaska Supreme Court reached a similar unanimous result in *Alaskans for a Common Language Inc., v. Kritz*, 3 P. 3d 906 (2000). It noted that, except in extraordinary cases, “a sponsor’s direct interest in legislation enacted through the initiative process and the concomitant need to avoid the appearance of [a conflict of interest] will ordinarily preclude courts from denying intervention as of right to a sponsoring group.” *Id.*, at 914.

For these and other reasons, the Supreme Court of California held that the California Elections Code and Article II, §8, of the California Constitution afford proponents “the authority . . . to assert the state’s interest in the validity of the initiative” when State officials decline to do so. 52 Cal. 4th, at 1152, 265 P. 3d, at 1024. The court repeated this unanimous holding more than a half-dozen times and in no uncertain terms. See *id.*, at 1126, 1127, 1139, 1149, 1151, 1152, 1165, 256 P. 3d, at 1006, 1007, 1015, 1022, 1024, 1025, 1033; see also *id.*, at 1169–1170, 265 P. 3d, at 1036–1037 (Kennard, J., concurring). That should suffice to resolve the central issue on which the federal question turns.
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II

A

The Court concludes that proponents lack sufficient ties to the state government. It notes that they "are not elected," "answer to no one," and lack "a fiduciary obligation" to the State. *Ante*, at 15 (quoting 1 Restatement (Third) of Agency §1.01, Comments e, f (2005)). But what the Court deems deficiencies in the proponents' connection to the State government, the State Supreme Court saw as essential qualifications to defend the initiative system. The very object of the initiative system is to establish a lawmaking process that does not depend upon state officials. In California, the popular initiative is necessary to implement "the theory that all power of government ultimately resides in the people." 52 Cal. 4th, at 1140, 265 P. 3d, at 1016 (internal quotation marks omitted). The right to adopt initiatives has been described by the California courts as "one of the most precious rights of [the State's] democratic process." *Ibid.* (internal quotation marks omitted). That historic role for the initiative system "grew out of dissatisfaction with the then governing public officials and a widespread belief that the people had lost control of the political process." *Ibid.* The initiative's "primary purpose," then, "was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt." *Ibid.*

The California Supreme Court has determined that this purpose is undermined if the very officials the initiative process seeks to circumvent are the only parties who can defend an enacted initiative when it is challenged in a legal proceeding. See *id.*, at 1160, 265 P. 3d, at 1030; cf. *Alaskans for a Common Language*, supra, at 914 (noting that proponents must be allowed to defend an enacted initiative in order to avoid the perception, correct or not, "that the interests of [the proponents] were not being
defended vigorously by the executive branch"). Giving the Governor and attorney general this de facto veto will erode one of the cornerstones of the State’s governmental structure. See 52 Cal. 4th, at 1126–1128, 265 P. 3d, at 1006–1007. And in light of the frequency with which initiatives’ opponents resort to litigation, the impact of that veto could be substantial. K. Miller, Direct Democracy and the Courts 106 (2009) (185 of the 455 initiatives approved in Arizona, California, Colorado, Oregon, and Washington between 1900 and 2008 were challenged in court). As a consequence, California finds it necessary to vest the responsibility and right to defend a voter-approved initiative in the initiative’s proponents when the State Executive declines to do so.

Yet today the Court demands that the State follow the Restatement of Agency. See ante, at 15–16. There are reasons, however, why California might conclude that a conventional agency relationship is inconsistent with the history, design, and purpose of the initiative process. The State may not wish to associate itself with proponents or their views outside of the “extremely narrow and limited” context of this litigation, 52 Cal. 4th, at 1159, 265 P. 3d, at 1029, or to bear the cost of proponents’ legal fees. The State may also wish to avoid the odd conflict of having a formal agent of the State (the initiative’s proponent) arguing in favor of a law’s validity while state officials (e.g., the attorney general) contend in the same proceeding that it should be found invalid.

Furthermore, it is not clear who the principal in an agency relationship would be. It would make little sense if it were the Governor or attorney general, for that would frustrate the initiative system’s purpose of circumventing elected officials who fail or refuse to effect the public will. Id., at 1139–1140, 265 P. 3d, at 1016. If there is to be a principal, then, it must be the people of California, as the ultimate sovereign in the State. See ibid., 265 P. 3d, at
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1015–1016 (quoting Cal. Const., Art. II, §1) ("All political power is inherent in the people"). But the Restatement may offer no workable example of an agent representing a principal composed of nearly 40 million residents of a State. Cf. 1 Restatement (Second) of Agency, p. 2, Scope Note (1957) (noting that the Restatement “does not state the special rules applicable to public officers”); 1 Restatement (First) of Agency, p. 4, Scope Note (1933) (same).

And if the Court’s concern is that the proponents are unaccountable, that fear is neither well founded nor sufficient to overcome the contrary judgment of the State Supreme Court. It must be remembered that both elected officials and initiative proponents receive their authority to speak for the State of California directly from the people. The Court apparently believes that elected officials are acceptable “agents” of the State, see ante, at 11–12, but they are no more subject to ongoing supervision of their principal—i.e., the people of the State—than are initiative proponents. At most, a Governor or attorney general can be recalled or voted out of office in a subsequent election, but proponents, too, can have their authority terminated or their initiative overridden by a subsequent ballot measure. Finally, proponents and their attorneys, like all other litigants and counsel who appear before a federal court, are subject to duties of candor, decorum, and respect for the tribunal and co-parties alike, all of which guard against the possibility that initiative proponents will somehow fall short of the appropriate standards for federal litigation.

B

Contrary to the Court’s suggestion, this Court’s precedents do not indicate that a formal agency relationship is necessary. In Karcher v. May, 484 U. S. 72 (1987), the Speaker of the New Jersey Assembly (Karcher) and President of the New Jersey Senate (Orechio) intervened in
support of a school moment-of-silence law that the State’s Governor and attorney general declined to defend in court. In considering the question of standing, the Court looked to New Jersey law to determine whether Karcher and Orechio "had authority under state law to represent the State’s interest in both the District Court and Court of Appeals." Id., at 82. The Court concluded that they did. Because the "New Jersey Supreme Court ha[d] granted applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment," the Karcher Court held that standing had been proper in the District Court and Court of Appeals. Ibid. By the time the case arrived in this Court, Karcher and Orechio had lost their presiding legislative offices, without which they lacked the authority to represent the State under New Jersey law. This, the Court held, deprived them of standing. Id., at 81. Here, by contrast, proponents’ authority under California law is not contingent on officeholder status, so their standing is unaffected by the fact that they “hold no office” in California’s Government. Ante, at 12.

Arizonans for Official English v. Arizona, 520 U. S. 43 (1997), is consistent with the premises of this dissent, not with the rationale of the Court’s opinion. See ante, at 13–14. There, the Court noted its serious doubts as to the aspiring defenders’ standing because there was “no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.” 520 U. S., at 65. The Court did use the word “agents”; but, read in context, it is evident that the Court’s intention was not to demand a formal agency relationship in compliance with the Restatement. Rather, the Court used the term as shorthand for a party whom “state law authorizes” to “represent the State’s interests” in court. Ibid.
Both the Court of Appeals and the Supreme Court of California were mindful of these precedents and sought to comply with them. The state court, noting the importance of *Arizonaans for Official English*, expressed its understanding that “the high court’s doubts as to the official initiative proponents’ standing in that case were based, at least in substantial part, on the fact that the court was not aware of any ‘Arizona law appointing initiative sponsors as agents of the people of Arizona to defend . . . the constitutionality of initiatives made law of the State.’” 52 Cal. 4th, at 1136–1137, 265 P. 3d, at 1013–1014 (quoting 520 U.S., at 65). Based on this passage, it concluded that “nothing in [Arizonaans for Official English] indicates that if a state’s law does authorize the official proponents of an initiative to assert the state’s interest in the validity of a challenged state initiative when the public officials who ordinarily assert that interest have declined to do so, the proponents would not have standing to assert the state’s interest in the initiative’s validity in a federal lawsuit.” *Id.*, at 1137, 265 P. 3d, at 1014.

The Court of Appeals, too, was mindful of this requirement. *Perry v. Brown*, 671 F. 3d 1052, 1072–1073 (CA9 2012). Although that panel divided on the proper resolution of the merits of this case, it was unanimous in concluding that proponents satisfy the requirements of Article III. Compare *id.*, at 1070–1075 (majority opinion), with *id.*, at 1096–1097 (N. R. Smith, J., concurring in part and dissenting in part). Its central premise, ignored by the Court today, was that the “State’s highest court [had] held that California law provides precisely what the Arizonaans Court found lacking in Arizona law: it confers on the official proponents of an initiative the authority to assert the State’s interests in defending the constitutionality of that initiative, where state officials who would ordinarily assume that responsibility choose not to do so.” *Id.*, at 1072 (majority opinion). The Court of Appeals and the
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State Supreme Court did not ignore Arizonans for Official English; they were faithful to it.

C

The Court’s approach in this case is also in tension with other cases in which the Court has permitted individuals to assert claims on behalf of the government or others. For instance, Federal Rule of Criminal Procedure 42(a)(2) allows a court to appoint a private attorney to investigate and prosecute potential instances of criminal contempt. Under the Rule, this special prosecutor is not the agent of the appointing judge; indeed, the prosecutor’s “determination of which persons should be targets of the investigation, what methods of investigation should be used, what information will be sought as evidence," whom to charge, and other “decisions . . . critical to the conduct of a prosecution, are all made outside the supervision of the court.” Young v. United States ex rel. Vuitton et Fils S. A., 481 U.S. 787, 807 (1987). Also, just as proponents have been authorized to represent the State of California, “[p]rivate attorneys appointed to prosecute a criminal contempt action represent the United States,” United States v. Providence Journal Co., 485 U.S. 693, 700 (1988). They are “appointed solely to pursue the public interest in vindication of the court’s authority,” Young, supra, at 804, an interest that—like California’s interest in the validity of its laws—is “unique to the sovereign,” Providence Journal Co., supra, at 700. And, although the Court dismisses the proponents’ standing claim because initiative proponents “are not elected” and “decide for themselves, with no review, what arguments to make and how to make them” in defense of the enacted initiative, ante, at 15, those same charges could be leveled with equal if not greater force at the special prosecutors just discussed. See Young, supra, at 807.

Similar questions might also arise regarding qui tam
actions, see, e.g., Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 771–778 (2000); suits involving “next friends” litigating on behalf of a real party in interest, see, e.g., Whitmore v. Arkansas, 495 U.S. 149, 161–166 (1990); or shareholder-derivative suits, see, e.g., Gollust v. Mendell, 501 U.S. 115, 125–126 (1991). There is no more of an agency relationship in any of these settings than in the instant case, yet the Court has nonetheless permitted a party to assert the interests of another. That *qui tam* actions and “next friend” litigation may have a longer historical pedigree than the initiative process, see ante, at 12–13, is no basis for finding Article III’s standing requirement met in those cases but lacking here. In short, the Court today unsettles its longtime understanding of the basis for jurisdiction in representative-party litigation, leaving the law unclear and the District Court’s judgment, and its accompanying statewide injunction, effectively immune from appellate review.

III

There is much irony in the Court’s approach to justiciability in this case. A prime purpose of justiciability is to ensure vigorous advocacy, yet the Court insists upon litigation conducted by state officials whose preference is to lose the case. The doctrine is meant to ensure that courts are responsible and constrained in their power, but the Court’s opinion today means that a single district court can make a decision with far-reaching effects that cannot be reviewed. And rather than honor the principle that justiciability exists to allow disputes of public policy to be resolved by the political process rather than the courts, see, e.g., Allen v. Wright, 468 U.S. 737, 750–752 (1984), here the Court refuses to allow a State’s authorized representatives to defend the outcome of a democratic election.

