COMPARATIVE LAW AND RIGHTS: FROM THE UNITED STATES TO LATIN AMERICAN BY WAY OF EUROPE

READING MATERIALS

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Introduction

On February 15, 2003, I turned on the morning news as I prepared to go to a rally in the Pakistani-Indian neighborhood of Chicago to protest the Bush Administration's determination to invade Iraq. I learned that millions of people had already streamed into the streets of Sydney, Tokyo, Delhi, Berlin, Madrid, and Johannesburg, and that millions more would be chanting and carrying signs in São Paulo, Managua, Vancouver, and dozens of other cities. Knowing that I was part of an international protest movement rolling across the world changed my experience of marching with a few thousand people down Devon Street. At least ten million people in scores of cities marched for peace on that weekend.

In a statement published a few months later also signed by Jacques Derrida, Jürgen Habermas declared that the protest marches of that weekend showed that there is a transnational public sphere. A public sphere consists in a discursive space mediating strangers in which claims and criticisms can be made with the knowledge that they are heard by many others, including political leaders and other powerful actors. Increasingly today, such public discourse and criticism is transnational. Those who speak truth to power and the anonymous auditors to whom they speak do not take officials of their own nation-states to be the sole or even primary target of their political expression. Publics in Paris and London aimed to speak not only to Tony Blair, but to George W. Bush and the United Nations General Assembly. Europe itself, according to Habermas, has emerged as a single political entity with a single public sphere.

In "Decentering the Project of Global Democracy," reprinted here, I criticize Habermas for confining his observations and interest to [***2]** Europe. I agree that significant social movement activity in the twenty-first century reveals transnational public communication, which the weekend of February 15 shows to be global, not merely European. Indeed, it can be argued that movements in the global South have led the creation of a global public sphere.

The essays in this volume, even those written before that weekend, all intend to join in the spirit of February 15. They are inspired by contemporary social movements that call multinational corporations to accountability and question the global military hegemony of the United States. They aim, however, not merely to applaud the anger and hope of these movements, but more importantly, to offer concepts for analyzing a range of events and issues that these movements address and to give arguments for some of their specific claims. In this introduction, I review several themes that the essays treat under the headings of war, self-determination, and global justice.

Self-Determination

Each of the three wars whose rightness I challenge in this book was justified at least partly on humanitarian grounds. In each case the United States and its allies said they were aiding oppressed people—the Albanians in Kosovo, and the people of Iraq and Afghanistan.

Humanitarianism is fast becoming the primary justification for military action, especially from the United States. Some discussions of human rights and war go so far as to suggest that principles of state and sovereignty are obsolete, and that intervention for humanitarian ends is always morally permissible or even obligatory. I certainly would not claim that the international community should never use military force to save people who are being slaughtered by their governments or neighbors. I do think that such action should be genuinely multilateral, approved by global democratic processes, and be likely to succeed in preventing harm. Those are conditions difficult to meet.

[*3] The world community should be wary, however, of humanitarian justifications for war. When the claim that the United States and Britain had to attack Iraq in order to protect the world from Iraq's weapons was exposed as false, the United States and Britain justified their action primarily as liberating the people from a ruthless dictator. Such an appeal in principle would justify going to war against any authoritarian government. When I was in South Africa in April 2003, people asked me why the United States wasn't aiming to topple Robert Mugabe in Zimbabwe. They thought that he is another example of a ruthless dictator. The problem is that there are too many potential sites of intervention on these grounds. Any hope of world order evaporates if we affirm that outsiders are justified in removing governments by military force whenever they are cruel dictatorships.

Why? As John Stuart Mill argued one hundred and fifty years ago, and others repeated in the twentieth century, military intervention violates principles of self-determination. However much they hate the dictatorship, the people living under it usually hate their foreign saviors as much or more. A stronger global rule of law should not entail that people lose a right of self-determination. Recognition of an equal right of peoples to self-determination can provide some cushion for smaller and economically less advantaged peoples against the turbulence and power inequalities that globalization exacerbates.

Many advocates of cosmopolitan ethics and stronger global governance institutions pay little attention to principles of self-determination for peoples. Some doubt that such a vision is compatible with such principles. If we assume that self-determination is equivalent to Westphalian ideas of sovereignty, they may be right. Three of the papers in this volume offer an alternative theory of self-determination, which I suggest is compatible with and ideally part of institutions of transnational governance.

Two of these papers begin with claims of indigenous peoples. "Hybrid Democracy: Iroquois Federalism and the Postcolonial Project," considers the structure and operation of the Iroquois federation before and during the eighteenth century as interacting with the birth of the United States. I suggest that an understanding of the spirit of these governance practices among six self-determining peoples can help us today to

imagine international relations with more recognized regulation of peoples who retain strong institutions of self-governance.

"Two Concepts of Self-Determination" explains the conceptual shift that must be made to make such ideas coherent. I take a practical [***4]** cue from two distinct but not contradictory aspects of indigenous politics today: most indigenous people claim that their rights of self-determination have not been fully recognized, and yet they do not usually seek the status of independent nation-states. I argue that the most politically useful understanding of self-determination today would define it not as noninterference, but rather as nondomination. Conceptualizing self-determination as nondomination challenges an equation of self-determination with sovereignty, in the sense of having final authority over a unified and bounded jurisdiction in which outsiders have no say. A conception of self-determination as nondomination agrees prima facie that outsiders ought not to interfere, but with an important caveat. In an interdependent world there are many circumstances in which the decisions and actions of outsiders affect insiders and those of insiders affect outsiders; these circumstances often call for procedures to regulate the relationship between prima facie self-determining entities.

Relying on a notion of relational autonomy, I argue for a conception of self-determination that involves institutionalized procedures for negotiating between self-determining units when their activities affect one another's basic interests. In institutional terms, such procedures would imply some version of federalism at a global level and [***5]** at more regional and even local levels. As a general idea, federalism refers to governance procedures in whose design member groups participate, and whose purpose is to enable fair cooperation among them.

"Self-Determination as Nondomination; Ideals Applied to Palestine/Israel" takes some steps toward theorizing alternative forms of federalism. Most federalist theories and practices make three assumptions about the form of federal institutions; that federal institutions relate vertically to the constituent units, overriding their decisions; that constituent units should be large contiguous territories; and that all constituent units should have the same rights and duties. None of these assumptions is necessary to the concept or design of federalism, I argue. If we open the political imagination to conceiving relationships among federated units in new ways, we may be able to conceive some institutional solutions to conflicts that now appear intractable. We can think of federated units as local jurisdictions, or as encompassing a noncontiguous jurisdiction, as providing ways that units relate horizontally more than vertically, or as having different rights and duties. The essay proposes an interpretation of proposals for a bi-national federated political solution to conflict between Israeli Jews and Palestinians as an example of such political imagination.

Understood as nondomination, then, a principle of self-determination both recognizes rights of self-governance, and affirms that such rights entail obligations on the part of self-governing units to respond to claims by outsiders that they are harmed by activities of the unit. Federated institutions need not be conceived as constituting a center whose rules override those of the constituents of a federal system. Instead, they can be designed as regulated practices of negotiation and cooperation among units. With such an understanding of federalism, we can imagine more federated relations among locales and regions in the world quite distinct from any notion of a single global state. The ideas of global, regional, and local governance that I put forward in these

essays should not be taken as full-blown political proposals, but rather as critical methods that dislodge unproductive habits of thinking about issues of sovereignty, self-determination, and interdependence.

IRIS MARION YOUNG, *Two Concepts of Self-Determination* (Chap. 2), *in* GLOBAL CHALLENGES: WAR, SELF-DETERMINATION, AND RESPONSIBILITY FOR JUSTICE 39-57 (Polity Press: Cambridge, UK) (2007)

In a speech he gave before a 1995 meeting of the Open-Ended Inter-Sessional Working Group on Indigenous Peoples' Rights established in accordance with the United Nations Commission on Human Rights, Craig Scott appealed to a meaning of self-determination as relationship and connection rather than its more common understanding as separation and independence.

> If one listens, one can often hear the message that the right of a people to self-determination is not a right for peoples to determine their status without consideration of the rights of other peoples with whom they are presently connected and with whom they will continue to be connected in the future. For we must realize that peoples, no less than individuals, exist and thrive only in dialogue with each other. Self-determination necessarily involves engagement with and responsibility to others (which includes responsibility for the implications of one's preferred choices for others).... We need to begin to think of self-determination in terms of peoples existing in relationship with each other. It is the process of negotiating the nature of such relationships which is part of, indeed at the very core of, what it means to be a self-determining people.[1]

Scott's plea is very suggestive, but he neither develops a critical account of the concept of self-determination from which he distinguishes his own, nor does he explain the meaning, justification, and implications of the concept he proposes. In this essay[2] I articulate these two interpretations of a principle of the self-determination of peoples, and argue for a relational interpretation along the lines [***40]** that Scott proposes. Like Scott, my motive in this conceptual work is to contribute to an understanding of the specific claims of indigenous peoples to self-determination. I believe the concept of self-determination I advocate, however, applies to all peoples and relationships among peoples.

First I briefly review the current status of a principle of self-determination in international law and recent developments of indigenous peoples. Then I elaborate the historically dominant interpretation of a principle of self-determination for peoples, which continues to hold the minds of many who write on the subject. This concept of self-determination equates it with sovereign independence, where the self-determining entity claims a right of nonintervention and noninterference. Drawing particularly on feminist critiques of a concept of the autonomy of the person as independence and noninterference, I argue that this first concept of self-determination ignores the

[1] Craig Scott, "Indigenous Self-Determination and Decolonization of the International Imagination: A Plea," *Human Rights Quarterly*, vol. 18, 1996, p. 819.

[2] I am grateful to David Alexander, Rainer Bauböck, Augie Fleras, Philip Pettit, and Franke Wilmer for helpful comments on an earlier version of this essay.

relations of interdependence peoples have with one another, especially in a global economic system. Again following the lead of feminist theories of autonomy, I argue for a relational concept of the self-determination of peoples. I draw on Philip Pettit's theory of freedom as nondomination to argue that peoples can be self-determining only if the relations in which they stand to others are nondominating. To ensure nondomination, their relations must be regulated both by institutions in which they all participate and by ongoing negotiations among them.

Self-Determination and International Politics

Neither the United Nations Charter nor the 1948 Declaration of Human Rights mentions a right of self-determination. <<The General Assembly resolution 1541 appears to be the origin of the post-World War II discourse of self-determination. Passed with the project of decolonization in view, that resolution defines self-government as entailing either independence, free association with an independent state, or the integration of a people with an independent state on the basis of equality.>> It implicitly entails the "salt water" test for ascertaining whether a people deserves recognition of their right to self-determination: they have a distinct territory separated by long global distances from a colonial power from which they claim independence. <<Recognition of self-determination in these cases entails recognition of separate independent sovereign states if that is what the former colonies wish.>>

[*41] Between the era of postcolonial independence and the early 1990s the international community showed great reluctance to apply a principle of self-determination to disputes among peoples in territorial contiguity. In two decades fewer than ten new states were established and recognized under such a principle. As international law on human rights has evolved, some scholars argue that many of the issues of freedom and self-governance that people in the world raise can be treated under individual human rights principles, without invoking a collective principle of self-determination—such as rights of minorities against discrimination and persecution, rights to participate in the governance of the state, rights of cultural practice and preservation.

<<Some international agreements since the 1950s, however, elaborate further a principle of self-determination for peoples. The Covenant on Economic, Social and Cultural Rights and Covenant on Civil and Political Rights, which was drafted in 1966 and went into force in 1976, states a principle of self-determination in Article 1.>> All peoples have the right to self-determination, which means freely to determine their political status and pursue economic, social, and cultural development. The Helsinki Final Act of 1975, the Conference on Security and Cooperation in Europe, also reaffirms the right of a people to be free from external influence in choosing its own form of government.[3]

<<A principle of self-determination for peoples, then, has been increasingly recognized as applying to all peoples, and not only those in the territories of the former European colonies of Africa and Asia.>> Continued and wider affirmation of a principle of self-determination in international documents encourages indigenous groups

[3] On the state of international law, see Hurst Hannum, "Self-Determination in the Post-Colonial Era," in Donald Clark and Robert Williamson, eds, *Self-Determination: International Perspectives* (New York: St Martin's Press, 1996), pp. 12-44; see also Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990).

and other displaced, oppressed, or dominated groups to press claims against states that claim to have jurisdiction over them both directly and in international fora. Hotly contested, of course, is just what counts as a "people" who have a legitimate claim to self-determination. This is a crucial question which I believe cannot be settled by means of a once and for all definition. Peoples are not natural kinds, clearly identifiable and distinguishable by a set of essential attributes. Although I shall not argue this here, I believe that the relations among peoples and their degrees of distinctness are more fluid, relational and dependent on context than such a substantial logic suggests.[4]

Instead of addressing the important and contentious question of what a people is, here I will assume that there are some groups in the world today whose status as distinct peoples is largely uncontested, but which do not have states of their own and make claims for greater [***42]** self-determination. Among such groups are at least some of those called indigenous peoples.

I bracket the question of what is a people in order to focus on the question of what counts as self-determination. For while a principle of self-determination appears to have acquired a wider scope in international law in recent decades, it appears at the same time to have lost clarity and precision as a concept. <<Since the era when former colonies obtained state independence, the international community has been very reluctant to allow a principle of self-determination to ground or endorse claims of separation, secession, and the formation of new states.>> The break-up of the Soviet Union and Yugoslavia into separate sovereign states is a grand exception, mainly explicable by a cynical desire in the West to weaken a former world power once and for all. Claims by minority groups that they are wrongly dominated by dominant groups in nation-states seem to be getting more hearing in international political discussions. At the same time, the dominant opinion among global powers gives a strong priority to the preservation of existing state territories. Thus, the opinion seems to be widely held among scholars and practitioners of international law that if certain peoples have rights to self-determination, this does not entail rights to secede from existing nation-states and establish their own independent sovereign states with exclusive rights over a contiguous territory. Such clarity on what self-determination does not imply today, however, produces confusion about what it does imply. It is to this question that I aim to contribute moral and political theoretical arguments of clarification.

The Claims of Indigenous Peoples

For more than twenty years United Nations commissions have met to discuss the claims and status of the world's indigenous peoples. This work has culminated in the UN Draft Declaration of the Rights of Indigenous Peoples, which was discussed at the 1995 meeting I cited above,[5] and has been revised several times since.

At issue in world fora and in documents such as the Draft Declaration are both the definition of indigenous peoples and to whom the definition applies. Just who

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[4] I develop some of this argument in another paper, "Self-Determination and Global Democracy," in Ian Shapiro and Stephen Macedo, eds, *Designing Democratic Institutions* (New York: New York University Press, 2000), see also I.M. Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000), Chapter 7.

[5] See Russel Lawrence Barsh, "Indigenous Peoples and the U.N. Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force," *Human Rights Quarterly,* vol. 18, 1996, pp. 782-813.

counts as indigenous is fairly clear in the case of the American settler colonies and in the settler colonies of Australia and New Zealand. They are the people who inhabited the land for centuries before the European settlers came, and who live today in some continuity with the premodern ways of life of their [***43]** ancestors. The United Nations, however, also recognizes some other peoples in Europe, Asia, and Africa as indigenous, a designation which some states contest for some of "their" minorities. Still other groups which the United Nations does not recognize as indigenous would like to be so recognized. Just who should and should not count as indigenous people, as distinct from simply ethnic groups, is a contentious issue. Although this question is also important, I will bracket it as well. I will assume that descendants of the pre-Columbian inhabitants of North and South America count as indigenous people, as well as the Aboriginal people of New Zealand and Australia. While I believe there are others who ought to have rights of indigenous people, in this essay I will not develop criteria for classifying a people as indigenous and apply these criteria. <<Although I begin my thinking about the principle of self-determination by reflecting on the claims of (at least some) indigenous people, ultimately I believe that the conception of self-determination which I recommend ought to apply to all peoples.>> Thus, for the argument of this essay it is neither necessary to find an ironclad definition of *indigenous* nor to sort out which peoples are and which are not indigenous.

The UN Draft Declaration specifies that indigenous peoples have a right to autonomy or self-government in matters relating to their internal and local affairs, including culture, employment, social welfare, economic activities, land and resources, management and environment.[6] Nothing in the Declaration implies that indigenous peoples have a right to form separate states, and few if any indigenous people actually seek to form separate states. Most seek explicit recognition as distinct peoples by the states that claim to have jurisdiction over them, and wider terms of autonomy and negotiation with those states and with the other peoples living within those states. They claim or seek significant self-government rights, not only with respect to cultural issues, but with respect to land and access to resources. They claim to have rights to be distinct political entities with which other political entities, such as states, must negotiate agreements and over which they cannot simply impose their will and their law.[7]

<<Although indigenous peoples rarely seek to be separate states, they nevertheless claim that their legitimate rights of self-determination are nowhere completely recognized and respected.>> Every region of the world has its own stories and struggles of indigenous peoples in relation to the states that have emerged from colonization, and a full review of these claims and struggles would take me away from the conceptual work that is the main task of this essay. Thus, I will focus on the example of indigenous peoples related to the United States. Native Americans have a relatively long history of [***44]** self-government institutions recognized by the United States government, and in the last twenty years native self-government has been more actual

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[6] Erica-Irene A. Daes, "The Right of Indigenous Peoples to Self-Determination in the Contemporary World Order," in op. cit. Clark and Williamson, eds, p. 55.

[7] Recent discussions affirm that the principle of self-determination does not imply that indigenous peoples wish to or have a right to secede from existing states to form new sovereign states. Much discussion of the meaning of the principle turns on implementation of land rights and self-governance rights within a state. See *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32,* United Nations Economic and Social Council, December 6, 1999.

than ever before. Nevertheless, Native Americans typically claim that the United States government has never recognized their rights to self-determination, and that they are not so recognized today. The United States Congress reserves the right to recognize a group as a tribe, a status which accords it self-government rights. At any time, the Congress believes itself to have the power to rescind tribal status, and it has done so in the past, most notably during the period in the 1950s when the Indian Termination Act was in effect. Congress continues to act as though it has ultimate legislative authority over Native Americans. In the Indian Gaming Act of 1988, Congress for the first time ever required Native peoples to negotiate with US state governments regarding the use of Indian lands.

Some US public officials believe that Indians should not have distinct and recognized self-government and legal jurisdiction, and have led efforts to cripple Indian sovereignty. In a recent attack of fall 1997, Senator Slade Gorton (Rep., Washington) led a move to make the allocation of funds to tribal governments conditional on their waiving their current immunity from civil lawsuits filed in United States courts. This effort, hidden within the bill allocating funds to the National Endowment for the Arts and for national parks, was defeated. Even if it had passed it would likely not have stood up to treaty-based court challenge. It nevertheless shows how thin the line may be between self-government and subjection for Native Americans today.

My interest in rethinking the concept of the self-determination of peoples, then, begins from this apparent paradox. Indigenous peoples claim not to have full recognition of rights of self-determination, but most do not claim that allowing them to constitute separate states is necessary for such recognition. The dominant meaning of the concept of self-determination today would seem to require sovereign statehood. What is a meaning of the concept of self-determination that would correspond to the claims of indigenous peoples? I will argue that a concept of self-determination as relational autonomy in the context of nondomination best corresponds to these indigenous claims.

Self-Determination as Noninterference

<<Although some international political and legal developments of recent decades have brought it into question, the most widely **[*45]** accepted and clearly articulated meaning of self-determination defines it as independent *sovereignty*.>> An authority is sovereign, in the sense I have in mind, when it has final authority over the regulation of all activities within a territory, and when no authority outside that territory has the legitimate right to cancel or override it.[8]

<<This concept of self-determination interprets freedom as noninterference. In this model, self-determination means that a people or government has the authority to exercise complete control over what goes on inside its jurisdiction, and no outside agent has the right to make claims upon or interfere with what the self-determining agent does.>> Reciprocally, the self-determining people have no claim on what others do with respect to issues within their own jurisdictions, and no right to interfere in the business of the others. Just as it denies rights of interference by outsiders in a

[8] For definitions of sovereignty, see Christopher Morris, *An Essay on the Modern State* (Cambridge: Cambridge University Press, 1998), ms. p. 166; Thomas Pogge, "Cosmopolitanism and Sovereignty," *Ethics*, vol. 103, October 1992, pp. 48-75.

jurisdiction, this concept entails that each self-determining entity has no inherent obligations with respect to outsiders.

<<Only states have a status approaching self-determination as noninterference in today's world.>> When the principle of self-determination was systematized in the early twentieth century and then again after World War II, world leaders created or authorized the formation of states according to criteria of viability and independence. For a state to be sovereign or self-determining, and thus to have a right of noninterference, it was thought, it must be large enough to stand against other states if necessary, and have the right amount and kind of resources so that its people can thrive economically without depending on outsiders. Thus, the world powers that created states after World War I were concerned that no state be land locked and that states recognized as sovereign have sufficient natural resources to sustain an independent economy. The powers creating states in the decades after World War II also brought these standards of viability for independent living to bear on their work, usually seeking to make states large, though not always succeeding. Some today who worry about applying a principle of self-determination to peoples, such as the indigenous, continue to take the ability to be economically independent as a condition of such exercise of self-determination.

Some political theorists argue that state sovereignty considered as final authority and the enjoyment of noninterference is eroding today, and may have never existed to the extent that concept supposes.[9] Some think that global capitalism and international law increasingly circumscribe the independence and sovereignty of states.[10] <<Here, I am less concerned with whether any peoples or governments actually have self-determination as noninterference than with evaluating the normative adequacy of the concept, especially in [***46]** light of indigenous peoples' claims. I argue below that noninterference is not a normatively adequate interpretation of a principle of self-determination.>>

<<My argument relies on two different but I believe compatible efforts to theorize a concept of individual autonomy which criticize the primacy of noninterference and offer alternative accounts. The first comes from feminist political theory and the second from neorepublican theory. Both theories suggest that the idea of freedom as noninterference does not properly take account of social relationships and possibilities for domination. The form of their arguments can be extended, however, from the relations among individuals to relations among peoples.>>

<<The concept of freedom as noninterference presupposes that agents have a domain of action that is their own which is independent of need for relationship with or influence by others. The status of autonomous citizenship presupposes this private sphere of individual property. From this base of independence, on this account, individual agents enter relationships with others through voluntary agreements. Except where obligations are generated through such agreements, the freedom of individuals ought not to be interfered with unless they are directly and actively interfering with the freedom of others. The ideal of self-determination, on this view, consists in an

[9] See Daniel Philpott, "Sovereignty: An Introduction and Brief History," *Journal of International Affairs,* Winter 1995, no. 2, pp. 353-68.

[10] See David Held, *Democracy and the Global Order* (Cambridge: Polity, 1995) Chapters 5 and 6; Ruth Lapidoth, "Sovereignty in Transition," *Journal of International Affairs*, vol. 45, no. 2, Winter 1992, pp. 325-46.

agent's being left alone to conduct his or her affairs over his or her own independent sphere.>>

<<Critics of liberal individualism since Hegel have argued that this image of the free individual as ontologically and morally independent fails to recognize that subjects are constituted through relationships, and that agents are embedded in institutional relations that make them interdependent in many ways.>> Relational feminist critics of the equation of freedom with noninterference draw on both these insights. In contrast to an account of the subject as constituted through bounding itself from others, a relational account of the subject says that the individual person is constituted through his or her communicative and interactive relations with others. Individuals acquire a sense of self from being recognized by others with whom they have relationships; they act in reference to a complex web of social relations and social effects that both constrain and enable them.[11]

On this account, the idea that a person's autonomy consists in control over a domain of activity independent of others and from which others are excluded except through mutual agreements is a dangerous fiction. This concept of self-determination as noninterference values independence, and thereby devalues any persons not **[*47]** deemed independent by its account. Historically, this meant that only property-holding heads of household could expect to have their freedom recognized. Women and workers could not be fully self-determining citizens, because their position in the division of labor rendered them dependent on the property holders. Feminist criticism argues, however, that in fact the male head of household and property holder is no more independent than the women or workers he rules. The appearance of his independence is produced by a system of domination in which he is able to command and benefit from the labor of others. This frees him from bodily and menial tasks of self-care and routine production, and helps increase his property, so that he can spend his time at politics or business deals. In fact, the more powerful agents are as embedded in interdependent social relations as the less powerful agents. Feminists argue that contemporary discourse of the freedom of individuals understood as noninterference continues to assume falsely that all or most persons are or ought to be independent in the sense that they can rely on their own sphere of activity to support them and need nothing from others.

Feminist theory thus offers an alternative concept of autonomy, which takes account of the interdependence of agents and their embeddedness in relationships at the same time that it continues to value individual choices. In this concept, all agents are owed equal respect as autonomous agents, which means that they are able to choose their ends and have capacity and support to pursue those ends. They are owed this because they are agents, and not because they inhabit a separate sphere from others. The social constitution of agents and their acting in relations of interdependence

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[11] See Anna Yeatman, "Beyond Natural Right: The Conditions for Universal Citizenship," in Yeatman, *Postmodern Revisionings of the Political* (New York: Routledge, 1994), pp. 57-79; "Feminism and Citizenship," in Nick Stevenson, ed., *Cultural Citizenship* (London: Sage, 1998); "Relational Individualism," manuscript; see also Jennifer Nedelsky, "Relational Autonomy," *Yale Women's Law Journal,* 1989; "Law, Boundaries, and the Bounded Self," in Robert Post, ed., *Law and Order of Culture* (Berkeley: University of California Press, 1991); for an application of this feminist revision of autonomy to international relations theory, see Karen Knop, "Re/Statements: Feminism and State Sovereignty in International Law," *Transnational Law and Contemporary Problems*, vol. 3, no. 2, Fall 1993, pp. 293-344; see also Jean Elshtain, "The Sovereign State," *Notre Dame Law Review*, vol. 66, 1991, pp. 1355-84.

means the ability to be in such separate spheres is rare if it appears at all. Thus, an adequate conception of autonomy should promote the capacity of individuals to pursue their own ends in the context of relationships in which others may do the same. While this concept of autonomy entails a presumption of noninterference, especially with the choice of ends, it does not imply a social scheme in which atomized agents simply mind their own business and leave each other alone. Instead, it entails recognizing that agents are related in many ways they have not chosen, by virtue of kinship, history, proximity, or the unintended consequences of action. In these relationships agents are able either to thwart one another or support one another. Relational autonomy consists partly, then, in the structuring of relationships so that they support the maximal pursuit of individual ends.

In his reinterpretation of ideals of classical republicanism, Philip Pettit offers a similar criticism of the idea of freedom as noninterference.[12] Interference means that one agent blocks or redirects the **[*48]** action of another in a way that worsens that agent's choice situation by changing the range of options. In Pettit's account, noninterference, while related to freedom, is not equivalent to it. Instead, freedom should be understood as nondomination. An agent dominates another when he or she has power over that other and is thus able to interfere with the other *arbitrarily*. Interference is arbitrary when it is chosen or rejected without consideration of the interests or opinions of those affected. An agent may dominate another, however, without ever interfering with that person. Domination consists in standing in a set of relations which makes an agent *able* to interfere arbitrarily with the actions of others.

Thus, freedom is not equivalent to noninterference both because an unfree person may not experience interference, and because a free person may be interfered with. In both cases the primary criterion of freedom is nondomination. Thus when a person has a personal or institutional power that makes him or her able to interfere with my action arbitrarily, I am not free, even if in fact the dominating agent has not directly interfered with my actions. Conversely, a person whose actions are interfered with for the sake of reducing or eliminating such relations of domination is not unfree. In Pettit's account, it is appropriate for governing agents to interfere in actions in order to promote institutions that minimize domination. Interference is not arbitrary if its purpose is to minimize domination, and if it is done in a way that takes the interests and voices of affected parties into account. Like the feminist concept of relational autonomy, then, the concept of freedom as nondomination refers to a set of social relations. "Nondomination is the position that someone enjoys when they live in the presence of other people and when, by virtue of social design, none of those others dominates them" (p. 67).

<<In sum, both the feminist and neorepublican criticisms of the identification of freedom with noninterference are mindful of the relations in which people stand. A concept of freedom as noninterference aims to bound the agent from those relations, and imagines an independent sphere of action unaffected by and not affecting others. Because people and groups are deeply embedded in relationships, many of which they have not chosen, they are affected by and affect one another in their actions, even when they do not intend this mutual effect. Such interdependence is part of what en-

[12] Philip Pettit, *Republicanism* (Oxford: Oxford University Press, 1997).

ables domination, the ability for some to interfere arbitrarily with the actions of others. Freedom then means regulating and negotiating the relationships of people so that all are able to be secure in the knowledge that their interests, opinions, and desires for action are taken into account.>> [***49]**

Relational Interpretation of Self-Determination

We are now in a position to fill out Craig Scott's claim, which I quoted above, that we should think of the self-determination of peoples in the context of relationships. For the moment I will keep the discussion focused on the situation of indigenous people in the Americas and the antipodes. Because of a long and dominative history of settlement, exchange, treaty, conquest, removal, and sometimes recognition, indigenous and nonindigenous peoples are now interrelated in their territories. Webs of economic and communicative exchange, moreover, place the multicultural people of a particular region in relations of interdependence with others far away. In such a situation of interdependence, it is difficult for a people to be independent in the sense that they require nothing from outsiders and their activity has no effect on others.

<<I propose that the critique of the idea of freedom as noninterference and an alternative concept of relational autonomy and nondomination are not only relevant to thinking about the meaning of freedom for individuals. They can be usefully extended to an interpretation of the self-determination of a people.>> Extending any ideas of individual freedom and autonomy to peoples, of course, raises conceptual and political issues of what is the "self" of a people analogous to individual will and desire, by which it can makes sense to apply a concept of self-determination to a people at all. Extending political theoretical concepts of individual freedom to a people appears to reify or personify a social aggregate as a unity with a set of common interests, agency, and will of its own.[13] In fact, however, no such unified entity exists. Any tribe, city, nation, or other designated group is a collection of individuals with diverse interests and affinities, prone to disagreements and internal conflicts. One rarely finds a set of interests agreed upon by all members of a group that can guide their autonomous government. When we talk about self-determination for people, moreover, we encounter the further problem that it is sometimes ambiguous who belongs to a particular group, and that many individuals have reasonable claim to belong to more than one. Since a group has neither unanimity nor bounded unity of membership, what sense does it make to recognize its right to self-determination?