The Court’s opinion disrespects and disparages both the
political process in California and the well-stated opinion of the California Supreme Court in this case. The California Supreme Court, not this Court, expresses concern for vigorous representation; the California Supreme Court, not this Court, recognizes the necessity to avoid conflicts of interest; the California Supreme Court, not this Court, comprehends the real interest at stake in this litigation and identifies the most proper party to defend that interest. The California Supreme Court's opinion reflects a better understanding of the dynamics and principles of Article III than does this Court's opinion.

Of course, the Court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject. But it is shortsighted to misconstrue principles of justiciability to avoid that subject. As the California Supreme Court recognized, "the question before us involves a fundamental procedural issue that may arise with respect to any initiative measure, without regard to its subject matter." 52 Cal. 4th, at 1124, 265 P. 3d, at 1005 (emphasis in original). If a federal court must rule on a constitutional point that either confirms or rejects the will of the people expressed in an initiative, that is when it is most necessary, not least necessary, to insist on rules that ensure the most committed and vigorous adversary arguments to inform the rulings of the courts.

* * *

In the end, what the Court fails to grasp or accept is the basic premise of the initiative process. And it is this. The essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around. Freedom resides first in the people without need of a grant from government. The California initiative process embodies these principles and has done so for over
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a century. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as sovereign." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). In California and the 26 other States that permit initiatives and popular referendums, the people have exercised their own inherent sovereign right to govern themselves. The Court today frustrates that choice by nullifying, for failure to comply with the Restatement of Agency, a State Supreme Court decision holding that state law authorizes an enacted initiative's proponents to defend the law if and when the State's usual legal advocates decline to do so. The Court's opinion fails to abide by precedent and misapplies basic principles of justiciability. Those errors necessitate this respectful dissent.
Cite as: 570 U. S. ___ (2013)

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

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]

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.
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
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-
ggress'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).
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.¹

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. ___.

¹Both 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
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 supplicant 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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Katzenbach, 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. Elowah 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
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
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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<td>35.2</td>
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<td>80.5</td>
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<td>48.9</td>
<td>75.1</td>
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<td>Mississippi</td>
<td>69.9</td>
<td>6.7</td>
<td>63.2</td>
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<td>South Carolina</td>
<td>75.7</td>
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<tr>
<td>Virginia</td>
<td>61.1</td>
<td>38.3</td>
<td>22.8</td>
<td>68.2</td>
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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
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
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.
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 disenfranchise-ment 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
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
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 cov-
ered to noncovered jurisdictions as blocks, how to dis-
aggregate 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 is-
sues. 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,” “ fla-
grant,” “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 recenacted a
formula based on 40-year-old facts having no logical rela-
tion 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 tar-
geting 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
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
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
Opinion of the Court

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

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 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 “sharp departure” 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-

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 “unprece-dented” 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).
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.
JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

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

\(^1\)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.
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 “circumvent[ ]” 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
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
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,
GINSBURG, J., dissenting

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
of VRA-occasioned increases in black voting. Whatever
the device employed, this Court has long recognized that
vote dilution, when adopted with a discriminatory pur-
pose, 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
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
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 preclear-
ance mechanism remained an appropriate response to the
problem of voting discrimination in covered jurisdictions.

Congress did not take this task lightly. Quite the oppo-
site. The 109th Congress that took responsibility for the
renewal started early and conscientiously. In October
2005, the House began extensive hearings, which contin-
No. 109–295, p. 2 (2006). In April 2006, the Senate fol-
lowed 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.
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
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 (CADC 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
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.
GINSBURG, J., dissenting

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." 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, is there

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2 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 role 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.

3 Acknowledging the existence of "serious constitutional questions," see ante, at 22 (internal quotation marks omitted), does not suggest how those questions should be answered.
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:
"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
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.
GINSBURG, J., dissenting

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
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
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 obliga-
tion[s]” 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 Evi-
dence 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

\textsuperscript{4}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
unsupported assertion about “deterrence” would not be sufficient to
justify keeping a remedy in place in perpetuity. See note, 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.
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 865.5

5For 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

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 Breyer, J.).
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. 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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8Because 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
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. 108–478, 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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ere 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 “debate 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-

"[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." Broderick, 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
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 “den[i][e]d or abridge[e][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.7

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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7This 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.
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-
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-
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.8 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) ("If 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 "in so far as [it] creates a private cause of action ... for conduct that actually violates the Fourteenth Amend-

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8 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.9

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.

9The 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.
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
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
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
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
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).
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.

*   *   *

For the reasons stated, I would affirm the judgment of the Court of Appeals.
Opinion of the Court

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SUPREME COURT OF THE UNITED STATES

No. 12–307

UNITED STATES, PETITIONER v. EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL.

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

[June 26, 2013]

JUSTICE KENNEDY delivered the opinion of the Court.

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of "spouse" as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of this provision. The United States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional and ordered the United States to pay Windsor a refund. This Court granted certiorari and now affirms the judgment in Windsor's favor.

I

In 1996, as some States were beginning to consider the concept of same-sex marriage, see, e.g., Boehr v. Lewin, 74
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Haw. 530, 852 P. 2d 44 (1993), and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA), 110 Stat. 2419. DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States. See 28 U. S. C. §1738C.

Section 3 is at issue here. It amends the Dictionary Act in Title 1, §7, of the United States Code to provide a federal definition of “marriage” and “spouse.” Section 3 of DOMA provides as follows:

“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” 1 U. S. C. §7.

The definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status. The enactment’s comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law. See GAO, D. Shah, Defense of Marriage Act: Update to Prior Report 1 (GAO–04–353R, 2004).

Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993. Concerned about Spyer’s health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside
in New York City. The State of New York deems their Ontario marriage to be a valid one. See 699 F. 3d 169, 177–178 (CA2 2012).

Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation “any interest in property which passes or has passed from the decedent to his surviving spouse.” 26 U. S. C. §2056(a). Windsor paid $363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a “surviving spouse.” Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U. S. C. §530D, that the Department of Justice would no longer defend the constitutionality of DOMA’s §3. Noting that “the Department has previously defended DOMA against . . . challenges involving legally married same-sex couples,” App. 184, the Attorney General informed Congress that “the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.” Id., at 191. The Department of Justice has submitted many §530D letters over the years refusing to defend laws it deems unconstitutional, when, for instance, a federal court has rejected the Government’s defense of a statute and has issued a judgment against it. This case is unusual, however, because the §530D letter was not preceded by an adverse
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judgment. The letter instead reflected the Executive's own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation. Although "the President . . . instructed the Department not to defend the statute in Windsor," he also decided "that Section 3 will continue to be enforced by the Executive Branch" and that the United States had an "interest in providing Congress a full and fair opportunity to participate in the litigation of those cases." Id., at 191–193. The stated rationale for this dual-track procedure (determination of unconstitutionality coupled with ongoing enforcement) was to "recogniz[e] the judiciary as the final arbiter of the constitutional claims raised." Id., at 192.

In response to the notice from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the constitutionality of §3 of DOMA. The Department of Justice did not oppose limited intervention by BLAG. The District Court denied BLAG's motion to enter the suit as of right, on the rationale that the United States already was represented by the Department of Justice. The District Court, however, did grant intervention by BLAG as an interested party. See Fed. Rule Civ. Proc. 24(a)(2).

On the merits of the tax refund suit, the District Court ruled against the United States. It held that §3 of DOMA is unconstitutional and ordered the Treasury to refund the tax with interest. Both the Justice Department and BLAG filed notices of appeal, and the Solicitor General filed a petition for certiorari before judgment. Before this Court acted on the petition, the Court of Appeals for the Second Circuit affirmed the District Court's judgment. It applied heightened scrutiny to classifications based on sexual orientation, as both the Department and Windsor had
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urged. The United States has not complied with the judgment. Windsor has not received her refund, and the Executive Branch continues to enforce §3 of DOMA.

In granting certiorari on the question of the constitutionality of §3 of DOMA, the Court requested argument on two additional questions: whether the United States' agreement with Windsor's legal position precludes further review and whether BLAG has standing to appeal the case. All parties agree that the Court has jurisdiction to decide this case; and, with the case in that framework, the Court appointed Professor Vicki Jackson as amicus curiae to argue the position that the Court lacks jurisdiction to hear the dispute. 568 U.S. ___ (2012). She has ably discharged her duties.

In an unrelated case, the United States Court of Appeals for the First Circuit has also held §3 of DOMA to be unconstitutional. A petition for certiorari has been filed in that case. Pet. for Cert. in Bipartisan Legal Advisory Group v. Gill, O. T. 2012, No. 12–13.

II

It is appropriate to begin by addressing whether either the Government or BLAG, or both of them, were entitled to appeal to the Court of Appeals and later to seek certiorari and appear as parties here.

There is no dispute that when this case was in the District Court it presented a concrete disagreement between opposing parties, a dispute suitable for judicial resolution. "[A] taxpayer has standing to challenge the collection of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer." Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587, 599 (2007) (plurality opinion) (emphasis deleted). Windsor suffered a redressable injury when she was required to pay estate taxes from which, in her view, she was exempt.
but for the alleged invalidity of §3 of DOMA.

The decision of the Executive not to defend the constitutionality of §3 in court while continuing to deny refunds and to assess deficiencies does introduce a complication. Even though the Executive’s current position was announced before the District Court entered its judgment, the Government’s agreement with Windsor’s position would not have deprived the District Court of jurisdiction to entertain and resolve the refund suit; for her injury (failure to obtain a refund allegedly required by law) was concrete, persisting, and unredressed. The Government’s position—agreeing with Windsor’s legal contention but refusing to give it effect—meant that there was a justiciable controversy between the parties, despite what the claimant would find to be an inconsistency in that stance. Windsor, the Government, BLAG, and the amicus appear to agree upon that point. The disagreement is over the standing of the parties, or aspiring parties, to take an appeal in the Court of Appeals and to appear as parties in further proceedings in this Court.

The amicus’ position is that, given the Government’s concession that §3 is unconstitutional, once the District Court ordered the refund the case should have ended; and the amicus argues the Court of Appeals should have dismissed the appeal. The amicus submits that once the President agreed with Windsor’s legal position and the District Court issued its judgment, the parties were no longer adverse. From this standpoint the United States was a prevailing party below, just as Windsor was. Accordingly, the amicus reasons, it is inappropriate for this Court to grant certiorari and proceed to rule on the merits; for the United States seeks no redress from the judgment entered against it.

This position, however, elides the distinction between two principles: the jurisdictional requirements of Article III and the prudential limits on its exercise. See Warth v.

The requirements of Article III standing are familiar:

"First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural or hypothetical."' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... the result of the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Lujan, supra, at 560–561 (footnote and citations omitted).

Rules of prudential standing, by contrast, are more flexible "rule[s] ... of federal appellate practice," Deposit Guaranty Nat. Bank v. Roper, 445 U. S. 338, 333 (1980), designed to protect the courts from "decid[ing] abstract questions of wide public significance even [when] other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." Worth, supra, at 500.

In this case the United States retains a stake sufficient to support Article III jurisdiction on appeal and in pro-
ceedings before this Court. The judgment in question orders the United States to pay Windsor the refund she seeks. An order directing the Treasury to pay money is "a real and immediate economic injury," *Hein*, 551 U. S., at 599, indeed as real and immediate as an order directing an individual to pay a tax. That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not. The judgment orders the United States to pay money that it would not disburse but for the court's order. The Government of the United States has a valid legal argument that it is injured even if the Executive disagrees with §3 of DOMA, which results in Windsor's liability for the tax. Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction. It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling.