<<It is certainly true that group membership is sometimes plural, ambiguous, and overlapping, and that groups cannot be defined by a single set of shared attributes or interests. This is why it is sometimes difficult to say decisively that a particular collection of individuals [***50]** counts as a distinct people.>> Such difficulties do not negate the fact, however, that historical and cultural groups have often been and continue to be dominated and exploited by other groups, often using state power to do so. Nor do these ambiguities negate the fact that freedom as self-government and cultural autonomy is important to many individuals who consider themselves belonging to distinct peoples.

<<Any collection of people that constitutes itself as a political community must worry about how to respond to conflict and dissent within the community, and

[13] See Russell Hardin, *One for All* (Chicago: University of Chicago Press, 1995), for a critique of the notion of collective common interests in the context of nationalist politics.

whether the decisions and actions carried out in the name of a group can be said to *belong* to the group. For this reason the "self" of a group that claims a right to self-determination needs more explication than does the "self" of individual persons, though the latter concept is hardly clear and distinct. Insofar as a collective has a set of institutions through which that people make decisions and implement them, then the group sometimes expresses unity in the sense of agency.>> Whatever conflicts and disagreements may have led up to that point, once decisions have been made and action taken through collective institutions, the group itself can be said to act. <<Such a discourse of group agency and representation of agency to wider publics need not falsely personify the group or suppress differences among its members.>> Most governments claim to act for "the people," and their claims are more or less legitimate to the extent that the individuals in the society accept the government and its actions as theirs, and even more legitimate if they have had real influence in its decision-making processes. This capacity for agency is the only secular political meaning that the "self" of collective self-determination can have.

<<Self-determination for indigenous peoples, as well as other peoples, should not mean noninterference.>> The interpretation of self-determination that models it on state sovereign independence equates a principle of self-determination with noninterference. For the most part, indigenous peoples do not wish to be states in that sense, and while they claim autonomy they do not claim such a blanket principle of noninterference. <<Their claims for self-determination, I suggest, are better understood as a quest for an institutional context of nondomination.[14]>>

<<On such an interpretation, self-determination for peoples means that they have a right to their own governance institutions through which they decide on their goals and interpret their way of life.>> Other people ought not to constrain, dominate, or interfere with those decisions and interpretations for the sake of their own ends, or according to their judgment of what way of life is best, or in order to [***51]** subordinate a people to a larger "national" unit. Peoples, that is, ought to be free from domination. <<Because a people stands in interdependent relations with others, however, a people cannot ignore the claims and interests of those others when their actions potentially affect them.>> Insofar as outsiders are affected by the activities of a self-determining people, those others have a legitimate claim to have their interests and needs taken into account even though they are outside the government jurisdiction. Conversely, outsiders should recognize that when they themselves affect a people, the latter can legitimately claim that they should have their interests taken into account insofar as they may be adversely affected. Insofar as their activities affect one another, peoples are in relationship and ought to negotiate the terms and effects of the relationship.

Self-determining peoples morally cannot do whatever they want without interference from others. Their territorial, economic, or communicative relationships with others generate conflicts and collective problems that oblige them to acknowledge the legitimate interests of others as well as promote their own. Pettit argues that states can legitimately interfere with the actions of individuals in order to foster institutions

[14] For one effort toward this sort of conceptualization in the context of the relation of Maori and Pakeha in New Zealand, see Roger Maaka and Augie Fleras, "Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa," in Duncan Ivison, Paul Patton, and Will Sanders, eds, *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000), pp. 89-112.

that minimize domination. A similar argument applies to actions and relations of collectivities. <<In a densely interdependent world, peoples require political institutions that lay down procedures for coordinating action, resolving conflicts, and negotiating relationships.>>

The self-determination of peoples, then, has the following elements. First, self-determination means a presumption of noninterference. A people has the prima facie right to set its own governance procedures and make its own decisions about its activities, without interference from others. Second, insofar as the activities of a group may adversely affect others, or generate conflict, self-determination entails the right of those others to make claims on the group, negotiate the terms of their relationships, and mutually adjust their effects. Third, a world of self-determining peoples thus requires recognized and settled institutions and procedures through which peoples negotiate, adjudicate conflicts, and enforce agreements. Self-determination does not imply independence, but rather that peoples dwell together within political institutions which minimize domination among peoples. It would take another essay to address the question of just what form such intergovernmental political institutions should take; some forms of federalism do and should apply. Finally, the self-determination of peoples requires that the peoples have the right to participate *as peoples* in designing and implementing intergovernmental institutions aimed at minimizing domination.

[*52] I have argued for a principle of self-determination understood as relational autonomy in the context of nondomination, instead of a principle of self-determination understood simply as noninterference. This argument applies as much to large nation-states as to small indigenous groups. Those entities that today are considered self-determining independent states in principle ought to have no more right of noninterference than should smaller groups. Self-determination for those entities now called sovereign states should mean nondomination. While this means a presumption of noninterference, outsiders may have a claim on their activities.

<<Understanding freedom as nondomination implies shifting the idea of state sovereignty into a different context. Sovereign independence is neither a necessary nor a sufficient condition of self-determination understood as nondomination.>> As I have developed it above, a self-governing people need not be able to say that it is entirely independent of others in order to be self-determining; indeed, I have argued that such an idea of independence is largely illusory. For these reasons, self-governing peoples ought to recognize their connections with others, and make claims on others when the actions of those others affect them, just as the others have a legitimate right to make claims on them when their interdependent relations threaten to harm them.

Those same relations of interdependence mean, however, that sovereign independence is not a sufficient condition of self determination understood as nondomination. The people living within many formally independent states stand in relation to other states, or powerful private actors such as multinational corporations, where those others are able to interfere arbitrarily with actions in order to promote interests of their own. For some people, formal sovereignty is little protection against such dominative relations. The institutions of formal state sovereignty, however, allow many agents to absolve themselves of responsibility to support self-governing peoples who nevertheless stand in relations of domination.

Thus, the interpretation of self-determination as nondomination ultimately implies limiting the rights of existing nation-states and setting these into different, more cooperatively regulated relationships. Just as promoting freedom for individuals involves regulating relationships in order to prevent domination, so promoting self-determination for peoples involves regulating international relations to prevent the domination of peoples.

<<Applying a principle of self-determination as nondomination to existing states, then, as well as to peoples not currently organized as states, has profound implications for the freedom of the former. [***53]** States ought not to have rights to interfere arbitrarily in the activities of those peoples in relation to whom they claim special jurisdictional relation.>> In the pragmatic context of political argument within both nation-state and international politics, many indigenous groups do not challenge the idea that the autonomy rights they claim are or will be within the framework of nation-states. Some appear to recognize that nation-states presume a right of noninterference in their dealings with "their" autonomous minorities.[15] If self-determination for peoples means not noninterference but nondomination, however, then nation-states cannot have a right of noninterference in their dealings with indigenous minorities and other ethnic minorities. Small, resource poor, relatively weak peoples are most likely to experience domination by larger and more organized peoples living next to or among them than from others far away. The nation-state that claims jurisdiction with respect to a relatively autonomous people is likely sometimes to dominate such people. <<If a self-determining people has no public forum to which it can go to press claims of such wrongful domination against a nation-state, and if no agents outside the state have the authority and power to affect a state's relation to that people, then that people cannot be said to be self-determining.>>

Thus, a principle of self-determination for indigenous peoples can have little meaning unless it accompanies a limitation on and ultimately a transformation of the rights and powers of existing nation-states and the assumptions of recognition and noninterference that still largely govern the relation between states.[16] <<There are good reasons to preserve the coordination capacities that many existing states have and to strengthen these capacities where they are weak. Nevertheless, the capacities of diverse peoples to coordinate action to promote peace, distributive justice, or ecological value can in principle be maintained and enlarged within institutions that also aim to minimize the domination that states are able to exercise over individuals and groups.>>

Illustration: The Goshutes Versus Utah

Let me illustrate the difference between a concept of self-determination as noninterference and a concept of self-determination as autonomy in regulated relations by reflecting on a particular conflict between a Native American tribe and some residents of the state of Utah.

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[15] See, for example, Hector Diaz Polanco, *Indigenous Peoples in Latin America: The Quest for Self-Determination,* trans. Lucia Rayas (Boulder, CO: Westview Press, 1997), especially Part Two.
[16] See Franke Wilmer, *The Indigenous Voice in World Politics* (London: Sage, 1993).

[*54] <<According to a report in the New York Times,[17] the Skull Valley Band of Goshutes have offered to lease part of their reservation as the temporary storage ground for high-level civil nuclear waste.>> The State of Utah's territory surrounds this small reservation, and state officials have vowed to block the border of the reservation from shipments of nuclear waste. The Skull Valley Band of Goshutes asserts that they have sovereign authority over the reservation territory and the activities within it, and that the State of Utah has no jurisdiction over this activity. The State of Utah, on behalf of counties near the reservation, claims that they have the responsibility to protect the health and welfare of the citizens of Utah. <<Since the storage of nuclear waste carries risks of potential harm that people in counties surrounding the reservation would bear along with those living on the reservation, the State of Utah feels obliged to assert its power.>>

So far as I understand the law of tribes and the United States the Goshutes do have a right to make this decision through their own government mechanism, and to issue their own guidelines to a waste storage operation that wishes to lease their land. They are obliged neither to consult the State of Utah nor to abide by the regulations of the US Environmental Protection Agency. Just this sort of legal independence makes Indian reservations attractive as potential sites for the treatment or storage of hazardous wastes from the point of view of the companies that operate such facilities. Sometimes, companies are willing to pay handsomely for the privilege of working with Indian groups in order to bypass what some regard as unnecessarily complex and time-consuming state and federal regulatory processes. For their part, some Indian groups such as the Skull Valley Band find in such leasing arrangements one of only a few opportunities to generate significant income with which they can improve the lives of their members and develop reservation infrastructure.

The Goshutes, I have said, do have self-determination rights in this situation. They are a distinct and historically colonized people with a right to preserve their cultural distinctness and enlarge their wellbeing as a group through their own forms of collective action. On the interpretation of this right of self-determination that I reject, they may simply deny that the State of Utah and US federal government have a right to interfere with their decision to lease the land for a nuclear waste storage site. On this interpretation, they can rightfully say that this decision is entirely their business and is none of the business of the State of Utah.

There is no denying, however, that the siting of a nuclear waste storage facility has potential consequences for people living in Utah counties near the reservation. They can be just as adversely affected [***55]** as those on the reservation if the facility leaks radioactive material into the ground, water, or air. In my account of self-determination, the Goshutes and the citizens of Utah are in a close and ongoing relationship. This relationship, in this case partly defined by geographical proximity, obliges the Goshutes to take the interests of potentially affected citizens of Utah into account.

The apparent approach of the State of Utah to this controversy, however, is to challenge any right to self-determination. The State of Utah apparently would like to have the power to override the Goshute decision, to impose state government power

[17] Timothy Egan, "New Prosperity Brings New Conflict to Indian Country," *New York Times*, March 8, 1998, Nation/Metro section. As of February 2000, this dispute remained at a standoff. See "Other Nuclear Waste Facilities Being Considered in Utah," *Salt Lake Tribune*, February 20, 2000.

and regulations over this group. <<It seems that between the two groups we face the alternatives of either recognizing the right of the Indian band to do what it wishes with its territory or recognizing the right of a larger entity around it to exercise final authority over that territory.>>

More generally, the United States Congress has recently held hearings on the question of whether US tribal sovereignty should not be revised or eliminated. <<There are many in the United States who believe that disputes such as this nuclear siting dispute are best addressed by eliminating jurisdictional difference. All the people in a contiguous territory in this case ought to be subject to the same laws and procedures of decision-making. On this account, a state ought to be the overriding, unifying, and final authority, with no independent entities "within" it.>> When that state is recognized by the international community as an independent sovereign state, such as the United States or New Zealand, then that sovereign state has a right of self-determination understood as noninterference. Such a right of noninterference applies particularly to the right of that state to make its own decisions about how it will rule over "its" minorities who claim rights of self-determination in relation to it. All states recognized as independent sovereign states in international law today, at the moment have such a right of noninterference with respect to "their" indigenous peoples. Hearings considering the question of whether to continue the current system of tribal self-determination assume that the United States has such a right.

<<From the point of view of indigenous people, even those that presently have significant autonomy rights in relation to the states that claim jurisdiction over them, this right of states is illegitimate. The only recourse they have within the logic of national sovereigntists is to assert for themselves the right of autonomy as noninterference.>> Political stand-off, then, is the typical result of this position.

<<Self-determination understood as relational autonomy, on the other hand, conceives the normative and jurisdictional issues in this dispute as follows. The Skull Valley Band of the Goshutes should be [***56]** recognized as a self-determining people.>> This implies that they have self-government rights and through that government they can make decisions about the use of land and resources under their jurisdiction which they think will benefit their members. <<Thus, they may decide to lease land for nuclear waste storage.>> They do not have an unlimited right of noninterference, however, concerning their activities. <<Communities outside the tribe who claim potential adverse effects to themselves because of tribal decisions have a *claim* upon those activities, and the Goshutes are morally obliged to hear that claim. Intergovernmental relations ought to be structured such that, when self-governing entities stand in relationships of contiguity or mutual effect, there are settled procedures of discussion and negotiations about conflicts, side effects of their activities, and shared problems. Because parties in a dispute frequently polarize or fail to respect each other, such procedures should include a role for public oversight and arbitration by outside parties with less stake in the dispute.>> Such procedures of negotiation, however, are very different from being subject to the authority of a state under which more local governments including the indigenous governments stand, and which finally decides the rules.[18]

[18] Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995); Kymlicka argues that national minorities, including indigenous peoples, ought to have recognized self-government rights, and that such rights limit nation-state sovereignty over them without making them separate sovereign

Final Question: The Rights of Individuals

I have argued that international law ought to continue to recognize a principle of self-determination for peoples, and should interpret this principle differently from the traditional principle of noninterference and independence. I have argued for an alternative interpretation of self-determination as relational autonomy in the context of institutions that aim to prevent domination. <<Some critics suspect claims to self-determination, and recognizing such claims, because they worry that this gives license to a group to oppress individuals or subgroups within the group.>> If a people has a right to govern its affairs its own way, some object, then this allows discriminatory or oppressive practices and policies toward women, or members of particular religious groups, or castes within the group, to go unchallenged. <<This sort of objection has little force, however, if we accept a concept of self-determination conceived as relational autonomy in the context of institutions that minimize domination.>>

<<My articulation of a principle of self-determination as involving nondomination instead of noninterference above focused on the relationship between a group and those outside the group. If we give priority [***57]** to a principle of nondomination, however, then it should also apply to the relation between a group and its members.>> The self-determination of a people should not extend so far as to permit the domination of some of its members by others. <<For reasons other than those of mutual effect, namely reasons of individual human rights, outsiders sometimes have a responsibility to interfere with the self-governing actions of a group in order to prevent severe human rights violations.>> This claim introduces a whole new set of contentious questions, however, about how human rights are defined, who should decide when they have been seriously violated by a government against its members, and the proper agents and procedures of intervention. These important questions are beyond the scope of this essay. <<A relational concept of self-determination for peoples does not entail that members of the group can do anything they want to other members without interference from those outside. It does entail, however, that insofar as there are global rules defining individual rights and agents to enforce them, all peoples should have the right to be represented *as peoples* in the fora that define and defend those rights.>> Thus, the sort of global regulatory institutions I have said are ultimately necessary to prevent domination between peoples should be constituted by the participation of all the peoples regulated by them.

THOMAS M. SCANLON, *Human Rights as a Neutral Concern* (Ch. 6), *in* THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY 113-123 (2003)

<<The thesis that human rights should be an important determinant of foreign policy derives support from certain ideas about what human rights are like. These include the following. Human rights, it is held, are a particularly important class of moral considerations. Their gross and systematic violation represents not just the failure to meet some ideal but rather a case of falling below *minimum* standards required of political institutions. Second, human rights are of *broad application.* They apply not only to countries that have recognized these rights in their legal institutions, and not merely to countries that are "like us" in their political traditions or in their economic

states. Kymlicka does not specify the details of the meaning of self-government in a context of negotiated federated relationships as much as one would like, but it is clear that he has something like this in mind.

development, but to virtually all countries. Human rights are not controversial in the way that other political and economic issues are. This is not to say that everyone respects them or that there is full agreement about what they entail. But the central human rights are recognized, for example, in the constitutions of countries whose political principles are otherwise quite divergent. This normal acceptance, and the fact that violations of human rights are not confined to governments of any particular ideological stripe but occur both on the left and on the right, lend support to the idea that concern for human rights is a ground for action that is neutral with respect to the main political and economic divisions in the world.>> Thus, whatever our other political commitments may be, we have reason to be opposed to violations of human rights whether they are carried out by regimes of the right or of the left; whether these regimes are parliamentary democracies, military dictatorships, or monarchies. <<In addition to having this *ideological neutrality,* it is often held, or at least thought, that human rights are *practically separable* from partisan political issues. Thus, in particular, to advocate a cessation of human rights violations in a country does not involve advocating a change in regime.>> One can oppose what the government is doing without opposing the government, or supporting the opposition.

<<The first of these ideas—the minimal character of human rights—is important to the positive case for making human rights a determinant of **[*114]** foreign policy. The others—broad applicability, ideological neutrality, and practical separability—are important in overcoming natural objections to giving human rights such a role. These objections turn, for example, on the assertion that human rights are ideal considerations that one cannot hope to see realized, or on the assertion that they are applicable only to countries like our own, or that they are parochial concerns peculiar to our political tradition, not shared by others, or on the assertion that to combat human rights violations in other countries represents an unwarranted intrusion into their domestic affairs, an attempt to impose on them our conception of the government they should have.>>

In the following brief discussion I will examine some of these claims, specifically, the claims that human rights are ideologically neutral and practically separable from partisan political disputes. I will also consider, on the other side, the charge that it is intrusive to bring pressure on other countries to end human rights violations when these countries may have different political traditions from ours and may not share these values. First, however, I want to say something about what I take rights to be and what kind of foundation I see them as having.

I

<<It sometimes seems that to invoke a right, particularly one in our familiar pantheon of civil and political liberties, is to appeal to a discrete moral principle whose validity can be apprehended just by thinking about it, without recourse to complicated reasoning or to the calculation of the costs and benefits flowing from a given course of action. But this impression fades when we discover that it is extremely difficult even to give a coherent statement of any of our familiar rights.>> For example, while we feel that we know what religious persecution is, and that it violates a right, it is not easy to state what this right is. Freedom of religion is violated when there is an established religion; that is, when everyone is required by law to observe the dictates of a particular faith or when membership in a particular religion is made a condition for

the possession of other political and legal rights. Freedom of religion is also violated when particular religions are forbidden to hold ceremonies and gatherings or when the publication and dissemination of their tracts and religious materials are proscribed. At least freedom of religion is infringed when these things are done *for certain reasons*—roughly speaking, for reasons concerned with the religious views involved. <<Not just any restriction on the practice of one's religion infringes freedom of religion. Religion is not a heading under which everything becomes legally **[*115]** permitted. It is compatible with freedom of religion to outlaw the torture of animals in religious rituals, though it would not be so compatible to outlaw it in Baptist rites but allow it for Episcopalians.>>

<<What lies behind the claim that the complex of elements I have briefly described here represents a *right*? This claim is supported, first, by the idea that religious belief is important, and important in a particular way. Its primary importance is seen to rest in the value for an individual of remaining true to his or her conscience (and in fact the right in question is often referred to as "freedom of conscience").>> The interest in bringing other people's actions into conformity with one's own religious beliefs is seen as having lesser value. <<But a second element in the case for the right of religious freedom is the belief, drawn from historical experience, that the tendency to look down on other religious groups, to try to drive them out or to force them to convert, is strong and pervasive.>> Experience strongly suggests that when governments have the power to act in the ways forbidden by the right as described above they will frequently use this power, at great cost to those who find themselves in the minority. <<Finally, a third element in the case for the right of freedom of religion is the belief that a pluralistic society incorporating the form of religious toleration that this right describes is both possible and desirable. The belief that this is so—that the losses involved in tolerating other beliefs are outweighed by the gains in social harmony, decreased risk of persecution, and so on—depends on the particular view of the importance of religion mentioned above.>>

<<I believe that other rights have this same structure.[19] That is to say, first, that to assert a right is not merely to assert the value of some goal or the great disvalue of having a certain harm befall one. Rather, it is either to deny that governments or individuals have the authority to act in certain ways, or to assert that they have an affirmative duty to act in certain other ways, for example, to render assistance of a specified kind. Often, the assertions embodied in rights involve complexes of these positive and negative elements. The backing for a right lies in an empirical judgment that the restrictions on authority or assignments of affirmative permission or duty that the right embodies are both necessary and efficacious. They are necessary because, given the nature of social life and political institutions of the type we are familiar with, when the restrictions or requirements that the right embodies are absent, governments and individuals can be expected to behave in ways that lead to intolerable results. They are efficacious in that recognition of **[*116]** the right will provide a significant degree of protection against these results at tolerable cost.>> Rights do not promise to bring the millennium, and not just any way of improving things gives rise to a right. Rather, rights arise as responses to specific serious threats and generally, though not always, embody specific strategies for dealing with these threats.

[19] Here I outline a view of rights presented at greater length in "Rights, Goals, and Fairness" (1978), in this volume, essay 2.

<<The empirical judgments on which rights are based presuppose certain background conditions. The claim that a right is necessary is not a claim about what would happen in a "state of nature" but rather a claim about what we expect to happen in societies of the kind we are familiar with in the absence of a right of the kind in question. The threats that rights are supposed to help meet are generally ones that arise because of the distribution of power and the patterns of motivation typically found in such societies. These conditions are not universal, though in the case of most rights commonly listed as "human rights" they are sufficiently widespread to be considered universal for all practical purposes.>>

<<The judgment that a right is efficacious also depends on a view of "how things work." Religious freedom depends on the belief that people can and will develop the patterns of motivation necessary to make a pluralistic society work.>> Similarly, a belief in the right to due process depends on the belief in the possibility of an independent judiciary or, minimally, on the belief that the need to defend a charge publicly and with reference to a known law serves as a significant, though far from infallible, check on the arbitrary use of power. <<Commonly claimed rights vary in the degree to which they involve specific institutional strategies of this kind. What are sometimes called welfare or humanitarian rights differ from traditional civil or personal rights in this respect.>> For example, when people speak of "the right to a decent diet," they are not just saying that it is a very bad thing for people to be without adequate food. They are also, I believe, expressing the judgment that political institutions must take responsibility in this area: institutions that do not take reasonable steps to avert starvation for their citizens (and, one might add, for others) are not meeting minimum conditions of legitimacy. It is this connection with institutional authority and responsibility that makes it appropriate to speak here of a *right.* What differentiates this claim of a right from the rights embodied in our Constitution, however, is in part that it does not focus on any particular institutional mechanisms that would count as "reasonable" protections against the threat in question.

<<Even among traditional civil rights, and among those commonly called "rights of the person," there are some involving only minimal commitment to institutional mechanisms. Thus, for example, the right against torture, or cruel and unusual punishment, has less such commitment than the rights to **[*117]** due process or various political rights. This lack of dependence makes these rights the most clearly exportable, since it frees them from the limitation of being applicable only where the relevant institutional mechanisms can be expected to work.>>

<<Even those human rights involving the least commitment to specific institutional remedies retain a political character that differentiates them from mere goals. To condemn torture as a gross violation of human rights is not simply to deplore pain, suffering, cruelty, and degradation. These things are great evils, but the condemnation of torture involves the invocation of a human right because torture is an evil to which political authorities are particularly prone.>> Torture, as a violation of a human right, is a political act—political in being carried out by agents of the state and political in its aims, which are typically to crush opposition through the spread of fear. The recognition of a human right against the use of torture reflects the judgment that the temptation to rule in this manner is a recurrent threat and that the power to use

torture is a power whose real potential for misuse is so clear as to render it indefensible.[20]

<<I believe that the view of rights just sketched supports the claims, mentioned at the outset, that human rights are minimal requirements on social and political institutions and that they have broad application. These rights embody fixed points in our judgment of what tolerable institutions must be like. While not literally universal in application, they apply very broadly.>> In particular, they are not limited to those countries in which they are generally recognized or where they are embodied in law. If they were so limited then much of their critical point would be lost. <<To hold that there is a certain right is to hold that when people complain of being treated in this way their complaints are justified, whether the perpetrators grant this or not.>>

II

<<I turn now to the question of acting in defense of human rights. The moral case for such action is an instance of the general case for aiding a victim of wrongful harm and for doing what one can to stop, or at least not to aid, the person who is wrongfully harming him. Given the minimal character of human rights, gross violations of these rights represent particularly strong instances of the moral requirement to aid a victim and not aid his aggressor. Of course there is also a presupposition against interfering in the affairs of **[*118]** another country, which applies in these cases as well. But this presupposition can be overridden. To argue by analogy, there is a generally strong presupposition against interference in the affairs of another family, but this presupposition does not preclude intervening to protect a battered wife.>> Now it may seem that there is a clear disanalogy here. No one would suggest that the wife's only recourse is to her husband as protector, but it is more plausible to claim that the political institutions of a country are singled out as the source of protection for citizens. Intervention gains plausibility in the domestic case because here the state stands as an authority outside the family with a duty to protect all of its citizens, including battered wives. But in the international case, while multinational bodies exist, their claim to have this kind of special responsibility and authority is a matter of dispute. Other states and private citizens, on the other hand, have the status of neighbors, on a par with one or another of the disputes.

I do not accept this response. Even in the domestic case, private parties with no special authority can be justified in bringing pressure to bear to protect the wife and even, I think, in intervening physically to protect her if all else fails. People who know well what is going on but do nothing are justly criticized for failure to aid. And the duties of third parties are not limited to cases of physical cruelty. The person who grossly neglects his family is appropriately subject to social pressure as well as to the force of law. I don't know exactly what kinds of pressure third parties are entitled or required to use in such cases, but surely they are required at least nor to make things worse. The neighbor who gets a man into debt by selling him expensive cars and hunting rifles when he knows that the man's family is already suffering is clearly morally blameworthy. This suggests that, if the analogy I have been working with holds at all, humanitarian rights too can give rise to moral requirements on third parties.

[20] See Henry Shue. "Torture," *Philosophy and Public Affairs 7* (Winter 1978).

III

<<I should say clearly that this analogy has its problems. One of these is simply the fact of scale: attempts by one state to affect the internal affairs of another are fraught with incomparably greater dangers than are analogous interventions between individuals. But the main argument that I want to consider against acting to defend human rights is quite different. This argument, which I have often heard, holds that while human rights have a special place in "our" moral and political tradition they are not universally shared.>> Many countries have different notions of political morality, and it is therefore inappropriate for us to bring pressure to bear on them to **[*119]** conform to our conception of human rights. To do so is a kind of moral imperialism.

<<I believe this argument to be seriously mistaken. It puts itself forward as a kind of enlightened and tolerant relativism, but this masks what is in fact an attitude of moral and cultural superiority. Like many forms of relativism, this argument rests on the attribution to "them" of a unanimity that does not in fact exist. "They" are said to be different from us and to live by different rules. Such stereotypes are seldom accurate, and the attribution of unanimity is particularly implausible in the case of human rights violations. These actions have victims who generally resent what is done to them and who would rarely concede that, because such behavior is common in their country, their tormentors are acting quite properly. But even if the victims did take the view that they have no rights against what is done to them, would this settle the issue? Couldn't they be wrong in thinking this?>> Isn't this what we would say in the case of the battered wife who protests that of course her husband beats her every week, that's what any woman has to expect? (Does our reaction here depend on what we assume to be the customs of the surrounding society? Do we feel differently if we suppose ourselves to be considering a foreign culture in which wife beating is much more common than here and people expect it?) <<The question here is the following: which is the more objectionable form of cultural superiority, to refuse to aid a victim on the ground that "they live like that—they don't recognize rights as we know them," or to attempt to protect the defenseless even when they themselves feel that suffering is their lot and they have no basis to complain of it?>>

I admit that we may answer this question differently in different cases. We may feel differently, for example, if the victims are in fact recent perpetrators, and show every intention of becoming perpetrators again when they have the chance. Perhaps we are moved here by retributionist sentiments. But I believe that an important variable is the kind and degree of intervention that would be required to achieve a significant effect. It is one thing to bring diplomatic pressure to bear, to decline to make military assistance agreement, or to use economic pressure in order to bring about an end to a specific series of acts. It would be something else to continue to exert such pressure over a long period of time in order to bring about a general change in people's outlook and in the operation of their political institutions. Such action might in some cases be justified, but it raises obvious and severe problems. <<I believe that appeals to cultural differences have their main force not by way of a relativism of values but rather through the fact that such differences may greatly increase the scale of any intervention that could **[*120]** hope to be successful, and decrease the chances that any intervention would actually succeed. If people are very different from us in their attitude toward human rights, this doesn't make what they do *right,* but it may mean

that there is little we can do about it short of remaking their whole society, and this may be something we are neither required nor even able to do.>>

<<I believe that this problem can be a genuine one. Nonetheless, it does not seem to be an important factor in the cases we have actually considered. Despite some mention of the problem of the parochiality of rights in our discussions, none of these cases seems to be an example of a society marked by a complete lack of concern for rights, where implanting such concern would be a major exercise in cultural change.>>

IV

<<This brings me to my last question, that of separability. As I mentioned earlier, I think that some support for human rights as a foreign policy objective is aided by the belief that one can oppose human rights violations in a country without taking a stand on domestic political questions such as the question of who is to rule.>> Thus, support for steps to halt torture or religious discrimination in foreign countries draws its particular strength not only from our strong feelings of revulsion at these practices but also from the view that they are discrete evils whose persistence is separable from that of the prevailing government, whose policies we may or may not agree with but which we would not think it proper for us to attempt directly to alter.