This Court confronted a comparable case in *INS v. Chadha*, 462 U. S. 919 (1983). A statute by its terms allowed one House of Congress to order the Immigration and Naturalization Service (INS) to deport the respondent Chadha. There, as here, the Executive determined that the statute was unconstitutional, and "the INS presented the Executive's views on the constitutionality of the House action to the Court of Appeals." *Id.*, at 930. The INS, however, continued to abide by the statute, and "the INS brief to the Court of Appeals did not alter the agency's decision to comply with the House action ordering deportation of Chadha." *Ibid.* This Court held "that the INS was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take," *ibid.*, regardless of whether the agency welcomed the judgment. The necessity of a "case or controversy" to
satisfy Article III was defined as a requirement that the Court's "decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold [the statute], the INS will execute its order and deport him." Id., at 939–940 (quoting Chadha v. INS, 634 F.2d 408, 419 (CA9 1980)). This conclusion was not dictum. It was a necessary predicate to the Court's holding that "prior to Congress’ intervention, there was adequate Art. III adverseness." 462 U.S., at 939. The holdings of cases are instructive, and the words of Chadha make clear its holding that the refusal of the Executive to provide the relief sought suffices to preserve a justiciable dispute as required by Article III. In short, even where "the Government largely agree[s] with the opposing party on the merits of the controversy," there is sufficient adverseness and an "adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party." Id., at 940, n. 12.

It is true that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." Roper, supra, at 333, see also Camreta v. Greene, 563 U. S. ___ (2011) (slip op., at 8) ("As a matter of practice and prudence, we have generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed us to do so"). But this rule "does not have its source in the jurisdictional limitations of Art. III. In an appropriate case, appeal may be permitted ... at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III." Roper, supra, at 333–334.

While these principles suffice to show that this case presents a justiciable controversy under Article III, the prudential problems inherent in the Executive's unusual position require some further discussion. The Executive's agreement with Windsor's legal argument raises the risk
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that instead of a "real, earnest and vital controversy," the Court faces a "friendly, non-adversary, proceeding . . . [in which] 'a party beaten in the legislature [seeks to] transfer to the courts an inquiry as to the constitutionality of the legislative act.'" *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (quoting *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892)). Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

There are, of course, reasons to hear a case and issue a ruling even when one party is reluctant to prevail in its position: Unlike Article III requirements—which must be satisfied by the parties before judicial consideration is appropriate—the relevant prudential factors that counsel against hearing this case are subject to "countervailing considerations [that] may outweigh the concerns underlying the usual reluctance to exert judicial power." *Warth*, 422 U.S., at 500–501. One consideration is the extent to which adversarial presentation of the issues is assured by the participation of *amicus curiae* prepared to defend with vigor the constitutionality of the legislative act. With respect to this prudential aspect of standing as well, the *Chadha* Court encountered a similar situation. It noted that "there may be prudential, as opposed to Art. III, concerns about sanctioning the adjudication of [this case] in the absence of any participant supporting the validity of [the statute]. The Court of Appeals properly dispelled any such concerns by inviting and accepting briefs from both Houses of Congress." 462 U.S., at 940. *Chadha* was not an anomaly in this respect. The Court adopts the practice of entertaining arguments made by an *amicus* when the
Solicitor General confesses error with respect to a judgment below, even if the confession is in effect an admission that an Act of Congress is unconstitutional. See, e.g., *Dickerson v. United States*, 530 U. S. 428 (2000).

In the case now before the Court the attorneys for BLAG present a substantial argument for the constitutionality of §3 of DOMA. BLAG’s sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree. Were this Court to hold that prudential rules require it to dismiss the case, and, in consequence, that the Court of Appeals erred in failing to dismiss it as well, extensive litigation would ensue. The district courts in 94 districts throughout the Nation would be without precedential guidance not only in tax refund suits but also in cases involving the whole of DOMA’s sweep involving over 1,000 federal statutes and a myriad of federal regulations. For instance, the opinion of the Court of Appeals for the First Circuit, addressing the validity of DOMA in a case involving regulations of the Department of Health and Human Services, likely would be vacated with instructions to dismiss, its ruling and guidance also then erased. See *Massachusetts v. United States Dept. of Health and Human Servs.*, 682 F. 3d 1 (CA1 2012). Rights and privileges of hundreds of thousands of persons would be adversely affected, pending a case in which all prudential concerns about justiciability are absent. That numerical prediction may not be certain, but it is certain that the cost in judicial resources and expense of litigation for all persons adversely affected would be immense. True, the very extent of DOMA’s mandate means that at some point a case likely would arise without the prudential concerns raised here; but the costs, uncertainties, and alleged harm and injuries likely would continue for a time measured in years before the issue is resolved. In these unusual and urgent circum-
stances, the very term "prudential" counsels that it is a proper exercise of the Court's responsibility to take jurisdiction. For these reasons, the prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority.

The Court's conclusion that this petition may be heard on the merits does not imply that no difficulties would ensue if this were a common practice in ordinary cases. The Executive's failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma. On the one hand, as noted, the Government's agreement with Windsor raises questions about the propriety of entertaining a suit in which it seeks affirmance of an order invalidating a federal law and ordering the United States to pay money. On the other hand, if the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's. This would undermine the clear dictate of the separation-of-powers principle that "when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" Zivotofsky v. Clinton, 566 U. S. __, __ (2012) (slip op., at 7) (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803)). Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court.
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The Court's jurisdictional holding, it must be underscored, does not mean the arguments for dismissing this dispute on prudential grounds lack substance. Yet the difficulty the Executive faces should be acknowledged. When the Executive makes a principled determination that a statute is unconstitutional, it faces a difficult choice. Still, there is no suggestion here that it is appropriate for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal. The integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise. But this case is not routine. And the capable defense of the law by BLAG ensures that these prudential issues do not cloud the merits question, which is one of immediate importance to the Federal Government and to hundreds of thousands of persons. These circumstances support the Court's decision to proceed to the merits.

III

When at first Windsor and Spyer longed to marry, neither New York nor any other State granted them that right. After waiting some years, in 2007 they traveled to Ontario to be married there. It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For 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. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. Accordingly some States
concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons. After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood. See Marriage Equality Act, 2011 N. Y. Laws 749 (codified at N. Y. Dom. Rel. Law Ann. §§10–a, 10–b, 13 (West 2013)).

Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution. By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting dis-
crete statutes, can make determinations that bear on marital rights and privileges. Just this Term the Court upheld the authority of the Congress to pre-empt state laws, allowing a former spouse to retain life insurance proceeds under a federal program that gave her priority, because of formal beneficiary designation rules, over the wife by a second marriage who survived the husband. *Hillman v. Maretta*, 569 U. S. ___ (2013); see also *Ridgway v. Ridgway*, 454 U. S. 46 (1981); *Wissner v. Wissner*, 338 U. S. 655 (1950). This is one example of the general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt. See *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819). Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue.

Other precedents involving congressional statutes which affect marriages and family status further illustrate this point. In addressing the interaction of state domestic relations and federal immigration law Congress determined that marriages "entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant" will not qualify the noncitizen for that status, even if the noncitizen's marriage is valid and proper for state-law purposes. 8 U. S. C. §1186a(b)(1) (2006 ed. and Supp. V). And in establishing income-based criteria for Social Security benefits, Congress decided that although state law would determine in general who qualifies as an applicant's spouse, common-law marriages also should be recognized, regardless of any particular State's view on these relationships. 42 U. S. C. §1382c(d)(2).

Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to

In order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, see, e.g., Loving v. Virginia, 388 U. S. 1 (1967); but, subject to those guarantees, “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States.” Sosna v. Iowa, 419 U. S. 393,
404 (1975).

The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. See *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders"). The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." *Ibid.* "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Haddock v. Haddock*, 201 U.S. 562, 575 (1906); see also *In re Burrus*, 136 U.S. 586, 593–594 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States").

Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations. In *De Sylva v. Ballentine*, 351 U.S. 570 (1956), for example, the Court held that, "[t]o decide who is the widow or widower of a deceased author, or who are his executors or next of kin," under the Copyright Act "requires a reference to the law of the State which created those legal relationships" because "there is no federal law of domestic relations." *Id.*, at 580. In order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction. See *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992). Federal courts will not hear divorce and custody cases even if they arise in diversity because of "the virtually exclusive primacy . . . of the
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States in the regulation of domestic relations.” Id., at 714 (Blackmun, J., concurring in judgment).

The significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning; for “when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.” Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383–384 (1930). Marriage laws vary in some respects from State to State. For example, the required minimum age is 16 in Vermont, but only 13 in New Hampshire. Compare Vt. Stat. Ann., Tit. 18, §5142 (2012), with N. H. Rev. Stat. Ann. §457:4 (West Supp. 2012). Likewise the permissible degree of consanguinity can vary (most States permit first cousins to marry, but a handful—such as Iowa and Washington, see Iowa Code §595.19 (2009); Wash. Rev. Code §26.04.020 (2012)—prohibit the practice). But these rules are in every event consistent within each State.

Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of

The Federal Government uses this state-defined class for the opposite purpose—to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.

In acting first to recognize and then to allow same-sex marriages, New York was responding "to the initiative of those who [sought] a voice in shaping the destiny of their own times." *Bond v. United States*, 564 U. S. __, ___ (2011) (slip op., at 9). These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.

The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form "but one element in a personal bond that is more enduring." *Lawrence v. Texas*, 539 U. S. 558, 567 (2003). By its recognition of the validity of same-sex
marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

IV

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. See U.S. Const., Amdt. 5; Bolling v. Sharpe, 347 U.S. 497 (1954). The Constitution’s guarantee of equality “must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot” justify disparate treatment of that group. Department of Agriculture v. Moreno, 413 U.S. 528, 534–535 (1973). In determining whether a law is motivated by an improper animus or purpose, “[d]iscriminations of an unusual character” especially require careful consideration. Supra, at 19 (quoting Romer, supra, at 633). DOMA cannot survive under these principles. The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State’s classifications have in the daily lives and customs of its people. DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a
law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage... H. R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." H. R. Rep. No. 104–664, pp. 12–13 (1996). The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." Id., at 16 (footnote deleted). The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." Ibid. Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.

The arguments put forward by BLAG are just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married. As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was "to put a thumb on the scales and influence a
state's decision as to how to shape its own marriage laws." *Massachusetts*, 682 F. 3d, at 12–13. The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment.

DOMA's operation in practice confirms this purpose. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples,
and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see Lawrence, 539 U. S. 558, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the 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.


For certain married couples, DOMA’s unequal effects are even more serious. The federal penal code makes it a crime to “assaul[t], kidnap[p], or murde[r] . . . a member of the immediate family” of “a United States official, a United States judge, [or] a Federal law enforcement officer,” 18 U. S. C. §115(a)(1)(A), with the intent to influence or retaliate against that official, §115(a)(1). Although a “spouse” qualifies as a member of the officer’s “immediate
family," §115(c)(2), DOMA makes this protection inapplicable to same-sex spouses.


DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force. For instance, because it is expected that spouses will support each other as they pursue educational opportunities, federal law takes into consideration a spouse’s income in calculating a student’s federal financial aid eligibility. See 20 U.S.C. §1087nn(b). Same-sex married couples are exempt from this requirement. The same is true with respect to federal ethics rules. Federal executive and agency officials are prohibited from “participat[ing] personally and substantially” in matters as to which they or their spouses have a financial interest. 18 U.S.C. §208(a). A similar statute prohibits Senators, Senate employees, and their spouses from accepting high-value gifts from certain sources, see 2 U.S.C. §31–2(a)(1), and another mandates detailed financial disclosures by numerous high-ranking officials and their spouses. See 5 U.S.C. App. §§102(a), (e). Under DOMA, however, these Government-integrity rules do not apply to same-sex spouses.
Opinion of the Court

*   *   *

The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.