<<Perhaps no one holds this view. It once played a role in my thinking about human rights, at least, but I now think it mistaken. In those cases in which they raise the most serious problems, the practices just mentioned are engaged in because they are seen as serving important political purposes.>> These perceptions can, of course, be incorrect, but I see no reason to think that they generally are. <<A regime may have good reasons to believe that it can remain in power only by quelling opposition through terror, or only by exploiting and catering to religious differences in the country. When such beliefs are correct, ending human rights violations will involve, as a consequence, bringing down the regime. But even though they are practically linked, these two events remain intellectually separable, and the doctrine of separability may persist in a revised form.>> The fall of the government may be only an unintended consequence of our action, the ‘ purpose of which was merely to bring an end to violations of human rights. This distinction may be important; perhaps such an action is less of an **[*121]** objectionable intrusion than an action whose purpose is to bring about a change in government.

This may seem more plausible if it is put in the following way. <<It is intrusive in an objectionable sense to attempt to bring about a change in government in another country to suit one’s own interests. But, as argued above, human rights violations may be a serious enough matter to justify, indeed even to require, outsiders to do what they can to protect and aid the victims. And this may be true even if the result of this aid is internal political change.>> The force of this argument may lead us to reverse our original question: when a regime engages in serious violations of basic human rights is it even permissible to refrain from taking action on the ground that any successful defense of human rights would lead to undesirable political change?

If by “undesirable” we mean unfavorable to our own country’s interests, it seems that the answer to this question will generally be “no,” unless the unfavorable results are of major proportions. There is a limit to the sacrifices one is required to make to

aid innocent victims, but it is surely corrupt to stand by while someone is beaten up because the aggressor is a customer of yours and you want to keep his business.

Suppose, alternatively, that the undesirable consequences of a change in government would accrue to the people whose government is engaging in human rights violations. It seems that this is, for most people, a more difficult case. <<Most people are reluctant to take steps to oppose human rights violations when they see the regime in question as basically a good one, but unstable, and likely to he replaced by one that would be much worse from the point of view of most people in the country. Their view seems to be that in situations of political instability a decision whether to bring pressure to end human rights violations has to be made on the basis of a full assessment of the political situation in the country in question.>> Human rights are one important element in this assessment, but not the only consideration.

This position strikes me as too lenient. <<While I would not take the extreme position that human rights may never be violated no matter what the consequences, I do want to say that the situations in which their violation could be justified would have to be very extreme indeed. To make my position clearer let me consider a particular problem of separability. It is sometimes asserted that many countries face a choice between adherence to human rights and economic development.>> The belief that there is such a conflict seems to represent a common ground between people who take it as a justification for suspension of human rights and others who take **[*122]** it as part of a case against economic development for these countries. I say "economic development" here, though of course what is at issue is a particular path of economic development pursued at a particular rate. The two groups just mentioned may be divided over whether what conflicts with human rights is the only path of economic development possible for these countries or whether it is just the particular path favored by outside financial interests.

If this conflict, in either form, is a real one for a society, then a successful defense of human rights there would not only affect the stability of a particular government but also affect and perhaps settle an important question of national policy. This problem might be brought within the account of rights offered earlier in this chapter in the following way. I have said that to claim that there is a right of a particular sort one must, among other things, claim that a society recognizing such a right is feasible—that the right avoids the harms to which it is addressed at tolerable cost. But what costs are "tolerable"? In particular, what sacrifices in economic progress are an acceptable price to pay for the benefits of a society in which civil liberties are observed? Surely, it may be said, different societies may legitimately give different answers to this question, and also to the related question of which forms of development are to be preferred. Isn't it therefore inappropriate for us, as outsiders, to impose our judgment of these matters on another society? Aren't these questions ones that each society is best left to answer for itself?

But here it is important to ask what one means by "letting a society decide for itself." <<How does a conflict between human rights and the pursuit of economic development (or some other social policy) arise? Most often it arises because there is considerable opposition to the policy in question and human rights must be violated to prevent this opposition from becoming politically effective.>> In such a situation there is likely to be no consensus on the question of the relative value to be attached to the success of this policy and to human rights. <<In deciding whether to act in

support of human rights in such a society, then, there is no way to escape the need for an independent judgment of the case for these rights in comparison to the competing goals. This judgment should take into account special features of the society—its particular needs, level of development, and so on—which determine the options open to it and affect their desirability. The need for a judgment cannot, however, be finessed by appealing to a supposed consensus in the society in question.>>

I might summarize this argument by saying that the goal of "letting a society decide for itself" counts more in favor of support for human rights **[*123]** than in favor of a policy of careful neutrality. I believe this to be generally true, particularly in those contemporary cases cited as examples of the conflict between human rights and economic development. But this belief does depend on some conception of the process through which a social decision would be reached in the absence of human rights violations: it depends on the claim that this process could be called one through which the society decides for itself. Perhaps one can imagine cases where this claim would be hard to make; for example, cases where the goal in question is not economic development but political democratization, and the method of decision that will operate if human rights are not violated will allow the traditional oligarchy to preserve its power.[21] But such examples are special in that the goal that is at stake is itself a matter of human rights. <<The question then becomes whether some human rights may be violated in order that other rights can be secured. Surely this question can *sometimes* be answered positively; it depends on the rights of issue and on the nature of the violations.>>

<<I have discussed the practical inseparability of human rights from internal political issues as a problem affecting the arguments for and against action by outsiders in defense of human rights. But this inseparability is an important fact to recognize for another reason as well: it indicates what one is up against in fighting human rights violations. If these violations represent not isolated outbreaks of cruelty and prejudice but, rather, strategic moves in an earnest political struggle, then they will not easily be given up.>> Moral suasion and the pressure of world opinion, or even the canceling of a few contracts, cannot be expected to carry much weight against considerations of political survival. <<Those who are serious about human rights must be prepared for a long, hard fight.>>

Bernard Williams, *Human Rights: The Challenge of Relativism*, SACKLER DISTINGUISHED LECTURE: UNIVERSITY OF CONNECTICUT (April 23, 1997)

Human Rights and Relativism

<<We have a good idea of what human rights are. The most important problem is not that of identifying them but of getting them enforced.>> The denial of human rights means the maintenance of power by torture and execution; surveillance of the population; political censorship; the denial of religious expression; and other such things. For the most gross of such violations, at least, it is obvious what is involved.

I am going to discuss the case in which the violations are committed by governments or quasi-governments (*e.g.*, a movement which controls part of a territory.)

[21] For a good discussion of this problem see part III of Charles Beitz, "Political Theory and International Relations" (unpublished doctoral dissertation, Princeton University, 1977).

There is a border-line between these cases and others in which government has lost control and the infringements are committed by bandits, war-lords and so on. It is important to the theory of this subject (and more generally to the theory of politics) that this is a border-line which is not always very clear. This is because government is in the first instance the assertion of power against other power.

<<I identify the "first" political question (in the manner of Thomas Hobbes) as the securing of order, protection, safety, trust and the conditions of co-operation.>> It is the "first" political question because solving it is the condition of solving, indeed posing, any other political question. It is not (unhappily) first in the sense that once solved it never has to be solved again. Because a solution to the first political question is required all the time, the character of the solution is affected by historical circumstances: it is not a matter of arriving at a solution to the first question at the level of state of nature theory and then going on to the rest of the agenda. It is easy to think of the political in those terms, particularly in countries which have been long settled and whose history has not been disrupted by revolution or civil war. Rather more surprisingly, it is the standard picture in the United States, which has not been long settled, and whose history has been spectacularly disrupted by civil war.

The point, however, is not that in any country, at any moment, the basic question of recognizing an authority to secure order can reassert itself. <<It is obvious that in many states most of the time the question of legitimate authority can be sufficiently taken for granted for people to get on with other kinds of political agenda. But it is important to remember the elementary truth that even in settled circumstances the political order does rest on the legitimated direction of violence; and also that even in settled states, the nature of the legitimation, and what exactly it will legitimate, is constantly, if not violently, contested.>>

There is another, equally obvious, truth. In the history of the world, there have been quite a number of settled states in which people have got on with their business in conditions of relative order, but there have been few liberal states. <<Since any state that maintains a stable political order must offer its citizens some legitimation of its power, there have been many legitimations in the history of the world which were not liberal legitimations.>> In fact, at the present time, many of the states that display a settled and effective political order are, more or less, liberal states. But this is not universally true now, it has certainly not been true in the past, and it is only on the basis of a world-historical bet of Hegelian dimensions that we believe, if we do believe, that it will continue to be true in the future.

<<The idea of a legitimation is fundamental to political theory, and so to the discussion of human rights.>> The situation of one lot of people terrorizing another lot of people is not a political situation: it is, rather, the situation which the existence of the political is in the first place supposed to alleviate (replace). <<If the power of one lot of people over another is to represent a solution to the first political question, and not be itself part of the problem, something has to be said to explain (to the less empowered, to concerned bystanders, to children being educated in this structure *etc.*) what the difference is between the solution and the problem: and that cannot simply be an account of successful domination. It has to be something in the mode of justifying explanation or legitimation. Our conceptions of human rights are connected with what we count as such a legitimation; and our most basic conceptions of human rights are connected with our ideas of what it is for the supposed solution, political power, to

become part of the problem.>> Since—once again, at the most basic level—it is clear what it is for this to happen, it is clear what the most basic violations of human rights are. In the traditional words of the Catholic Church, the most basic truth on this matter is something *quod semper, quod ubique, quod ab omnibus creditum est*.

This is true only of the most basic human rights. Some other items that have been claimed to be human rights are much more disputed. However, we do need to make a distinction here. <<In many cases where there is a disagreement about whether people have a human right to receive or to do a certain kind of thing, at least one of the parties doubts whether the thing in question is even a good thing.[22]>> This is so with arguments about the right to have an abortion, for instance, or to consume pornography. I shall come back to disagreements of this kind.

<<However, there is another kind of disagreement, in which nobody doubts that having or doing the thing in question is good: the question is whether people have a right in the matter. This above all arises with so-called positive rights, such as the right to work. Declarations of human rights standardly proclaim rights of this kind, but there is a problem with them. Nobody doubts that having the opportunity to work is a good thing, or that unemployment is an evil. But does this mean that people have a right to work? The problem is: against whom is this right held? Who violates it if it is not observed? One understands why it is said that this is a matter of right. Unemployment is not just like the weather or an approaching asteroid: government action has some effect on it, and with that goes an idea of governmental responsibility (an idea which has both risen and sunk in my lifetime.) But even if governments accept some responsibility for levels of employment, it may not be possible for them to provide or generate work, and if they fail to do so, it is not clear that the best thing to say is that the rights of the unemployed have been violated.>>

<<I think that it may be unfortunate that declarations of human rights have, though for understandable reasons, included supposed rights of this kind. Since in many cases governments cannot actually deliver what their peoples are said to have a right to, this encourages the idea that human rights represent simply aspirations, that they signal goods and opportunities which, as a matter of urgency, should be provided if it is possible. But that is not the shape of a right. If people have a right to something, then someone does wrong who denies it to them.>> I shall concentrate on cases in which this is really what is claimed.

Philosophers often say that the point of their efforts is to make the unclear clearer. But they may make the clear unclear: they may cause plain truths to disappear into difficult cases, sensible concepts to dissolve into complex definitions, and so on. To some extent, philosophers do this. Still more, they may seem to do it, and even to seem to do it can be a political disservice. So it is very important that the clear cases should remain clear, and in this talk, I shall try to keep them so. <<Moreover, I want to emphasise the importance of thinking politically about human rights abuses, and I hope that this may at any rate emphasise reality at the expense of philosophical abstraction.>> Admittedly, the arguments that lead even to this are philosophical, and perhaps will display philosophical abstraction. But that is the ineliminable consequence which follows from a philosopher's discussing the subject at all.

[22] Both may do so, as when a liberal defends people's right to go to hell in their own way.

<<Not all rights are "human rights"—some are conferred by or are consequences of positive law, by contract and so on.>> Also, as I have already said, there are human goods the value of which is perhaps not best expressed in terms of rights. <<There are indeed clear cases of human rights, and we had better not forget it. But in addition to all these there are demands which would be claimed to be rights by many people in a modern liberal or near liberal state such the USA, which would not be recognised in many other places. They resemble the clear cases of human rights in this sense, that their basis is not positive law but a moral claim which is taken to be prior to positive law and is invoked in arguments about what the positive law should be.>> Examples include: equality of treatment between the sexes; the right of a woman to have an abortion; a terminally ill patient's right to have assisted suicide; freedom for publication of pornography. (I am not suggesting that all these will turn out to be on the same level.)

A liberal philosopher, Thomas Nagel, has said[23] that the most basic human rights, such as those that stand against such things as "the maintenance of power by the torture and execution of political dissidents or religious minorities, denial of civil rights to women, total censorship... demand denunciation and practical opposition, not theoretical discussion." He also says, a little more surprisingly, that "the flagrant violation of the most basic human rights is devoid of philosophical interest." I do not think that he means that there is no philosophical interest in discussing the basis or status of these most fundamental rights. Moreover, reference to their flagrant violation is not a bad way of recalling what these rights are. He means rather that no very elaborate or refined philosophical discussion is needed to establish what these rights are. I agree. But he wants to emphasise certain other issues, of freedom for hate speech and for pornography and a high level of sexual toleration, and he wants to claim these as fundamental human rights.

I agree with those who wonder whether these are matters of fundamental human rights at all. <<A fundamental human right, it seems to me, had better get slightly nearer to being what their traditional defenders always took them to be, self-evident, and self-evidence should register more than the convictions of their advocates, if the claims to human rights are to escape the familiar criticism that they only express the preferences of a liberal culture.>> This point seems to me all the more telling if they express the preferences of only some liberals. It is simply a fact that many European liberals, fully respectable (I hope) in their liberal convictions, find it a quaint local obsession of Americans, the extent to which they carry free speech—that they insist on defending on principle the right to offer any form of odious racist insult or provocation, for instance, so long as by some argument it can be represented as a form of speech. I should have thought that these were obviously matters of political judgement, above all in telling the difference between the point at which the enemies of liberalism have been given only enough rope to hang themselves, and the point at which they have enough rope to hang someone else. The fact that many trustworthy people elsewhere see it in that light should itself, I think, encourage American liberals to ask whether the powerful personal conviction that they very clearly express, to the effect that this is not a policy question but a matter of ultimate right, may not be partly the product of a culturally injected overdose of the First Amendment.

[23] At a conference at Yale Law School in memory of Carlos Nino: proceedings forthcoming.

On the other matter Nagel discusses, of sexuality, I agree with his liberal conclusions, but I do wonder how much of this can really rest in the territory of fundamental human rights. It is unsurprising that many and various conventions obtain in the world, and it must be a matter of judgement, I suppose, and one that to some extent will turn on local cultural significance, to decide where and when an accepted tradition becomes a matter of an unambiguous case of abusive power, which is what I take to be the subject matter of fundamental human rights.

Similar reflections are borne out by history. Cruelty, arbitrary tyranny, torture, are in a certain sense the same everywhere . . . *quod semper, quod ubique, quod ab omnibus*. But sexual mores are not, and much liberal practice with regard to this would seem strange and deplorable to many past cultures, as to some contemporary cultures as well. By "contemporary cultures", I merely mean those that exist now. I do not mean that they are necessarily modern in their content—some of our problems come precisely from the fact that some of them are not. <<I am going to claim that our relations to cultures that exist now raise questions of evaluation altogether different from any raised by cultures of the past.>> But not everyone would agree with this distinction; and since I think a lot turns on the consequences of agreeing or not agreeing with it, I shall take a closer look at the distinction.

The outlook of liberal universalism holds that if certain human rights exist, they have always existed, and if societies in the past did not recognise them, then either that is because those in charge were wicked, or the society did not, for some reason, understand the existence of these rights. Moreover, liberal theory typically supposes that universalism simply follows from taking one's own views about human rights seriously. The same liberal writer, Thomas Nagel, has said in another context[24]

> Faced with the fact that [liberal] values have gained currency only recently and not universally, one still has to decide whether they are right—whether one ought to continue to hold them. . . . The question remains . . . whether I would have been in error if I had accepted as natural, and therefore as justified, the inequalities of a caste society. . . . [p 104]

But does this question remain? Here is where the crucial distinction comes in. Nagel is absolutely right to say that the liberal, if he really is a liberal, must apply his liberalism to the world around him. (Nagel is keen to resist the force of Robert Frost's joke, that a liberal is a man who will not take his own side in an argument.) Nagel rightly says, too, that if one knows that few people in the history of the world have been liberals, this does not itself give one a reason to stop being a liberal. If there are reasons for giving up liberalism, they will be the sorts of considerations which suggest that there is something better, more convincing or more inspiring to believe instead. In this, I entirely agree with Nagel.

But how far does this extend? Does it follow, as Nagel also puts it, that "presented with the description of a traditional caste society I have to ask myself whether its hereditary inequalities are justified. . . ."? Many of us will agree that if we are presented with such a society we may have to ask ourselves this question. But is it really just the same if we are presented with the description of such a society?—one long

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[24] The Last Word (Oxford University Press, 1997), p 104.

ago, let us suppose, belonging to the ancient world or the Middle Ages? Of course, thinking about this ancient society, I can ask myself Nagel's question, but is it true that the force of reason demands that I must do so, and what does the question mean? "Would I have been in error if I had accepted its inequalities as justified?"—would who have been in error? Must I think of myself as visiting in judgement all the reaches of history? Of course, one can imagine oneself as Kant at the Court of King Arthur, disapproving of its injustices, but exactly what grip does this get on one's ethical or political thought?

<<The basic idea that we see things as we do because of our historical situation has become over two hundred years so deeply embedded in our outlook, that it is rather the universalistic assumption which may look strange, the idea that, self-evidently, moral judgement must take everyone everywhere as equally its object.>> It looks just as strange when we think of travel in the opposite direction. Nagel expresses very clearly a powerful and formative assumption when he says "To reason is to think systematically in ways anyone looking over my shoulder ought to be able to recognise as correct". Anyone? So I am reasoning, along with Nagel, in a liberal way, and Louis XIV is looking over our shoulder. He will not recognise our thoughts as correct. Ought he to?—or, more precisely, ought he to have done so when he was in own world and not yet faced with the task of trying to make sense of ours?

<<Of course, it does not matter very much, in itself, whether we get indignant with Louis XIV, but one familiar reason for not doing so is that if we don't we may do better in understanding both him and ourselves.>> Nagel's outlook poses a question which it cannot answer: If liberalism is correct and is universal in the way that Nagel takes it to be, so that the people of earlier times had ideas which were simply in the light of reason worse than ours, why did they not have better ideas? Kant had an answer, in terms of a theory of enlightenment. Hegel and Marx had other and less schematic answers. All of them accepted a progressive view of history. In the sciences and technology, a progressive history can indeed be sustained, in terms of the explanations we can give of scientific development. <<Perhaps ethical and political thought can join in a history of progress, as Hegel and Marx supposed, but there is a large and now unfashionable task to be discharged by those who think so. I would say that such theorists lack a "theory of error" for what they call correctness in moral thought: unlike the situation with the sciences (or at least, what I and most scientists—as opposed to certain sociologists of science—take to be the situation with the sciences), there is in the moral case no story about the subject matter and about these past people's situation which explains why those people got it wrong about that subject matter.>> But we do not need to press the formulation in terms of a theory of error. It is enough that these theorists lack an explanation of something which, surely, cries out for one.

Why is it important to make these distinctions between our attitudes to the past and to the present? The reason is that it is tempting to argue in the following way: if one does not think of one's morality as universally applicable to everyone, one cannot confidently apply it where one must indeed apply it, to the issues of one's own time and place. Some people do seem to think that if liberalism is a recent idea and people in the past were not liberals, they themselves should lose confidence in liberalism. This is, as Nagel says, a mistake. But why does the queasy liberal make this mistake?

I think that it is precisely because he agrees with Nagel's universalism: he thinks that if a morality is correct, it must apply to everyone. So if liberalism is correct, it

must apply to all those past people who were not liberals: they ought to have been liberals, and since they were not, they were bad, or stupid, or something on those lines. But—the queasy liberal feels, and to this extent he is right—these are foolish things to think about all those past people. So, he concludes, liberalism cannot be correct. That is the wrong conclusion; what he should do is give up the universalist belief he shares with Nagel. <<That does not mean, as Richard Rorty likes to suggest, that we must slide into a position of irony, holding to liberalism as practical liberals, but backing away from it as reflective critics. That posture is itself still under the shadow of universalism: it suggests that you cannot really believe in liberalism unless you hold it true in a sense which means that it applies to everyone.>>

So I agree, very broadly, with the outlook expressed by the British philosopher R.G. Collingwood (who died in 1942 and is still grossly underestimated in Britain), when he said that the question whether we might prefer to live in a past period because we think it better "cannot arise", because "the choice cannot be offered." "We ought not to call [the past] either better than the present or worse; for we are not called upon to choose it or to reject it, to like it or dislike it, to approve it or condemn it, but simply to accept it." I said I agreed with this "very broadly"; in particular, I agree with Collingwood's emphasis on what one can affect in action, and I shall come back to that. But I do not agree that there are no judgements that one can make about the past; I am going to claim that there are some that one must be able to make. But it does mean that one isn't compelled to extend all one's moral opinions, in particular about rights, to the past; and in particular it means that one needn't suppose that if one doesn't so extend them, one has no right to them at all, as applied to the present world.

<<So is this relativism? One can call it a kind of relativism, if one likes, and I have myself called such a position "the relativism of distance". But it is very importantly different from what is standardly called relativism. Standard relativism says simply that if in culture A, X is favoured, and in Culture B, Y is favoured, than X is right for A and Y is right for B.>> In particular, if "we" think X right and "they" think X wrong, then each party is right "for itself". <<This differs from the relativism of distance because this tells people what judgements to make, whereas the relativism of distance tells them about certain judgements which they need not make. But more basically, as soon as standard relativism is applied to any case that goes beyond the relativism of distance—that is to say, to any case that is not distant—it is completely useless.>>

<<The reason for this is that the distinction on which relativism hangs everything, that between "we" and "they", is not merely given, and to erect it at a certain point involves a political decision or recognition.>> Standard relativism arose first in the Western world in the 5th century BC, when Greeks reflected on their encounters with peoples who were, very significantly, identified as not Greeks. It was in part, perhaps, a reaction against the sense of superiority that the Greeks typically brought to that distinction, and I think it is no accident that the paradigm expression of the distinction between nature and culture, which contributed to relativism, referred to the despised enemy: "fire burns the same in Persia as it does here, but what counts as right and wrong is different."

In something of the same way, modern relativism has complex relations to colonialism. Some colonialists thought that native peoples should be forced or encouraged to adopt European outlooks. Others thought that some peoples should be treated in that way, and others (more or less) left alone. Again, there were places in which some practices were suppressed—a notorious example was suttee in India—while other practices were not. Anti-colonialists thought that European powers should leave everyone alone. But every one of these outlooks transcends the outlook of standard relativism, even the last: to say that it is better for them to be left alone by us is not at all the same as to say that what they think is right for them and what we think is right for us.

Now, after colonialism, we still have to work out our relations with various societies, and standard relativism still cannot help us. <<Confronted with a hierarchical society in the present world, we cannot just count them as them and us as us: we may well have reason to count its members as already some of "us".>> For standard relativism, one may say, it is always too early or too late. It is too early, when the parties have no contact with each other, and neither can think of itself as "we" and the other as "they". It is too late, when they have encountered one another: the moment that they have done so, there is a new "we" to be negotiated.

<<So far as human rights in the contemporary world are concerned, standard relativism is an irrelevance—as it is, in fact, everywhere. The relativism of distance, on the other hand, in many though not all respects, is a sensible attitude to take.>> It applies to the past (to the extent that it does) for the reason that Collingwood implied, because the past is not within our causal reach. <<So far as human rights are concerned, what matters is what presents itself in our world, now. In this sense, the past is not another country: if it were just another country, we might have to wonder what to do about it.>>

In fact, as I have said, there are some judgements we can make about the past. There are very many, such as that Caligula seems to have been a singularly nasty man and Cicero notably self-important, and we should not forget all those: they are connected with our capacity to understand the past at all. <<But for the present purpose, we need to emphasise a particular kind of judgement which we can, indeed must, make about the past: those that we make in virtue of what I called the first question of politics, the question of order, and the danger related to that question, that the solution may become part of the problem. The categories of an ordered as opposed to a disordered social situation, disorder which is at the limit anarchy, apply everywhere; correspondingly, so do the ideas of a legitimate political order, where that means, not necessarily what we would count now as an acceptable political order, but what counted then as one.>> There simply is a social and historical difference between a medieval hierarchical state, for instance, and an area controlled by a band of brigands. <<Everywhere, universally, at least this much is true, that might is not *per se* right: the mere power to coerce does not in itself provide a legitimation.>>

<<This means, as I said at the beginning, that there are conceptions, which apply everywhere, of what it is for the solution to have become the problem, for the supposedly legitimate order to approximate to unmediated coercive power. This applies to the past, and, more relevantly, it applies to the present.>> Under such a conception we recognise the most blatant denials of human rights, torture, surveillance, arbitrary

arrest and murder: the world of Argentina under the junta, the story, only partly ever to be told, of those who disappeared.

Of course, it goes without saying that such cases are near some slippery slopes. There are other states which are uncomfortably like this, but which may be able to make a rather better case for their activities. <<Thus what is in its own terms a legitimate order may use what we would regard as cruel and unusual punishments; it is significant that, not surprisingly, they make no secret of this.>> They or others may use, rather less openly, ruthless methods against subversives or threatening revolutionaries. Are such measures in themselves violations of human rights? If they are, are they violations justified by emergency?

Of course, there is always room for argument about cases, but the point here is that it is clear what the argument is about. <<Any state may use such methods *in extremis*, and it is inescapably true that it is a matter of political judgement, by political actors and by commentators, whether given acts are part of the solution or of the problem. Liberal states make it a virtue—and it is indeed a virtue—to wait as long as possible before using such solutions, because they have the constant apprehension that those solutions will become part of the problem.>> Liberal states are well regarded, and rightly so, for showing this restraint. They should be less well regarded, as the writings of Carl Schmitt may remind us, if they turn this into the belief that the only real sign of virtue is to wait too long.

These cases, I think, are not conceptually very complicated. They indeed involve complexity and danger in deciding what is needed when, and these are matters of historical and sometimes personal luck. <<Conceptual complications multiply when one is concerned with a different case, that in which a style of legitimation that was accepted at one time is still accepted in some places but no longer accepted in others.>> I said earlier that the past is not causally within our reach. However, the contemporary world is certainly within the reach of the past, and the influences of the past include, now, theocratic conceptions of government and patriarchal ideas of the rights of women. Should we regard practices elsewhere that still express such conceptions as violations of fundamental human rights?

I should repeat that this is not a question to be put in terms of the standard relativist theory. We should have left behind us by now the manifestly confused notion that we cannot possibly talk about violations of human rights in such a case because these practices must be right for them, though they are not right for us.

We must ask, first, what is actually happening? <<Let us grant, as a condition of the problem, that we do not accept the local legitimation.>> It may depend on a religious story which we reject, either in its entirety or, perhaps, in the way it is used to legitimate the current forms of political power. (It is particularly important to remember this second possibility when, as in the case of Islam, some critics offer only a relentless Westernized secularism to oppose a rigidly autocratic theocracy; Islam itself has more resources than this old saga suggests.) In any case, we reject the legitimation of the theocrats. <<The question is whether we must then think of these practices as violations of human rights.>> A short argument will say that they must be: since the legitimation is unsound, the practices involve coercion without legitimation. But this is rather too short. For one thing, there is an issue of how much manifest coercion is involved, and that is why, very obviously, the situation is worse in these respects if

opponents of the religion are silenced or women are forced into roles they do not even think they want to assume. Simply the fact that this is so makes the situation more like the paradigm of rights violation, of the solution becoming part of the problem.

How far it will have come to be like that paradigm is in good part a matter of fact and understanding. <<Up to a certain point, it may be possible for supporters of the system to make a decent case (in both senses of that helpful expression) that the coercion is legitimate.>> Somewhere beyond that point there may come a time at which the cause is lost, the legitimation no longer makes sense, and only the truly fanatical can bring themselves to believe it. There will have been no great change in the argumentative character of the legitimation or the criticisms of it. The change is in the historical setting in terms of which one or the other makes sense.

Much of this, of course, is equally true of a liberal regime taking steps against anti-liberal protestors, and it is one that revolutionaries often rely on. It is precisely because this is so that it is a crucial, and always recurrent, matter of political judgement, how much rope a given set of protestors may be given.

<<Suppose, then, that the theocratic regime, or the roles of women, are still widely accepted in a certain society, more or less without protest. Then there is a further question, to what extent this fact, granted it does not rest on a genuinely credible legitimation, nevertheless means that, as I put it earlier, it can be decently supposed that there is a legitimation. Here it seems to me an important consideration, as the Frankfurt tradition has insisted, how far the acceptance of these ideas can itself be plausibly understood as an expression of the power-relations that are in question.>>

<<It is notoriously problematical to reach such conclusions, but to the extent that the belief system can be reasonably interpreted as (to put it in improbably simple terms) a device for sustaining the domination of the more powerful group, to that extent the whole enterprise might be seen as a violation of human rights. Otherwise, without such an interpretation, we may see the members of this society as jointly caught up in a set of beliefs which regulate their lives and which are indeed unsound, but which are shared in ways that moves the society further away from the paradigm of unjust coercion.>> In that case, although we shall have various things to say against this state of affairs, and although we may see the decline of these beliefs as representing a form of liberation, we may be less eager to insist that its way of life constitutes a violation of human rights.