What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. See Bolling, 347 U. S., at 499-500; Adarand Constructors, Inc. v. Peña, 515 U. S. 200, 217-218 (1995). While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its mar-
riage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

The judgment of the Court of Appeals for the Second Circuit is affirmed.

It is so ordered.
ROBERTS, C. J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 12–307

UNITED STATES, PETITIONER v. EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL.

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

[June 26, 2013]

CHIEF JUSTICE ROBERTS, dissenting.

I agree with JUSTICE SCALIA that this Court lacks jurisdiction to review the decisions of the courts below. On the merits of the constitutional dispute the Court decides to decide, I also agree with JUSTICE SCALIA that Congress acted constitutionally in passing the Defense of Marriage Act (DOMA). Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world. Post, at 19–20 (dissenting opinion).

The majority sees a more sinister motive, pointing out that the Federal Government has generally (though not uniformly) deferred to state definitions of marriage in the past. That is true, of course, but none of those prior state-by-state variations had involved differences over something—as the majority puts it—"thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization." Ante, at 13. That the Federal Government treated this fundamental question differently than it treated variations over consanguinity or minimum age is hardly surprising—and hardly enough to support a conclusion that the "principal purpose," ante, at 22, of the 342 Representa-
tives and 85 Senators who voted for it, and the President who signed it, was a bare desire to harm. Nor do the snippets of legislative history and the banal title of the Act to which the majority points suffice to make such a showing. At least without some more convincing evidence that the Act's principal purpose was to codify malice, and that it furthered no legitimate government interests, I would not tar the political branches with the brush of bigotry.

But while I disagree with the result to which the majority's analysis leads it in this case, I think it more important to point out that its analysis leads no further. The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their "historic and essential authority to define the marital relation," ante, at 18, may continue to utilize the traditional definition of marriage.

The majority goes out of its way to make this explicit in the penultimate sentence of its opinion. It states that "[t]his opinion and its holding are confined to those lawful marriages," ante, at 26—referring to same-sex marriages that a State has already recognized as a result of the local "community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality." Ante, at 20. JUSTICE SCALIA believes this is a "bald, unreasoned disclaimer." Post, at 22. In my view, though, the disclaimer is a logical and necessary consequence of the argument the majority has chosen to adopt. The dominant theme of the majority opinion is that the Federal Government's intrusion into an area "central to state domestic relations law applicable to its residents and citizens" is sufficiently "unusual" to set off alarm bells. Ante, at 17, 20. I think the majority goes off course, as I have said, but it is undeniable that its judgment is based on federalism.

The majority extensively chronicles DOMA's departure from the normal allocation of responsibility between State
and Federal Governments, emphasizing that DOMA "rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State." *Ante*, at 18. But there is no such departure when one State adopts or keeps a definition of marriage that differs from that of its neighbor, for it is entirely expected that state definitions would "vary, subject to constitutional guarantees, from one State to the next." *Ibid.* Thus, while "[t]he State's power in defining the marital relation is of central relevance" to the majority's decision to strike down DOMA here, *ibid.*, that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA's constitutionality in this case. See *ante*, at 19.

It is not just this central feature of the majority's analysis that is unique to DOMA, but many considerations on the periphery as well. For example, the majority focuses on the legislative history and title of this particular Act, *ante*, at 21; those statute-specific considerations will, of course, be irrelevant in future cases about different statutes. The majority emphasizes that DOMA was a "system-wide enactment with no identified connection to any particular area of federal law," but a State's definition of marriage "is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the 'protection of offspring, property interests, and the enforcement of marital responsibilities.'" *Ante*, at 22, 17. And the federal decision undermined (in the majority's view) the "dignity [already] conferred by the States in the exercise of their sovereign power," *ante*, at 21, whereas a State's decision whether to expand the definition of marriage from its traditional contours involves no similar concern.

We may in the future have to resolve challenges to state
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marriage definitions affecting same-sex couples. That issue, however, is not before us in this case, and we hold today that we lack jurisdiction to consider it in the particular context of Hollingsworth v. Perry, ante, p. ___. I write only to highlight the limits of the majority's holding and reasoning today, lest its opinion be taken to resolve not only a question that I believe is not properly before us—DOMA's constitutionality—but also a question that all agree, and the Court explicitly acknowledges, is not at issue.
SCALIA, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 12–307

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

[June 26, 2013]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom THE CHIEF JUSTICE joins as to Part I, dissenting.

This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today’s opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court’s errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.

I

A

The Court is eager—hungry—to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle, a technicality of little interest to anyone but the people of We the People, who created it as a barrier against judges’ intrusion into their lives. They gave judges, in Article III, only the “judicial Power,” a power to decide not abstract questions but real, concrete
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"Cases" and "Controversies." Yet the plaintiff and the Government agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we doing here?

The answer lies at the heart of the jurisdictional portion of today's opinion, where a single sentence lays bare the majority's vision of our role. The Court says that we have the power to decide this case because if we did not, then our "primary role in determining the constitutionality of a law" (at least one that "has inflicted real injury on a plaintiff") would "become only secondary to the President's." Ante, at 12. But wait, the reader wonders—Windsor won below, and so cured her injury, and the President was glad to see it. True, says the majority, but judicial review must march on regardless, lest we "undermine the clear dictate of the separation-of-powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is." Ibid. (internal quotation marks and brackets omitted).

That is jaw-dropping. It is an assertion of judicial supremacy over the people's Representatives in Congress and the Executive. It envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere "primary" in its role.

This image of the Court would have been unrecognizable to those who wrote and ratified our national charter. They knew well the dangers of "primary" power, and so created branches of government that would be "perfectly coordinate by the terms of their common commission," none of which branches could "pretend to an exclusive or superior right of settling the boundaries between their respective powers." The Federalist, No. 49, p. 314 (C. Rossiter ed. 1961) (J. Madison). The people did this to protect
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themselves. They did it to guard their right to self-rule against the black-robed supremacy that today's majority finds so attractive. So it was that Madison could confidently state, with no fear of contradiction, that there was nothing of "greater intrinsic value" or "stamped with the authority of more enlightened patrons of liberty" than a government of separate and coordinate powers. Id., No. 47, at 301.

For this reason we are quite forbidden to say what the law is whenever (as today's opinion asserts) "an Act of Congress is alleged to conflict with the Constitution." Ante, at 12. We can do so only when that allegation will determine the outcome of a lawsuit, and is contradicted by the other party. The "judicial Power" is not, as the majority believes, the power "to say what the law is," ibid., giving the Supreme Court the "primary role in determining the constitutionality of laws." The majority must have in mind one of the foreign constitutions that pronounces such primacy for its constitutional court and allows that primacy to be exercised in contexts other than a lawsuit. See, e.g., Basic Law for the Federal Republic of Germany, Art. 93. The judicial power as Americans have understood it (and their English ancestors before them) is the power to adjudicate, with conclusive effect, disputed government claims (civil or criminal) against private persons, and disputed claims by private persons against the government or other private persons. Sometimes (though not always) the parties before the court disagree not with regard to the facts of their case (or not only with regard to the facts) but with regard to the applicable law—in which event (and only in which event) it becomes the "province and duty of the judicial department to say what the law is." Ante, at 12.

In other words, declaring the compatibility of state or federal laws with the Constitution is not only not the "primary role" of this Court, it is not a separate, free-
standing role at all. We perform that role incidentally—by accident, as it were—when that is necessary to resolve the dispute before us. Then, and only then, does it become “the province and duty of the judicial department to say what the law is.” That is why, in 1793, we politely declined the Washington Administration’s request to “say what the law is” on a particular treaty matter that was not the subject of a concrete legal controversy. See Schlesinger v. Reservists Comm. to Stop the War, 418 U. S. 208, 227 (1974); United States v. Richardson, 418 U. S. 166, 179 (1974). And that is why, as our opinions have said, some questions of law will never be presented to this Court, because there will never be anyone with standing to bring a lawsuit. See Schlesinger v. Reservists Comm. to Stop the War, 418 U. S. 208, 227 (1974); United States v. Richardson, 418 U. S. 166, 179 (1974). As Justice Brandeis put it, we cannot “pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding”; absent a “real, earnest and vital controversy between individuals,” we have neither any work to do nor any power to do it. Ashwander v. TVA, 297 U. S. 288, 346 (1936) (concurring opinion) (quoting Chicago & Grand Trunk R. Co. v. Wellman, 143 U. S. 339, 345 (1892)). Our authority begins and ends with the need to adjudge the rights of an injured party who stands before us seeking redress. Lujan v. Defenders of Wildlife, 504 U. S. 555, 560 (1992).

That is completely absent here. Windsor’s injury was cured by the judgment in her favor. And while, in ordinary circumstances, the United States is injured by a directive to pay a tax refund, this suit is far from ordinary. Whatever injury the United States has suffered will surely not be redressed by the action that it, as a litigant, asks us to take. The final sentence of the Solicitor General’s brief on the merits reads: “For the foregoing reasons, the judgment of the court of appeals should be affirmed.” Brief for United States (merits) 54 (emphasis added). That will not cure the Government’s injury, but carve it into stone. One
could spend many fruitless afternoons ransacking our library for any other petitioner's brief seeking an affirmation of the judgment against it.\footnote{For an even more advanced scavenger hunt, one might search the annals of Anglo-American law for another "Motion to Dismiss" like the one the United States filed in District Court: It argued that the court should agree "with Plaintiff and the United States" and "not dismiss" the complaint. (Emphasis mine.) Then, having gotten exactly what it asked for, the United States promptly appealed.} What the petitioner United States asks us to do in the case before us is exactly what the respondent Windsor asks us to do: not to provide relief from the judgment below but to say that that judgment was correct. And the same was true in the Court of Appeals: Neither party sought to undo the judgment for Windsor, and so that court should have dismissed the appeal (just as we should dismiss) for lack of jurisdiction. Since both parties agreed with the judgment of the District Court for the Southern District of New York, the suit should have ended there. The further proceedings have been a contrivance, having no object in mind except to elevate a District Court judgment that has no precedential effect in other courts, to one that has precedential effect throughout the Second Circuit, and then (in this Court) precedential effect throughout the United States.

We have never before agreed to speak—to "say what the law is"—where there is no controversy before us. In the more than two centuries that this Court has existed as an institution, we have never suggested that we have the power to decide a question when every party agrees with both its nominal opponent and the court below on that question's answer. The United States reluctantly conceded that at oral argument. See Tr. of Oral Arg. 19–20.

The closest we have ever come to what the Court blesses today was our opinion in \textit{INS v. Chadha}, 462 U. S. 919 (1983). But in that case, two parties to the litigation
disagreed with the position of the United States and with the court below: the House and Senate, which had intervened in the case. Because Chadha concerned the validity of a mode of congressional action—the one-house legislative veto—the House and Senate were threatened with destruction of what they claimed to be one of their institutional powers. The Executive choosing not to defend that power, we permitted the House and Senate to intervene. Nothing like that is present here.

To be sure, the Court in Chadha said that statutory aggrieved-party status was “not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional.” Id., at 930–931. But in a footnote to that statement, the Court acknowledged Article III’s separate requirement of a “justiciable case or controversy,” and stated that this requirement was satisfied “because of the presence of the two Houses of Congress as adverse parties.” Id., at 931, n. 6. Later in its opinion, the Chadha Court remarked that the United States’ announced intention to enforce the statute also sufficed to permit judicial review, even absent congressional participation. Id., at 939. That remark is true, as a description of the judicial review conducted in the Court of Appeals, where the Houses of Congress had not inter-

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2 There the Justice Department’s refusal to defend the legislation was in accord with its longstanding (and entirely reasonable) practice of declining to defend legislation that in its view infringes upon Presidential powers. There is no justification for the Justice Department’s abandoning the law in the present case. The majority opinion makes a point of scolding the President for his “failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions,” ante, at 12. But the rebuke is tongue-in-cheek, for the majority gladly gives the President what he wants. Contrary to all precedent, it decides this case (and even decides it the way the President wishes) despite his abandonment of the defense and the consequent absence of a case or controversy.
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vened. (The case originated in the Court of Appeals, since it sought review of agency action under 8 U. S. C. §1105a(a) (1976 ed.).) There, absent a judgment setting aside the INS order, Chadha faced deportation. This passage of our opinion seems to be addressing that initial standing in the Court of Appeals, as indicated by its quotation from the lower court’s opinion, 462 U. S., at 939–940. But if it was addressing standing to pursue the appeal, the remark was both the purest dictum (as congressional intervention at that point made the required adverseness “beyond doubt,” id., at 939), and quite incorrect. When a private party has a judicial decree safely in hand to prevent his injury, additional judicial action requires that a party injured by the decree seek to undo it. In Chadha, the intervening House and Senate fulfilled that requirement. Here no one does.

The majority’s discussion of the requirements of Article III bears no resemblance to our jurisprudence. It accuses the amicus (appointed to argue against our jurisdiction) of “elid[ing] the distinction between ... the jurisdictional requirements of Article III and the prudential limits on its exercise.” Ante, at 6. It then proceeds to call the requirement of adverseness a “prudential” aspect of standing. Of standing. That is incomprehensible. A plaintiff (or appellant) can have all the standing in the world—satisfying all three standing requirements of Lujan that the majority so carefully quotes, ante, at 7—and yet no Article III controversy may be before the court. Article III requires not just a plaintiff (or appellant) who has standing to complain but an opposing party who denies the validity of the complaint. It is not the amicus that has done the eliding of distinctions, but the majority, calling the quite separate Article III requirement of adverseness between the parties an element (which it then pronounces a “prudential” element) of standing. The question here is not whether, as the majority puts it, “the United States retains a stake
sufficient to support Article III jurisdiction," ibid. the question is whether there is any controversy (which requires contradiction) between the United States and Ms. Windsor. There is not.

I find it wryly amusing that the majority seeks to dismiss the requirement of party-adverseness as nothing more than a "prudential" aspect of the sole Article III requirement of standing. (Relegating a jurisdictional requirement to "prudential" status is a wondrous device, enabling courts to ignore the requirement whenever they believe it "prudent"—which is to say, a good idea.) Half a century ago, a Court similarly bent upon announcing its view regarding the constitutionality of a federal statute achieved that goal by effecting a remarkably similar but completely opposite distortion of the principles limiting our jurisdiction. The Court's notorious opinion in Flast v. Cohen, 392 U.S. 83, 98–101 (1968), held that standing was merely an element (which it pronounced to be a "prudential" element) of the sole Article III requirement of adverseness. We have been living with the chaos created by that power-grabbing decision ever since, see Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587 (2007), as we will have to live with the chaos created by this one.

The authorities the majority cites fall miles short of supporting the counterintuitive notion that an Article III "controversy" can exist without disagreement between the parties. In Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980), the District Court had entered judgment in the individual plaintiff's favor based on the defendant bank's offer to pay the full amount claimed. The plaintiff, however, sought to appeal the District Court's denial of class certification under Federal Rule of Civil Procedure 23. There was a continuing dispute between the parties concerning the issue raised on appeal. The same is true of the other case cited by the majority, Camreta v. Greene,
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563 U. S. ___ (2011). There the District Court found that the defendant state officers had violated the Fourth Amendment, but rendered judgment in their favor because they were entitled to official immunity, application of the Fourth Amendment to their conduct not having been clear at the time of violation. The officers sought to appeal the holding of Fourth Amendment violation, which would circumscribe their future conduct; the plaintiff continued to insist that a Fourth Amendment violation had occurred. The “prudential” discretion to which both those cases refer was the discretion to deny an appeal even when a live controversy exists—not the discretion to grant one when it does not. The majority can cite no case in which this Court entertained an appeal in which both parties urged us to affirm the judgment below. And that is because the existence of a controversy is not a “prudential” requirement that we have invented, but an essential element of an Article III case or controversy. The majority’s notion that a case between friendly parties can be entertained so long as “adversarial presentation of the issues is assured by the participation of amici curiae prepared to defend with vigor” the other side of the issue, ante, at 10, effects a breathtaking revolution in our Article III jurisprudence.

It may be argued that if what we say is true some Presidential determinations that statutes are unconstitutional will not be subject to our review. That is as it should be, when both the President and the plaintiff agree that the statute is unconstitutional. Where the Executive is enforcing an unconstitutional law, suit will of course lie; but if, in that suit, the Executive admits the unconstitutionality of the law, the litigation should end in an order or a consent decree enjoining enforcement. This suit saw the light of day only because the President enforced the Act (and thus gave Windsor standing to sue) even though he believed it unconstitutional. He could have equally chosen (more appropriately, some would say) neither to enforce
nor to defend the statute he believed to be unconstitutional, see Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199 (Nov. 2, 1994)—in which event Windsor would not have been injured, the District Court could not have refereed this friendly scrimmage, and the Executive's determination of unconstitutionality would have escaped this Court's desire to blurt out its view of the law. The matter would have been left, as so many matters ought to be left, to a tug of war between the President and the Congress, which has innumerable means (up to and including impeachment) of compelling the President to enforce the laws it has written. Or the President could have evaded presentation of the constitutional issue to this Court simply by declining to appeal the District Court and Court of Appeals dispositions he agreed with. Be sure of this much: If a President wants to insulate his judgment of unconstitutionality from our review, he can. What the views urged in this dissent produce is not insulation from judicial review but insulation from Executive contrivance.

The majority brandishes the famous sentence from Marbury v. Madison, 1 Cranch 137, 177 (1803) that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Ante, at 12 (internal quotation marks omitted). But that sentence neither says nor implies that it is always the province and duty of the Court to say what the law is—much less that its responsibility in that regard is a "primary" one. The very next sentence of Chief Justice Marshall's opinion makes the crucial qualification that today's majority ignores: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule." I Cranch, at 177 (emphasis added). Only when a "particular case" is before us—that is, a controversy that it is our business to resolve under Article III—do we have the province and duty to pronounce the law. For the views of our early Court more
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precisely addressing the question before us here, the majority ought instead to have consulted the opinion of Chief Justice Taney in *Lord v. Veazie*, 8 How. 251 (1850):

"The objection in the case before us is ... that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be.

"A judgment entered under such circumstances, and for such purposes, is a mere form. The whole proceeding was in contempt of the court, and highly reprehensible ... A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it. This writ is, therefore, dismissed." *Id.*, at 255–256.

There is, in the words of *Marbury*, no "necessity [to] expound and interpret" the law in this case; just a desire to place this Court at the center of the Nation’s life. 1 Cranch, at 177.

B

A few words in response to the theory of jurisdiction set forth in JUSTICE ALITO’s dissent: Though less far-reaching in its consequences than the majority’s conversion of constitutionally required adverseness into a discretionary element of standing, the theory of that dissent similarly elevates the Court to the “primary” determiner of constitutional questions involving the separation of powers, and, to boot, increases the power of the most dangerous branch: the “legislative department,” which by its nature “draw[s] all power into its impetuous vortex.” The Federalist, No. 48, at 309 (J. Madison). Heretofore in our national history, the President’s failure to “take Care that the Laws be faithfully executed,” U. S. Const., Art. II, §3, could only be
brought before a judicial tribunal by someone whose concrete interests were harmed by that alleged failure. JUSTICE ALITO would create a system in which Congress can hale the Executive before the courts not only to vindicate its own institutional powers to act, but to correct a perceived inadequacy in the execution of its laws. This would lay to rest Tocqueville’s praise of our judicial system as one which “intimately bind[s] the case made for the law with the case made for one man,” one in which legislation is “no longer exposed to the daily aggression of the parties,” and in which “[t]he political question that [the judge] must resolve is linked to the interest” of private litigants. A. de Tocqueville, Democracy in America 97 (H. Mansfield

3 JUSTICE ALITO attempts to limit his argument by claiming that Congress is injured (and can therefore appeal) when its statute is held unconstitutional without Presidential defense, but is not injured when its statute is held unconstitutional despite Presidential defense. I do not understand that line. The injury to Congress is the same whether the President has defended the statute or not. And if the injury is threatened, why should Congress not be able to participate in the suit from the beginning, just as the President can? And if having a statute declared unconstitutional (and therefore inoperative) by a court is an injury, why is it not an injury when a statute is declared unconstitutional by the President and rendered inoperative by his consequent failure to enforce it? Or when the President simply declines to enforce it without opining on its constitutionality? If it is the inoperativeness that constitutes the injury—the “impairment of [the legislative] function,” as JUSTICE ALITO puts it, post., at 4—it should make no difference which of the other two branches inflicts it, and whether the Constitution is the pretext. A principled and predictable system of jurisprudence cannot rest upon a shifting concept of injury, designed to support standing when we would like it. If this Court agreed with JUSTICE ALITO’s distinction, its opinion in Raines v. Byrd, 521 U. S. 811 (1997), which involved an original suit by Members of Congress challenging an assertedly unconstitutional law, would have been written quite differently; and JUSTICE ALITO’s distinguishing of that case on grounds quite irrelevant to his theory of standing would have been unnecessary.
& D. Winthrop eds. 2000). That would be replaced by a system in which Congress and the Executive can pop immediately into court, in their institutional capacity, whenever the President refuses to implement a statute he believes to be unconstitutional, and whenever he implements a law in a manner that is not to Congress's liking.

JUSTICE ALITO's notion of standing will likewise enormously shrink the area to which "judicial censure, exercised by the courts on legislation, cannot extend," ibid. For example, a bare majority of both Houses could bring into court the assertion that the Executive's implementation of welfare programs is too generous—a failure that no other litigant would have standing to complain about. Moreover, as we indicated in Raines v. Byrd, 521 U.S. 811, 828 (1997), if Congress can sue the Executive for the erroneous application of the law that "injures" its power to legislate, surely the Executive can sue Congress for its erroneous adoption of an unconstitutional law that "injures" the Executive's power to administer—or perhaps for its protracted failure to act on one of his nominations. The opportunities for dragging the courts into disputes hitherto left for political resolution are endless.

JUSTICE ALITO's dissent is correct that Raines did not formally decide this issue, but its reasoning does. The opinion spends three pages discussing famous, decades-long disputes between the President and Congress—regarding congressional power to forbid the Presidential removal of executive officers, regarding the legislative veto, regarding congressional appointment of executive officers, and regarding the pocket veto—that would surely have been promptly resolved by a Congress-vs.-the-President lawsuit if the impairment of a branch's powers alone conferred standing to commence litigation. But it does not, and never has; the "enormous power that the judiciary would acquire" from the ability to adjudicate such suits "would have made a mockery of [Hamilton's]
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The quotation of Montesquieu to the effect that "of the three powers above mentioned . . . the JUDICIARY is next to nothing." Barnes v. Kline, 759 F.2d 21, 58 (CADC 1985) (Bork, J., dissenting) (quoting The Federalist No. 78 (A. Hamilton)).