<<The charge that a practice violates fundamental human rights is ultimate, the most serious of political accusations. In their most basic form, violations of human rights are very obvious, and so is what is wrong with them: unmediated coercion, might rather than right.>> Moreover, in their obvious form, they are always with us somewhere. <<It is a mark of philosophical good sense that the accusation should not be distributed too inconsiderately, and in particular that our theories should not lead us to treat like manifest crimes every practice that we reject on liberal principle and could not accept here—especially if in its locality it can be decently supposed to be legitimated. It is also a question of political sense, how widely the accusation should be distributed.>> Of course it can be politically helpful in certain circumstances to exaggerate the extent to which a practice resembles the paradigm violations of human rights, in order that it should be seen to do so. As always in real political connections, there is a responsibility in doing such a thing: in order for the practice to come to be

seen as resembling manifest crimes, it will almost certainly have to be made to change in actual fact so that more of them are committed.

<<Whether it is a matter of philosophical good sense to treat a certain practice as a violation of human rights, and whether it is politically good sense, cannot ultimately constitute two separate questions. The first question that we have to ask, I said, is: what is actually going on?>> Which includes: how is it to be interpreted? It is on the answers to this that our judgements must depend, not on any deployment of general relativistic categories.

<<The second question is: what if anything can we do about it? It should be obvious that this must be on every occasion a political question.>> The term "political" in such connections tends to be associated simply with matters of national interest or trade policy, *etc.* Or again the political is understood in internal terms, of how intervention or its opposite will go down at home. These are certainly considerations that are not irrelevant to the political. Max Weber in *Politik als Beruf* distinguished between an ethic of responsibility and an ethic of commitment, and it was his point that the former is still very much an ethic. But many do not see this point, and I was interested to find it made very firmly by Roman Herzog, in the first of a series of articles on human rights published last autumn in *Die Zeit*:[25]

> *Bei der Verwirklichung des Ziels kommt es aber auch auf Pragmatismus an. Das klingt in deutschen Ohren oft kompromisslerisch oder gar heuchlerisch. In Wirklichkeit ist ein Pragmatismus, der auch darauf achtet, wie das für richtig erkannte Ziel möglichst weitgehend realisiert werden kann, alles andere als das, und auf keinen Fall darf er einfach mit Opportunismus gleichgesetzt werden.*

Roosevelt famously said of Somoza, the ghastly dictator of Nicaragua, "he is a SOB, but he is our SOB". This can, on some occasions, be the correct attitude. Again, the habitual saying of a less revered American president, "how will it play in Peoria?" can be a responsibly democratic question. <<But the main point is that the political does not simply exclude principle; it includes it, but many other things as well. Because the question "what should we do?" can only be a political question, there is not much that can be said in general about it at an ethical or philosophical level.>> But let me end with two sets of outline remarks.

<<I have said that a violation of basic human rights approximates to unmediated coercion. We are likely to think that, other things being equal (which is a large qualification) and supposing there are some things we can do, there is more reason to do something if the violation is gross. Why should this be so? Well, (1) what is happening is worse. (2) In other cases, it is more likely that intervention will make it worse. (3) If in a case which looks less like unmediated coercion, the victims may not think they are victims, and then intervention may be difficult to distinguish from ideological imperialism. But, most basically, (4) the nearer to the paradigm the violations are, and the more the state is part of the problem, the nearer the situation may be to that of a state apparatus being at war with its own people.>> The reimposition of a solution,

[25] 6 September 1996 [("Achieving [a] goal also rides on pragmatism. To German ears, this often sounds [1] compromising or even [2] hypocritical. In reality, a pragmatism that also pays attention to how one may realize, to the extent possible, the goal recognized as correct [boils down to] neither the former nor the latter. Under no circumstances would it simply amount to opportunism.")].

the stopping of such a war, can be a better justification for intervention than ideological disagreement.

<<My second and last set of remarks concerns freedom of speech and information. Denial of this freedom is widely perceived as a significant human rights violation.>> Yet it may not be overtly very coercive, particularly if it is efficient enough. It hardly seems at all a case of what I have called the solution being part of the problem. Some liberals will say that denial of free expression is very deeply coercive, and attacks the individual's interests just as radically as violence attacks his physical being, because it attacks his interests, in John Stuart Mill's famous words, as a progressive being. But if we say this, we shall need a theory of the human person more ambitious than any invoked in the present account of basic human rights—a theory in terms of liberal autonomy.

More ambitious, such a theory will also be more disputable. <<It seems to me sensible, both philosophically and politically, to make our views about human rights, or at least the most basic human rights, depend as little as possible on disputable theses of liberalism or any other particular ideology.>> We should rely, so far as we can, on the recognition of that central core of evils (*quod semper, quod ubique, quod ab omnibus*. . . .); together with our best critical understanding of what may count now as a legitimation; together with what in modern conditions is implied by these recognitions.

<<It is in this last connection that I would bring in the rights to freedom of expression and communication. They are indeed basic, but not because their denial is coercive relative to a distinctively liberal conception of the individual's interests. Rather, freedom of speech is involved in making effective any criticism of what a regime is doing, in relation to any reasonable conception of the individual's interests.>> Neither the citizens themselves nor anyone else can answer the question "what is actually going on?" without true information and the possibility of criticism. <<Liberals may think that this is an excessively instrumental account of the freedom of speech, and indeed it is, relative to the elaborations of that value, its extensions and defences, which are appropriate to the political agenda of a settled liberal state. But the instrumentalist account is better for an account of free speech as a basic human right, and for the criticism of states that constrain that right.>>

We are concerned, as I have repeatedly said, with the contemporary world, with what actually exists. One encouraging feature of that world is that free speech tends to be internationally infectious. By the same token, that other question which comes up when rights are violated, "what shall we do?", is clearer: encouragement of information, denunciation of censorship etc., can be legitimately and often effectively achieved. It gets very hard for states to complain that others are insisting on informing their citizens. Moreover, it gets harder for them to stop the information.

Modern communications technology can contribute negatively to human rights observance: by making surveillance more powerful; and also, less obviously, by reducing the serious discussion of politics, and creating an international din of rubbish in which nothing critical or serious can be distinctly heard. But without doubt it also makes a positive contribution against secrecy, the control of information, and the suppression of criticism. In doing that it equally makes a contribution against tyranny

and unmediated coercion, and against regimes whose operations, rather than solving the problem that politics is there to address, add to it.

Richard Rorty, *What's Wrong with "Rights"?*, 292 (Issue 1733) HARPER'S, June, 1996, at 15-18.

From "The Intellectuals and the Poor," a speech by Richard Rorty, delivered in February at Pomona College in Pomona, California. Rorty is a professor of humanities at the University of Virginia; a collection of his essays, Philosophical Papers, Volumes 1 and 2, is published by Cambridge University Press. Rorty's essay "Demonizing the Academy" appeared in the January 1995 issue of Harper's Magazine.

If one accepts the premise that the basic responsibility of the American left is to protect the poor against the rapacity of the rich, it's difficult to argue that the postwar years have been particularly successful ones. As Karl Marx pointed out, the history of the modern age is the history of class warfare, and in America today, it is a war in which the rich are winning, the poor are losing, and the left, for the most part, is standing by.

<<Early American leftists, from William James to Walt Whitman to Eleanor Roosevelt, seeking to improve the standing of the country's poorest citizens, found their voice in a rhetoric of fraternity, arguing that Americans had a responsibility for the well-being of their fellow man. This argument has been replaced in current leftist discourse by a rhetoric of "rights.">> The shift has its roots in the fact that the left's one significant postwar triumph was the success of the civil-rights movement. <<The language of "rights" is the language of the documents that have sparked the most successful attempts to relieve human suffering in postwar America—the series of Supreme Court decisions that began with *Brown* v. *Board of Education* and continued through *Roe* v. *Wade*.>> The Brown decision launched the most successful appeal to the consciences of Americans since the Progressive Era.

<<Yet the trouble with rights talk, as the philosopher Mary Ann Glendon has suggested, is that it makes political morality not a result of political discourse—of reflection, compromise, and choice of the lesser evil—but rather an unconditional moral imperative: a matter of corresponding to something antecedently given, in the way that the will of God or the law of nature is purportedly given.>> Instead of saying, for example, that the absence of various legal protections makes the lives of homosexuals unbearably difficult, that it creates unnecessary human suffering for our fellow Americans, we have come to say that these protections must be instituted in order to protect homosexuals' rights.

<<The difference between an appeal to end suffering and an appeal to rights is the difference between an appeal to fraternity, to fellow-feeling, to sympathetic concern, and an appeal to something that exists quite independently from anybody's feelings about anything—something that issues unconditional commands. Debate about the existence of such commands, and discussion of which rights exist and which do not, seems to me a philosophical blind alley, a pointless importation of legal discourse into politics, and a distraction from what is really needed in this case: an attempt by the straights to put themselves in the shoes of the gays.>>

Consider Colin Powell's indignant reaction to the suggestion that the exclusion of gays from the military is analogous to the pre-1950s exclusion of African Americans from the military. Powell angrily insists that there is no analogy here—that gays simply do not have the rights claimed by blacks. As soon as the issue is phrased in rights. talk, those who agree with Powell and oppose what they like to call "special rights for homosexuals" start citing the Supreme Court's decision in Bowers v. Hardwick. The Court looked into the matter and solemnly found that there is no constitutional protection for sodomy. So people arguing against Powell have to contend that Bowers was wrongly decided. This leads to an argumentative impasse, one that suggests that rights talk is the wrong approach.

The *Brown* v. *Board of Education* decision was not a discovery of a hitherto unnoticed constitutional right, or of the hitherto unnoticed intentions of the authors of constitutional amendments. Rather, it was the result of our society's long-delayed willingness to admit that the behavior of white Americans toward the descendants of black slaves was, and continued to be, incredibly cruel—that it was intolerable that American citizens should be subjected to the humiliation of segregation. If *Bowers* v. *Hardwick* is reversed, it will not be because a hitherto invisible right to sodomy has become manifest to the justices. It will be because the heterosexual majority has become more willing to concede that it has been tormenting homosexuals for no better reason than to give itself the sadistic pleasure of humiliating a group designated as inferior—designated as such for no better reason than to give another group a sense of superiority.

I may seem to be stretching the term "sadistic," but I do not think I am. <<It seems reasonable to define "sadism" as the use of persons weaker than ourselves as outlets for our resentments and frustrations, and especially for the infliction of humiliation on such people in order to bolster our own sense of self-worth.>> All of us have been guilty, at some time in our lives, of this sort of casual, socially accepted sadism. <<But the most conspicuous instances of sadism, and the only ones relevant to politics, involve groups rather than individuals.>> Thus Cossacks and the Nazi storm troopers used Jews, and the white races have traditionally used the colored races, in order to bolster their group self-esteem. Men have traditionally humiliated women and beaten up gays in order to exalt their own sense of masculine privilege. The central dynamic behind this kind of sadism is the simple fact that it keeps up the spirits of a lot of desperate, beaten-down people to be able to say to themselves, "At least I'm not a nigger!" or "At least I'm not a faggot!"

<<Sadism, however, is not the only cause of cruelty and needless suffering. There is also selfishness. Selfishness differs from sadism in being more realistic and more thoughtful. It is less a matter of a sense of one's own worth and more a matter of rational calculation.>> If I own a business and pay my workers more than the minimum necessary to keep them at work, there will be less for me. My paying them less is not sadistic, but it may well be selfish. If I prevent my slaves, or the descendants of my ancestors' slaves, from getting an education, there will be less chance for them to compete with me and my descendants for the good jobs. If suburbanites cast their votes in favor of financing public education through locally administered property taxes, there will be less chance for the children in the cities to be properly educated, and so to compete with suburban children for membership in a shrinking middle class.

All these calculated actions are cruel and selfish, but it would be odd to call them sadistic.

Our knowledge of sadism is relatively new—it is something we have only begun to get a grip on with the help of Freud, and philosophers like Sartre and Derrida, who have capitalized on Freud's work. But it is as if the thrill of discovering something new has led us to forget other human impulses; on constant guard against sadism, we have allowed selfishness free reign.

<<Just as rights talk is the wrong approach to issues where appeals to human sympathy are needed, sadism is the wrong target when what is at hand is selfishness.>> But this is the way American leftists have learned to talk—and think—about the world.

You would not guess from listening to the cultural politicians of the academic left that the power of the rich over the poor remains the most obvious, and potentially explosive, example of injustice in contemporary America. For these academics offer ten brilliant unmaskings of unconscious sadism for every unmasking of the selfishness intrinsic to American political and economic institutions. Enormous ingenuity and learning are deployed in demonstrating the complicity of this or that institution, or of some rival cultural politician, with patriarchy or heterosexism or racism. But little gets said about how we might persuade Americans who make more than $50,000 a year to take more notice of the desperate situation of their fellow citizens who make less than $20,000.

Instead, we hear talk of "the dominant white patriarchal heterosexist culture." This idea isolates the most sadistic patterns of behavior from American history, weaves them together, and baptizes their cause "the dominant culture." It is as if I listed all the shameful things I have done in my life and then attributed them to the dark power of "my true, dominant self." This would be a good way to alienate myself from myself, and to induce schizophrenia, but it would not be a good way to improve my behavior. For it does not add anything to the nasty facts about my past to blame them on a specter. Nor does it add anything to the facts about the suffering endured by African Americans and other groups to invent a bogeyman called "the dominant culture."

The more we on the American left think that study of psychoanalytic or sociological or philosophical theory will give us a better grip on what is going on in our country, the less likely we are to speak a political language that will help bring about change in our society. The more we can speak a robust, concrete, and practical language—one that can be picked up and used by legislators and judges—the more use we will be.

Richard Rorty, *Human Rights, Rationality and Sentimentality* (Ch. 4), *in* THE POLITICS OF HUMAN RIGHTS 67-83 (Belgrade Circle ed.) (New York: Verso, 1999)

In a report from Bosnia some months ago, David Rieff said "To the Serbs, the Muslims are no longer human... Muslim prisoners, lying on the ground in rows, awaiting interrogation, were driven over by a Serb guard in a small delivery van." [26] This theme of dehumanization recurs when Rieff says

[26] [David Rieff,] "Letter from Bosnia", *New Yorker,* November 23, 1992, 82-95.

> A Muslim man in Bosanski Petrovac... [was] forced to bite off the penis of a fellow-Muslim... If you say that a man is not human, but the man looks like you and the only way to identify this devil is to make him drop his trousers—Muslim men are circumcised and Serb men are not—it is probably only a short step, psychologically, to cutting off his prick... There has never been a campaign of ethnic cleansing from which sexual sadism has gone missing.[1a]

The moral to be drawn from Rieff's stories is that Serbian murderers and rapists do not think of themselves as violating human rights. For they are not doing these things to fellow human beings, but to *Muslims*. They are not being inhuman, but rather are discriminating between the true humans and the pseudohumans. They are making the same sort of distinction as the Crusaders made between humans and infidel dogs, and the Black Muslims make between humans and blue-eyed devils. The founder of my university was able both to own slaves and to think it self-evident that all men were endowed by their creator with certain inalienable rights. He had convinced himself that the consciousness of Blacks, like that of animals, "participate[s] more of sensation than reflection."[27] Like the Serbs, Mr. Jefferson did not think of himself as violating *human* rights.