To be sure, if Congress cannot invoke our authority in the way that Justice Alito proposes, then its only recourse is to confront the President directly. Unimaginable evil this is not. Our system is designed for confrontation. That is what "[a]mbition . . . counteract[ing] ambition," The Federalist, No. 51, at 322 (J. Madison), is all about. If majorities in both Houses of Congress care enough about the matter, they have available innumerable ways to compel executive action without a lawsuit—from refusing to confirm Presidential appointees to the elimination of funding. (Nothing says "enforce the Act" quite like "... or you will have money for little else.") But the condition is crucial; Congress must care enough to act against the President itself, not merely enough to instruct its lawyers to ask us to do so. Placing the Constitution's entirely anticipated political arm wrestling into permanent judicial receivership does not do the system a favor. And by the way, if the President loses the lawsuit but does not faithfully implement the Court's decree, just as he did not faithfully implement Congress's statute, what then? Only Congress can bring him to heel by . . . what do you think? Yes: a direct confrontation with the President.

II

For the reasons above, I think that this Court has, and the Court of Appeals had, no power to decide this suit. We should vacate the decision below and remand to the Court of Appeals for the Second Circuit, with instructions to dismiss the appeal. Given that the majority has volunteered its view of the merits, however, I proceed to discuss that as well.
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A

There are many remarkable things about the majority’s merits holding. The first is how rootless and shifting its justifications are. For example, the opinion starts with seven full pages about the traditional power of States to define domestic relations—initially fooling many readers, I am sure, into thinking that this is a federalism opinion. But we are eventually told that “it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution,” and that “[t]he State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism” because “the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.” Ante, at 18. But no one questions the power of the States to define marriage (with the concomitant conferral of dignity and status), so what is the point of devoting seven pages to describing how long and well established that power is? Even after the opinion has formally disclaimed reliance upon principles of federalism, mentions of “the usual tradition of recognizing and accepting state definitions of marriage” continue. See, e.g., ante, at 20. What to make of this? The opinion never explains. My guess is that the majority, while reluctant to suggest that defining the meaning of “marriage” in federal statutes is unsupported by any of the Federal Government’s enumerated powers, 4 nonetheless needs some rhetorical basis to support its pretense that today’s prohibition of

4Such a suggestion would be impossible, given the Federal Government’s long history of making pronouncements regarding marriage—for example, conditioning Utah’s entry into the Union upon its prohibition of polygamy. See Act of July 16, 1894, ch. 138, §3, 28 Stat. 108 (“The constitution [of Utah] must provide ‘perfect toleration of religious sentiment,’ ‘Provided, That polygamous or plural marriages are forever prohibited’”).
laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing.

Equally perplexing are the opinion’s references to “the Constitution’s guarantee of equality.” Ibid. Near the end of the opinion, we are told that although the “equal protection guarantee of the Fourteenth Amendment makes [the] Fifth Amendment [due process] right all the more specific and all the better understood and preserved”—what can that mean?—“the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does.” Ante, at 25. The only possible interpretation of this statement is that the Equal Protection Clause, even the Equal Protection Clause as incorporated in the Due Process Clause, is not the basis for today’s holding. But the portion of the majority opinion that explains why DOMA is unconstitutional (Part IV) begins by citing Bolling v. Sharpe, 347 U. S. 497 (1954), Department of Agriculture v. Moreno, 413 U. S. 528 (1973), and Romer v. Evans, 517 U. S. 620 (1996)—all of which are equal-protection cases.5 And those three cases are the only authorities that the Court cites in Part IV about the Constitution’s meaning, except for its citation of Lawrence v. Texas, 539 U. S. 558 (2003) (not an equal-protection case) to support its passing assertion that the Constitution protects the “moral and sexual choices” of same-sex couples, ante, at 23.

Moreover, if this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the

5Since the Equal Protection Clause technically applies only against the States, see U. S. Const., Amdt. 14, Bolling and Moreno, dealing with federal action, relied upon “the equal protection component of the Due Process Clause of the Fifth Amendment,” Moreno, 413 U. S., at 533.
central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. That is the issue that divided the parties and the court below, compare Brief for Respondent Bipartisan Legal Advisory Group of U. S. House of Representatives (merits) 24–28 (no), with Brief for Respondent Windsor (merits) 17–31 and Brief for United States (merits) 18–36 (yes); and compare 699 F. 3d 169, 180–185 (CA2 2012) (yes), with id., at 208–211 (Straub, J., dissenting in part and concurring in part) (no). In accord with my previously expressed skepticism about the Court’s “tiers of scrutiny” approach, I would review this classification only for its rationality. See United States v. Virginia, 518 U. S. 515, 567–570 (1996) (SCALIA, J., dissenting). As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like Moreno. But the Court certainly does not apply anything that resembles that deferential framework. See Heller v. Doe, 509 U. S. 312, 320 (1993) (a classification “must be upheld . . . if there is any reasonably conceivable state of facts” that could justify it).

The majority opinion need not get into the strict-vs.-rational-basis scrutiny question, and need not justify its holding under either, because it says that DOMA is unconstitutional as “a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution,” ante, at 25; that it violates “basic due process” principles, ante, at 20; and that it inflicts an “injury and indignity” of a kind that denies “an essential part of the liberty protected by the Fifth Amendment,” ante, at 19. The majority never utters the dread words “substantive due process,” perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean. Yet the opinion does not argue that same-sex marriage is “deeply rooted in this Nation’s history and tradition,”
WASHINGTON v. GLUCKSBURG, 521 U.S. 702, 720-721 (1997), a claim that would of course be quite absurd. So would the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is one bereft of "ordered liberty." Id., at 721 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

Some might conclude that this loaf could have used a while longer in the oven. But that would be wrong; it is already overcooked. The most expert care in preparation cannot redeem a bad recipe. The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a "bare ... desire to harm" couples in same-sex marriages. Ante, at 20. It is this proposition with which I will therefore engage.

B

As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. See Lawrence v. Texas, 539 U.S. 558, 599 (2003) (SCALIA, J., dissenting). I will not swell the U.S. Reports with restatements of that point. It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.

However, even setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), there are many perfectly valid—indeed, downright boring—justifying rationales for this legislation. Their existence ought to be the end of this case. For they give the lie to the Court's conclusion that only those with hateful hearts could have voted "aye" on this Act. And more importantly, they serve to make the contents of the legis-
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lators' hearts quite irrelevant: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." United States v. O'Brien, 391 U. S. 367, 383 (1968). Or at least it was a familiar principle. By holding to the contrary, the majority has declared open season on any law that (in the opinion of the law's opponents and any panel of like-minded federal judges) can be characterized as mean-spirited.

The majority concludes that the only motive for this Act was the "bare . . . desire to harm a politically unpopular group." Ante, at 20. Bear in mind that the object of this condemnation is not the legislature of some once-Confederate Southern state (familiar objects of the Court's scorn, see, e.g., Edwards v. Aguillard, 482 U. S. 578 (1987)), but our respected coordinate branches, the Congress and Presidency of the United States. Laying such a charge against them should require the most extraordinary evidence, and I would have thought that every attempt would be made to indulge a more anodyne explanation for the statute. The majority does the opposite—affirmatively concealing from the reader the arguments that exist in justification. It makes only a passing mention of the "arguments put forward" by the Act's defenders, and does not even trouble to paraphrase or describe them. See ante, at 21. I imagine that this is because it is harder to maintain the illusion of the Act's supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as they see them.

To choose just one of these defenders' arguments, DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage. See, e.g., Baude, Beyond DOMA: Choice of State Law in Federal Statutes, 64 Stan. L. Rev. 1371 (2012). Imagine a pair of women who marry in Albany and then move to Alabama, which does not "recognize as valid any marriage of
parties of the same sex.” Ala. Code §30-1-19(e) (2011). When the couple files their next federal tax return, may it be a joint one? Which State’s law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State’s choice-of-law rules? If so, which State’s? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law? See Godfrey v. Spano, 13 N. Y. 3d 358, 920 N. E. 2d 328 (2009). DOMA avoided all of this uncertainty by specifying which marriages would be recognized for federal purposes. That is a classic purpose for a definitional provision.

Further, DOMA preserves the intended effects of prior legislation against then-unforeseen changes in circumstance. When Congress provided (for example) that a special estate-tax exemption would exist for spouses, this exemption reached only opposite-sex spouses—those being the only sort that were recognized in any State at the time of DOMA’s passage. When it became clear that changes in state law might one day alter that balance, DOMA’s definitional section was enacted to ensure that state-level experimentation did not automatically alter the basic operation of federal law, unless and until Congress made the further judgment to do so on its own. That is not animus—just stabilizing prudence. Congress has hardly demonstrated itself unwilling to make such further, revising judgments upon due deliberation. See, e.g., Don’t Ask, Don’t Tell Repeal Act of 2010, 124 Stat. 3515.

The Court mentions none of this. Instead, it accuses the Congress that enacted this law and the President who signed it of something much worse than, for example, having acted in excess of enumerated federal powers—or
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even having drawn distinctions that prove to be irrational. Those legal errors may be made in good faith, errors though they are. But the majority says that the supporters of this Act acted with malice—with the “purpose” (ante, at 25) “to disparage and to injure” same-sex couples. It says that the motivation for DOMA was to “demean,” ibid.; to “impose inequality,” ante, at 22; to “impose . . . a stigma,” ante, at 21; to deny people “equal dignity,” ibid.; to brand gay people as “unworthy,” ante, at 23; and to “humiliate[e]” their children, ibid. (emphasis added).

I am sure these accusations are quite untrue. To be sure (as the majority points out), the legislation is called the Defense of Marriage Act. But to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions. To hurl such accusations so casually demeans this institution. In the majority’s judgment, any resistance to its holding is beyond the pale of reasoned disagreement. To question its high-handed invalidation of a presumptively valid statute is to act (the majority is sure) with the purpose to “disparage,” “injure,” “degrade,” “demean,” and “humiliate” our fellow human beings, our fellow citizens, who are homosexual. All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it hostes humani generis, enemies of the human race.

*   *   *

The penultimate sentence of the majority’s opinion is a naked declaration that “[t]his opinion and its holding are
confined” to those couples “joined in same-sex marriages made lawful by the State.” Ante, at 26, 25. I have heard such “bald, unreasoned disclaimer[s]” before. Lawrence, 539 U. S., at 604. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Id., at 578. Now we are told that DOMA is invalid because it “demeans the couple, whose moral and sexual choices the Constitution protects,” ante, at 23—with an accompanying citation of Lawrence. It takes real cheek for today’s majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority’s moral judgment in favor of same-sex marriage is to the Congress’s hateful moral judgment against it. I promise you this: The only thing that will “confine” the Court’s holding is its sense of what it can get away with.

I do not mean to suggest disagreement with THE CHIEF JUSTICE’s view, ante, p. 2–4 (dissenting opinion), that lower federal courts and state courts can distinguish today’s case when the issue before them is state denial of marital status to same-sex couples—or even that this Court could theoretically do so. Lord, an opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways. And deserves to be. State and lower federal courts should take the Court at its word and distinguish away.

In my opinion, however, the view that this Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today’s opinion. As I have said, the real rationale of today’s opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by “bare . . . desire to harm”
couples in same-sex marriages. Supra, at 18. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. Consider how easy (inevitable) it is to make the following substitutions in a passage from today’s opinion ante, at 22:

“This state law’s principal effect is to identify a subset of state-sanctioned marriages constitutionally protected sexual relationships, see Lawrence, and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And this state law contrives to deprive some couples married under the laws of their State enjoying constitutionally protected sexual relationships, but not other couples, of both rights and responsibilities.”

Or try this passage, from ante, at 22–23:

“This state law tells those couples, and all the world, that their otherwise valid marriages relationships are unworthy of federal state recognition. This places same-sex couples in an unstable position of being in a second-tier marriage relationship. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see Lawrence, . . .”

Or this, from ante, at 23—which does not even require alteration, except as to the invented number:

“And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the 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.”
Similarly transposable passages—deliberately transposable, I think—abound. In sum, that Court which finds it so horrific that Congress irrationally and hatefuly robbed same-sex couples of the “personhood and dignity” which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures’ irrational and hateful failure to acknowledge that “personhood and dignity” in the first place. Ante, at 26. As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.

By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition. Henceforth those challengers will lead with this Court’s declaration that there is “no legitimate purpose” served by such a law, and will claim that the traditional definition has “the purpose and effect to disparage and to injure” the “personhood and dignity” of same-sex couples, see ante, at 25, 26. The majority’s limiting assurance will be meaningless in the face of language like that, as the majority well knows. That is why the language is there. The result will be a judicial distortion of our society’s debate over marriage—a debate that can seem in need of our clumsy “help” only to a member of this institution.

As to that debate: Few public controversies touch an institution so central to the lives of so many, and few inspire such attendant passion by good people on all sides. Few public controversies will ever demonstrate so vividly the beauty of what our Framers gave us, a gift the Court pawns today to buy its stolen moment in the spotlight: a system of government that permits us to rule ourselves. Since DOMA’s passage, citizens on all sides of the question have seen victories and they have seen defeats. There have been plebiscites, legislation, persuasion, and loud voices—in other words, democracy. Victories in one place
for some, see North Carolina Const., Amdt. 1 (providing that "[m]arriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State") (approved by a popular vote, 61% to 39% on May 8, 2012), 8 are offset by victories in other places for others, see Maryland Question 6 (establishing "that Maryland’s civil marriage laws allow gay and lesbian couples to obtain a civil marriage license") (approved by a popular vote, 52% to 48%, on November 6, 2012). 7 Even in a single State, the question has come out differently on different occasions. Compare Maine Question 1 (permitting “the State of Maine to issue marriage licenses to same-sex couples”) (approved by a popular vote, 53% to 47%, on November 6, 2012) 8 with Maine Question 1 (rejecting “the new law that lets same-sex couples marry”) (approved by a popular vote, 53% to 47%, on November 3, 2009). 9

In the majority’s telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one’s political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today’s Court can handle. Too bad. A reminder that disagreement over something so fundamental as marriage can still be politically legitimate would have been a fit task for what in earlier times was called the judicial temperament. We might have covered ourselves with honor today, by promising all sides of this debate that it was

9 Maryland State Board of Elections, Official 2012 Presidential General Election Results for All State Questions, Question 06.
8 Maine Bureau of Elections, Nov. 3, 2009, Referendum Tabulation (Question 1).
9 Maine Bureau of Elections, Nov. 6, 2012, Referendum Election Tabulations (Question 1).
theirs to settle and that we would respect their resolution. We might have let the People decide.

But that the majority will not do. Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.
ALITO, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 12–307

UNITED STATES, PETITIONER v. EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL.

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

[June 26, 2013]

JUSTICE ALITO, with whom JUSTICE THOMAS joins as to Parts II and III, dissenting:

Our Nation is engaged in a heated debate about same-sex marriage. That debate is, at bottom, about the nature of the institution of marriage. Respondent Edith Windsor, supported by the United States, asks this Court to intervene in that debate, and although she couches her argument in different terms, what she seeks is a holding that enshrines in the Constitution a particular understanding of marriage under which the sex of the partners makes no difference. The Constitution, however, does not dictate that choice. It leaves the choice to the people, acting through their elected representatives at both the federal and state levels. I would therefore hold that Congress did not violate Windsor’s constitutional rights by enacting §3 of the Defense of Marriage Act (DOMA), 110 Stat. 2419, which defines the meaning of marriage under federal statutes that either confer upon married persons certain federal benefits or impose upon them certain federal obligations.

I

I turn first to the question of standing. In my view, the
United States clearly is not a proper petitioner in this case. The United States does not ask us to overturn the judgment of the court below or to alter that judgment in any way. Quite to the contrary, the United States argues emphatically in favor of the correctness of that judgment. We have never before reviewed a decision at the sole behest of a party that took such a position, and to do so would be to render an advisory opinion, in violation of Article III's dictates. For the reasons given in JUSTICE SCALIA's dissent, I do not find the Court's arguments to the contrary to be persuasive.

Whether the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) has standing to petition is a much more difficult question. It is also a significantly closer question than whether the intervenors in Hollingsworth v. Perry, ante, p. ___—which the Court also decides today—have standing to appeal. It is remarkable that the Court has simultaneously decided that the United States, which "receive[d] all that [it] ha[d] sought" below, Deposit Guaranty Nat. Bank v. Roper, 445 U. S. 326, 333 (1980), is a proper petitioner in this case but that the intervenors in Hollingsworth, who represent the party that lost in the lower court, are not. In my view, both the Hollingsworth intervenors and BLAG have standing.1

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1Our precedents make clear that, in order to support our jurisdiction, BLAG must demonstrate that it had Article III standing in its own right, quite apart from its status as an intervenor. See Diamond v. Charles, 476 U. S. 54, 68 (1986) ("Although intervenors are considered parties entitled, among other things, to seek review by this Court, an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III" (citation omitted)); Arizonans for Official English v. Arizona, 520 U. S. 43, 64 (1997) ("Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess a direct stake in the outcome" (internal quotation marks omitted)); id.,
A party invoking the Court's authority has a sufficient stake to permit it to appeal when it has "suffered an injury in fact' that is caused by 'the conduct complained of' and that 'will be redressed by a favorable decision.'" Camreta v. Greene, 563 U. S. ___ (2011) (slip op., at 5) (quoting Lujan v. Defenders of Wildlife, 504 U. S. 555, 560-561 (1992)). In the present case, the House of Representatives, which has authorized BLAG to represent its interests in this matter,2 suffered just such an injury.

In INS v. Chadha, 462 U. S. 919 (1983), the Court held that the two Houses of Congress were "proper parties" to file a petition in defense of the constitutionality of the one-house veto statute, id., at 930, n. 5 (internal quotation marks omitted). Accordingly, the Court granted and decided petitions by both the Senate and the House, in addition to the Executive's petition. Id., at 919, n.*. That the two Houses had standing to petition is not surprising: The Court of Appeals' decision in Chadha, by holding the one-house veto to be unconstitutional, had limited Congress' power to legislate. In discussing Article III standing, the Court suggested that Congress suffered a similar injury whenever federal legislation it had passed was struck down, noting that it had "long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." Id., at 940.

The United States attempts to distinguish Chadha on

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1 570 U. S. ___ (2013)

2 H. Res. 5, 113th Cong., 1st Sess., ¶4(a)(1)(B) (2013) ("BLAG continues to speak for, and articulates the institutional position of, the House in all litigation matters in which it appears, including in Windsor v. United States").
the ground that it "involved an unusual statute that vested the House and the Senate themselves each with special procedural rights—namely, the right effectively to veto Executive action." Brief for United States (jurisdiction) 36. But that is a distinction without a difference: just as the Court of Appeals decision that the Chadha Court affirmed impaired Congress' power by striking down the one-house veto, so the Second Circuit's decision here impairs Congress' legislative power by striking down an Act of Congress. The United States has not explained why the fact that the impairment at issue in Chadha was "special" or "procedural" has any relevance to whether Congress suffered an injury. Indeed, because legislating is Congress' central function, any impairment of that function is a more grievous injury than the impairment of a procedural add-on.

The Court's decision in Coleman v. Miller, 307 U. S. 433 (1939), bolsters this conclusion. In Coleman, we held that a group of state senators had standing to challenge a lower court decision approving the procedures used to ratify an amendment to the Federal Constitution. We reasoned that the senators' votes—which would otherwise have carried the day—were nullified by that action. See id., at 438 ("Here, the plaintiffs include twenty senators, whose votes against ratification have been overidden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes"); id., at 446 ("[W]e find no departure from principle in recognizing in the instant case that at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and
deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision"). By striking down §3 of DOMA as unconstitutional, the Second Circuit effectively "held for naught" an Act of Congress. Just as the state-senator-petitioners in Coleman were necessary parties to the amendment’s ratification, the House of Representatives was a necessary party to DOMA’s passage; indeed, the House’s vote would have been sufficient to prevent DOMA’s repeal if the Court had not chosen to execute that repeal judicially.

Both the United States and the Court-appointed amicus err in arguing that Raines v. Byrd, 521 U. S. 811 (1997), is to the contrary. In that case, the Court held that Members of Congress who had voted “nay” to the Line Item Veto Act did not have standing to challenge that statute in federal court. Raines is inapposite for two reasons. First, Raines dealt with individual Members of Congress and specifically pointed to the individual Members’ lack of institutional endorsement as a sign of their standing problem: “We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit.” Id., at 829; see also ibid., n. 10 (citing cases to the effect that “members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take” (internal quotation marks omitted)).

Second, the Members in Raines—unlike the state senators in Coleman—were not the pivotal figures whose votes would have caused the Act to fail absent some challenged action. Indeed, it is telling that Raines characterized Coleman as standing “for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nulli-
Alito, J., dissenting

fied.” 521 U. S., at 823. Here, by contrast, passage by the House was needed for DOMA to become law. U. S. Const., Art. I, §7 (bicameralism and presentment requirements for legislation).

I appreciate the argument that the Constitution confers on the President alone the authority to defend federal law in litigation, but in my view, as I have explained, that argument is contrary to the Court’s holding in Chadha, and it is certainly contrary to the Chadha Court’s endorsement of the principle that “Congress is the proper party to defend the validity of a statute” when the Executive refuses to do so on constitutional grounds. 462 U. S., at 940. See also 2 U. S. C. §288h(7) (Senate Legal Counsel shall defend the constitutionality of Acts of Congress when placed in issue). Accordingly, in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so.

II

Windsor and the United States argue that §3 of DOMA violates the equal protection principles that the Court has found in the Fifth Amendment’s Due Process Clause. See Brief for Respondent Windsor (merits) 17–62; Brief for United States (merits) 16–54; cf. Bolling v. Sharpe, 347 U. S. 497 (1954). The Court rests its holding on related arguments. See ante, at 24–25.

Same-sex marriage presents a highly emotional and important question of public policy—but not a difficult question of constitutional law. The Constitution does not

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3 Buckley v. Valeo, 424 U. S. 1 (1976), is not to the contrary. The Court’s statements there concerned enforcement, not defense.
guarantee the right to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue.

The Court has sometimes found the Due Process Clauses to have a substantive component that guarantees liberties beyond the absence of physical restraint. And the Court’s holding that “DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution,” ante, at 25, suggests that substantive due process may partially underlie the Court’s decision today. But it is well established that any “substantive” component to the Due Process Clause protects only “those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’” Washington v. Glucksberg, 521 U. S. 702, 720–721 (1997); Snyder v. Massachusetts, 291 U. S. 97, 105 (1934) (referring to fundamental rights as those that are so “rooted in the traditions and conscience of our people as to be ranked as fundamental”), as well as “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” Glucksberg, supra, at 721 (quoting Palko v. Connecticut, 302 U. S. 319, 325–326 (1937)).

It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation’s history and tradition. In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See Goodridge v. Department of Public Health, 440 Mass. 309, 798 N. E. 2d 941. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.4

4Curry-Sumner, A Patchwork of Partnerships: Comparative Over-
What Windsor and the United States 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.

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 time to come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. See, e.g., S. Girgis, R. Anderson, & R. George, What is Marriage? Man and Woman: A Defense 53–58 (2012); Finnis, Marriage: A Basic and Exigent Good, 91 The Monist 388, 398

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As sociologists have documented, it sometimes takes decades to document the effects of social changes—like the sharp rise in divorce rates following the advent of no-fault divorce—on children and society. See generally J. Wallerstein, J. Lewis, & S. Blakeslee, The Unexpected Legacy of Divorce: The 25 Year Landmark Study (2000).

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

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*Among those holding that position, some deplore and some applaud this predicted development. Compare, e.g., Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 Harv. J. L. & Pub. Pol'y 771, 799 (2001) ("Culturally, the legalization of same-sex marriage would send a message that would undermine the social boundaries relating to marriage and family relations. The confusion of social roles linked with marriage and parenting would be tremendous, and the message of 'anything goes' in the way of sexual behavior, procreation, and parenthood would wreak its greatest havoc among groups of vulnerable individuals who most need the encouragement of bright line laws and clear social mores concerning procreative responsibility") and Gallagher, (How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman, 2 U. St. Thomas L. J. 33, 58 (2005) ("If the idea of marriage really does matter—if society really does need a social institution that manages opposite-sex attractions in the interests of children and society—then taking an already weakened social institution, subjecting it to radical new redefinitions, and hoping that there are no consequences is probably neither a wise nor a compassionate idea"), with Brownworth, Something Borrowed, Something Blue: Is Marriage Right for Queers? in I Do/I Don’t: Queers on Marriage 53, 58–59 (G. Wharton & I. Phillips eds. 2004) (Former President George W. "Bush is correct . . . when he states that allowing same-sex couples to marry will weaken the institution of marriage. It most certainly will do so, and that will make marriage a far better concept than it previously has been") and Willis, Can Marriage Be Saved? A Forum, The Nation, p. 16 (2004) (celebrating the fact that "conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart").
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.

III

Perhaps because they cannot show that same-sex marriage is a fundamental right under our Constitution, Windsor and the United States couch their arguments in equal protection terms. They argue that §3 of DOMA discriminates on the basis of sexual orientation, that classifications based on sexual orientation should trigger a form of “heightened” scrutiny, and that §3 cannot survive such scrutiny. They further maintain that the governmental interests that §3 purports to serve are not sufficiently important and that it has not been adequately shown that §3 serves those interests very well. The Court’s holding, too, seems to rest on “the equal protection guarantee of the Fourteenth Amendment,” ante, at 25—although the Court is careful not to adopt most of Windsor’s and the United States’ argument.

In my view, the approach that Windsor and the United States advocate is misguided. Our equal protection framework, upon which Windsor and the United States rely, is a judicial construct that provides a useful mechanism for analyzing a certain universe of equal protection cases. But that framework is ill suited for use in evaluating the constitutionality of laws based on the traditional understanding of marriage, which fundamentally turn on
what marriage is.

Underlying our equal protection jurisprudence is the central notion that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting F. S. Royter Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). The modern tiers of scrutiny—on which Windsor and the United States rely so heavily—are a heuristic to help judges determine when classifications have that "fair and substantial relation to the object of the legislation." Reed, supra, at 76.

So, for example, those classifications subject to strict scrutiny—i.e., classifications that must be "narrowly tailored" to achieve a "compelling" government interest, Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 720 (2007) (internal quotation marks omitted)—are those that are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985); cf. id., at 452-453 (Stevens, J., concurring) ("It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen's willingness or ability to exercise that civil right").

In contrast, those characteristics subject to so-called intermediate scrutiny—i.e., those classifications that must be "substantially related" to the achievement of "important governmental objective[s]." United States v. Virginia, 518 U.S. 515, 524 (1996); id., at 567 (SCALIA, J., dissenting)—are those that are sometimes relevant considerations to be taken into account by legislators, but "generally provid[e] no sensible ground for different treat-
ment,” Cleburne, supra, at 440. For example, the Court has held that statutory rape laws that criminalize sexual intercourse with a woman under the age of 18 years, but place no similar liability on partners of underage men, are grounded in the very real distinction that “young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse.” Michael M. v. Superior Court, Sonoma Cty., 450 U.S. 464, 471 (1981) (plurality opinion). The plurality reasoned that “[o]nly women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity.” Ibid. In other contexts, however, the Court has found that classifications based on gender are “arbitrary,” Reed, supra, at 76, and based on “outmoded notions of the relative capabilities of men and women,” Cleburne, supra, at 441, as when a State provides that a man must always be preferred to an equally qualified woman when both seek to administer the estate of a deceased party, see Reed, supra, at 76–77.

Finally, so-called rational-basis review applies to classifications based on “distinguishing characteristics relevant to interests the State has the authority to implement.” Cleburne, supra, at 441. We have long recognized that “the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantages to various groups or persons.” Romer v. Evans, 517 U.S. 620, 631 (1996). As a result, in rational-basis cases, where the court does not view the classification at issue as “inherently suspect,” Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 218 (1995) (internal quotation marks omitted), “the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should
be pursued.” *Cleburne*, *supra*, at 441–442.

In asking the Court to determine that §3 of DOMA is subject to and violates heightened scrutiny, Windsor and the United States thus ask us to rule that the presence of two members of the opposite sex is as rationally related to marriage as white skin is to voting or a Y-chromosome is to the ability to administer an estate. That is a striking request and one that unelected judges should pause before granting. Acceptance of the argument would cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools.

By asking the Court to strike down DOMA as not satisfying some form of heightened scrutiny, Windsor and the United States are really seeking to have the Court resolve a debate between two competing views of marriage.

The first and older view, which I will call the “traditional” or “conjugal” view, sees marriage as an intrinsically opposite-sex institution. BLAG notes that virtually every culture, including many not influenced by the Abrahamic religions, has limited marriage to people of the opposite sex. Brief for Respondent BLAG (merits) 2 (citing *Hernandez v. Robles*, 7 N.Y. 3d 338, 361, 855 N.E. 2d 1, 8 (2006) (“Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex”)). And BLAG attempts to explain this phenomenon by arguing that the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing. Brief for Respondent BLAG 44–46, 49. Others explain the basis for the institution in more philosophical terms. They argue that marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so. See, e.g., Girgis, Anderson, & George, *What is Marriage? Man and Woman:*
A Defense, at 23–28. While modern cultural changes have weakened the link between marriage and procreation in the popular mind, there is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship.

The other, newer view is what I will call the "consent-based" vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons. At least as it applies to heterosexual couples, this view of marriage now plays a very prominent role in the popular understanding of the institution. Indeed, our popular culture is infused with this understanding of marriage. Proponents of same-sex marriage argue that because gender differentiation is not relevant to this vision, the exclusion of same-sex couples from the institution of marriage is rank discrimination.

The Constitution does not codify either of these views of marriage (although I suspect it would have been hard at the time of the adoption of the Constitution or the Fifth Amendment to find Americans who did not take the traditional view for granted). The silence of the Constitution on this question should be enough to end the matter as far as the judiciary is concerned. Yet, Windsor and the United States implicitly ask us to endorse the consent-based view of marriage and to reject the traditional view, thereby arrogating to ourselves the power to decide a question that philosophers, historians, social scientists, and theologians are better qualified to explore.\(^7\) Because our consti-

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\(^7\)The degree to which this question is intractable to typical judicial processes of decisionmaking was highlighted by the trial in Hollingsworth v. Perry, ante, p. __. In that case, the trial judge, after
tutional order assigns the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence.

receiving testimony from some expert witnesses, purported to make “findings of fact” on such questions as why marriage came to be, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 958 (ND Cal. 2010) (finding of fact no. 27) (“Marriage between a man and a woman was traditionally organized based on presumptions of division of labor along gender lines. Men were seen as suited for certain types of work and women for others. Women were seen as suited to raise children and men were seen as suited to provide for the family”), what marriage is, id., at 961 (finding of fact no. 34) (“Marriage is the state recognition and approval of a couple’s choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents”), and the effect legalizing same-sex marriage would have on opposite-sex marriage, id., at 972 (finding of fact no. 55) (“Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages”).

At times, the trial reached the heights of parody, as when the trial judge questioned his ability to take into account the views of great thinkers of the past because they were unavailable to testify in person in his courtroom. See 13 Tr. in No. C 09-2292 VRW (ND Cal.), pp. 3038–3039.

And, if this spectacle was not enough, some professors of constitutional law have argued that we are bound to accept the trial judge’s findings—including those on major philosophical questions and predictions about the future—unless they are “clearly erroneous.” See Brief for Constitutional Law and Civil Procedure Professors as Amici Curiae in Hollingsworth v. Perry, O. T. 2012, No. 12-144, pp. 2–3 (“[T]he district court’s factual findings are compelling and should be given significant weight”); id., at 25 (“Under any standard of review, this Court should credit and adopt the trial court’s findings because they result from rigorous and exacting application of the Federal Rules of Evidence, and are supported by reliable research and by the unanimous consensus of mainstream social science experts”). Only an arrogant legal culture that has lost all appreciation of its own limitations could take such a suggestion seriously.
Legislatures, however, have little choice but to decide between the two views. We have long made clear that neither the political branches of the Federal Government nor state governments are required to be neutral between competing visions of the good, provided that the vision of the good that they adopt is not countermanded by the Constitution. See, e.g., Rust v. Sullivan, 500 U.S. 173, 192 (1991) ("[T]he government ‘may make a value judgment favoring childbirth over abortion’" (quoting Maher v. Rue, 432 U.S. 464, 474 (1977))). Accordingly, both Congress and the States are entitled to enact laws recognizing either of the two understandings of marriage. And given the size of government and the degree to which it now regulates daily life, it seems unlikely that either Congress or the States could maintain complete neutrality even if they tried assiduously to do so.

Rather than fully embracing the arguments made by Windsor and the United States, the Court strikes down §3 of DOMA as a classification not properly supported by its objectives. The Court reaches this conclusion in part because it believes that §3 encroaches upon the States’ sovereign prerogative to define marriage. See ante, at 21–22 ("As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was ‘to put a thumb on the scales and influence a state’s decision as to how to shape its own marriage laws’" (quoting Massachusetts v. United States Dept. of Health and Human Servs., 682 F. 3d 1, 12–13 (CA1 2012))). Indeed, the Court’s ultimate conclusion is that DOMA falls afoot of the Fifth Amendment because it “singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty” and “imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and
proper.” *Ante*, at 25 (emphasis added).

To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree. I hope that the Court will ultimately permit the people of each State to decide this question for themselves. Unless the Court is willing to allow this to occur, the whiffs of federalism in the today’s opinion of the Court will soon be scattered to the wind.

In any event, §3 of DOMA, in my view, does not encroach on the prerogatives of the States, assuming of course that the many federal statutes affected by DOMA have not already done so. Section 3 does not prevent any State from recognizing same-sex marriage or from extending to same-sex couples any right, privilege, benefit, or obligation stemming from state law. All that §3 does is to define a class of persons to whom federal law extends certain special benefits and upon whom federal law imposes certain special burdens. In these provisions, Congress used marital status as a way of defining this class—in part, I assume, because it viewed marriage as a valuable institution to be fostered and in part because it viewed married couples as comprising a unique type of economic unit that merits special regulatory treatment. Assuming that Congress has the power under the Constitution to enact the laws affected by §3, Congress has the power to define the category of persons to whom those laws apply.

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For these reasons, I would hold that §3 of DOMA does not violate the Fifth Amendment. I respectfully dissent.