The Serbs take themselves to be acting in the interests of true humanity by purifying the world of pseudohumanity. In this respect, their self-image resembles that of moral philosophers who hope to cleanse the world of prejudice and superstition. This cleansing will permit us to rise above our animality by becoming, for the first time, wholly rational and thus wholly human. The Serbs, the moralists, Jefferson, and the Black Muslims all use the term "men" to mean "people like us." They think the line between humans and animals is not simply the line between featherless bipeds and all others. They think the line divides some featherless bipeds from others: There are animals walking about in humanoid form. We and those like us are paradigm cases of humanity, but those too different from us in behavior or custom are, at best, borderline cases. As Clifford Geertz puts it, "Men's most importunate claims to humanity are cast in the accents of group pride."[28]

<<We in the safe, rich, democracies feel about the Serbian torturers and rapists as they feel about their Muslim victims: They are more like animals than like us.>> But we are not doing anything to help the Muslim women who are being gang raped or the Muslim men who are being castrated, any more than we did anything in the thirties when the Nazis were amusing themselves by torturing Jews. Here in the safe countries we find ourselves saying things like "That's how things have always been in the Balkans," suggesting that, unlike us, those people are used to being raped and castrated. The contempt we always feel for losers—Jews in the thirties, Muslims now—combines with our disgust at the winners' behavior to produce the semiconscious attitude: "a plague on both your houses." <<We think of the Serbs or the Nazis as animals, because ravenous beasts of prey are animals. We think of the Muslims or

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[1a] *Id*.

[27] "Their griefs are transient. Those numberless afflictions, which render it doubtful whether heaven has given life to us in mercy or in wrath, are less felt, and sooner forgotten with them. In general, their existence appears to participate more of sensation than reflection. To this must be ascribed their disposition to sleep when abstracted from their diversions, and unemployed in labor. An animal whose body is at rest, and who does not reflect must be disposed to sleep of course". Thomas Jefferson, "Notes on Virginia", *Writings*, ed. Lipscomb and Bergh (Washington, D.C.: 1905),1:194.

[28] Geertz, "Thick Description" in his *The Interpretation of Culture* (New York: Basic Books, 1973), 22.

the Jews being herded into concentration camps as animals, because cattle are animals.>> Neither sort of animal is very much like us, and there seems no point in human beings getting involved in quarrels between animals.

<<The human-animal distinction, however, is only one of the three main ways in which we paradigmatic humans distinguish ourselves from borderline cases. A second is by invoking the distinction between adults and children. Ignorant and superstitious people, we say, are like children; they will attain true humanity only if raised up by proper education. If they seem incapable of absorbing such education, that shows they are not really the same kind of being as we educable people are.>> Blacks, the whites in the United States and in South Africa used to say, are like children. That is why it is appropriate to address Black males, of whatever age, as "boy." Women, men used to say, are permanently childlike; it is therefore appropriate to spend no money on their education, and to refuse them access to power.

<<When it comes to women, however, there are simpler ways of excluding them from true humanity: for example, using "man" as a synonym of "human being.">> As feminists have pointed out, such usages reinforce the average male's thankfulness that he was not born a woman, as well as his fear of the ultimate degradation: feminization. The extent of the latter fear is evidenced by the particular sort of sexual sadism Rieff describes. His point that such sadism is never absent from attempts to purify the species or cleanse the territory confirms Catharine MacKinnon's claim that, for most men, being a woman does not count as a way of being human. <<Being a nonmale is the third main way of being nonhuman.>> There are several ways of being nonmale. One is to be born without a penis; another is to have one's penis cut or bitten off; a third is to have been penetrated by a penis. Many men who have been raped are convinced that their manhood, and thus their humanity, has been taken away. Like racists who discover they have Jewish or Black ancestry, they may commit suicide out of sheer shame, shame at no longer being the kind of featherless biped that counts as human.

<<Philosophers have tried to clear this mess up by spelling out what all and only the featherless bipeds have in common, thereby explaining what is essential to being human. Plato argued that there is a big difference between us and the animals, a difference worthy of respect and cultivation. He thought that human beings have a special added ingredient which puts them in a different ontological category than the brutes.>> Respect for this ingredient provides a reason for people to be nice to each other. <<Anti-Platonists like Nietzsche reply that attempts to get people to stop murdering, raping, and castrating each other are, in the long run, doomed to fail—for the real truth about human nature is that we are a uniquely nasty and dangerous kind of animal. When contemporary admirers of Plato claim that all featherless bipeds—even the stupid and childlike, even the women, even the sodomized—have the same inalienable rights, admirers of Nietzsche reply that the very idea of "inalienable human rights" is, like the idea of a special added ingredient, a laughably feeble attempt by the weaker members of the species to fend off the stronger.>>

<<As I see it, one important intellectual advance made in our century is the steady decline in interest in the quarrel between Plato and Nietzsche. There is a growing willingness to neglect the question "What is our nature?" and to substitute the question "What can we make of ourselves?.">> We are much less inclined than our ancestors were to take "theories of human nature" seriously, much less inclined to

take ontology or history as a guide to life. <<We have come to see that the only lesson of either history or anthropology is our extraordinary malleability.>> We are coming to think of ourselves as the flexible, protean, self-shaping, animal rather than as the rational animal or the cruel animal.

<<One of the shapes we have recently assumed is that of a human rights culture. I borrow the term "human rights culture" from the Argentinian jurist and philosopher Eduardo Rabossi.>> In an article called "Human Rights Naturalized," Rabossi argues that philosophers should think of this culture as a new, welcome fact of the post-Holocaust world. They should stop trying to get behind or beneath this fact, stop trying to detect and defend its so-called "philosophical presuppositions." On Rabossi's view, philosophers like Alan Gewirth are wrong to argue that human rights cannot depend on historical facts. "My basic point," Rabossi says, is that "the world has changed, that the human rights phenomenon renders human rights foundationalism outmoded and irrelevant."[29]

<<Rabossi's claim that human rights foundationalism is *outmoded* seems to me both true and important; it will be my principal topic in this lecture.>> I shall be enlarging on, and defending, Rabossi's claim that the question whether human beings really have the rights enumerated in the Helsinki Declaration is not worth raising. <<In particular, I shall be defending the claim that nothing relevant to moral choice separates human beings from animals except historically contingent facts of the world, cultural facts.>>

<<This claim is sometimes called "cultural relativism" by those who indignantly reject it. One reason they reject it is that such relativism seems to them incompatible with the fact that our human rights culture, the culture with which we in this democracy identify ourselves, is morally superior to other cultures. I quite agree that ours is morally superior, but I do not think this superiority counts in favor of the existence of a universal human nature. It would only do so if we assumed that a moral claim is ill-founded if not backed up by knowledge of a distinctively human attribute.>> But it is not clear why "respect for human dignity"—our sense that the differences between Serb and Muslim, Christian and infidel, gay and straight, male and female should not matter—must presuppose the existence of any such attribute.

<<Traditionally, the name of the shared human attribute which supposedly "grounds" morality is "rationality." Cultural relativism is associated with irrationalism because it denies the existence of morally relevant transcultural facts.>> To agree with Rabossi one must, indeed, be irrationalist in that sense. <<But one need not be irrationalist in the sense of ceasing to make one's web of belief as coherent, and as perspicuously structured, as possible. Philosophers like myself, who think of rationality as simply the attempt at such coherence, agree with Rabossi that foundationalist

[29] See Eduardo Rabossi, "La teoría de los derechos humanos naturalizada," *Revista del Centro de Estudios Constitucionales* (Madrid), no. 5 (January-March 1990), 159-79. Rabossi also says that he does not wish to question "the idea of a rational foundation of morality". I am not sure why he does not. Rabossi may perhaps mean that in the past—for example, at the time of Kant—this idea still made a kind of sense, but it makes sense no longer. That, at any rate, is my own view. Kant wrote in a period when the only alternative to religion seemed to be something like science. In such a period, inventing a pseudoscience called "the system of transcendental philosophy"—setting the stage for the show-stopping climax in which one pulls moral obligation out of a transcendental hat—might plausibly seem the only way of saving morality from the hedonists on one side and the priests on the other.

projects are outmoded. We see our task as a matter of making our own culture—the human rights culture—more self-conscious and more powerful, rather than of demonstrating its superiority to other cultures by an appeal to something transcultural.>>

<<We think that the most philosophy can hope to do is summarize our culturally influenced intuitions about the right thing to do in various situations. The summary is effected by formulating a generalization from which these intuitions can be deduced, with the help of noncontroversial lemmas. That generalization is not supposed to ground our intuitions, but rather to summarize them. John Rawls's "Difference Principle" and the U.S. Supreme Court's construction, in recent decades, of a constitutional "right to privacy" are examples of this kind of summary.>> We see the formulation of such summarizing generalizations as increasing the predictability, and thus the power and efficiency, of our institutions, thereby heightening the sense of shared moral identity which brings us together in a moral community.

<<Foundationalist philosophers, such as Plato, Aquinas, and Kant, have hoped to provide independent support for such summarizing generalizations. They would like to infer these generalizations from further premises, premises capable of being known to be true independently of the truth of the moral intuitions which have been summarized.>> Such premises are supposed to justify our intuitions, by providing premises from which the content of those intuitions can be deduced. <<I shall lump all such premises together under the label "claims to knowledge about the nature of human beings.">> In this broad sense, claims to know that our moral intuitions are recollections of the Form of the Good, or that we are the disobedient children of a loving God, or that human beings differ from other kinds of animals by having dignity rather than mere value, are all claims about human nature. So are such counterclaims as that human beings are merely vehicles for selfish genes, or merely eruptions of the will to power. <<To claim such knowledge is to claim to know something which, though not itself a moral intuition, can *correct* moral intuitions.>> It is essential to this idea of moral knowledge that a whole community might come to know that most of their most salient intuitions about the right thing to do were wrong.

<<But now suppose we ask: *Is* there this sort of knowledge? What kind of question is that? On the traditional view, it is a philosophical question, belonging to a branch of epistemology known as "metaethics." But on the pragmatist view which I favor, it is a question of efficiency, of how best to grab hold of history—how best to bring about the utopia sketched by the Enlightenment.>> If the activities of those who attempt to achieve this sort of knowledge seem of little use in actualizing this utopia, that is a reason to think there is no such knowledge. <<If it seems that most of the work of changing moral intuitions is being done by manipulating our feelings rather than increasing our knowledge, that will be a reason to think that there is no knowledge of the sort which philosophers like Plato, Aquinas, and Kant hoped to acquire.>>

This pragmatist argument against the Platonist has the same form as an argument for cutting off payment to the priests who are performing purportedly war-winning sacrifices—an argument which says that all the real work of winning the war seems to be getting done by the generals and admirals, not to mention the foot soldiers. The argument does not say: Since there seem to be no gods, there is probably no need to support the priests. It says instead: Since there is apparently no need to support the priests, there probably are no gods. <<We pragmatists argue from the fact that the emergence of the human rights culture seems to owe nothing to increased

moral knowledge, and everything to hearing sad and sentimental stories, to the conclusion that there is probably no knowledge of the sort Plato envisaged. We go on to argue: Since no useful work seems to be done by insisting on a purportedly ahistorical human nature, there probably is no such nature, or at least nothing in that nature that is relevant to our moral choices.>>

<<In short, my doubts about the effectiveness of appeals to moral knowledge are doubts about causal efficacy, not about epistemic status. My doubts have nothing to do with any of the theoretical questions discussed under the heading of "metaethics," questions about the relation between facts and values, or between reason and passion, or between the cognitive and the noncognitive, or between descriptive statements and action-guiding statements.>> Nor do they have anything to do with questions about realism and antirealism. The difference between the moral realist and the moral antirealist seems to pragmatists to be a difference which makes no practical difference. <<Further, such metaethical questions presuppose the Platonic distinction between inquiry which aims at efficient problem-solving and inquiry which aims at a goal called "truth for its own sake." That distinction collapses if one follows Dewey in thinking of all inquiry—in physics as well as in ethics—as practical problem-solving, or if one follows Peirce in seeing every belief as action-guiding.[30]>>

Even after the priests have been pensioned off, however, the memories of certain priests may still be cherished by the community—especially the memories of their prophecies. <<We remain profoundly grateful to philosophers like Plato and Kant, not because they discovered truths but because they prophesied cosmopolitan utopias—utopias most of whose details they may have got wrong, but utopias we might never have struggled to reach had we not heard their prophecies.>> As long as our ability to know, and in particular to discuss the question "What is man?" seemed the most important thing about us human beings, people like Plato and Kant accompanied utopian prophecies with claims to know something deep and important—something

[30] The present state of metaethical discussion is admirably summarized in Stephen Darwall, Allan Gibbard, and Peter Railton, "Toward *Fin de Siècle* Ethics: Some Trends", *The Philosophical Review* 101 (1992): 115-89. This comprehensive and judicious article takes for granted that there is a problem about "vindicating the objectivity of morality" (127), that there is an interesting question as to whether morals is "cognitive" or "non-cognitive", that we need to figure out whether we have a "cognitive capacity" to detect moral properties (148), and that these matters can be dealt with ahistorically.
When these authors consider historicist writers such as Alasdair MacIntyre and Bernard Williams, they conclude that they are "[meta]*théoriciens malgré eux*" who share the authors' own "desire to understand morality, its preconditions and its prospects" (183). They make little effort to come to terms with suggestions that there may be no ahistorical entity called "morality" to be understood. The final paragraph of the paper does suggest that it might be helpful if moral philosophers knew more anthropology, or psychology, or history. But the penultimate paragraph makes clear that, with or without such assists, "contemporary metaethics moves ahead, and positions gain in complexity and sophistication".
It is instructive, I think, to compare this article with Annette Baier's "Some Thoughts On How We Moral Philosophers Live Now", *The Monist* 67 (1984): 490-7. Baier suggests that moral philosophers should "at least occasionally, like Socrates, consider why the rest of society should not merely tolerate but subsidize our activity". She goes on to ask, "Is the large proportional increase of professional philosophers and moral philosophers a good thing, morally speaking? Even if it scarcely amounts to a plague of gadflies, it may amount to a nuisance of owls". The kind of metaphilosophical and historical self-consciousness and self-doubt displayed by Baier seems to me badly needed, but it is conspicuously absent in *Philosophy in Review* (the centennial issue of *The Philosophical Review* in which "Toward *Fin de Siècle* Ethics" appears). The contributors to this issue are convinced that the increasing sophistication of a philosophical subdiscipline is enough to demonstrate its social utility, and are entirely unimpressed by murmurs of "decadent scholasticism".

about the parts of the soul, or the transcendental status of the common moral consciousness. But this ability, and those questions, have, in the course of the last two hundred years, come to seem much less important. Rabossi summarizes this cultural sea change in his claim that human rights foundationalism is outmoded. <<In the remainder of this lecture, I shall take up the questions: *Why* has knowledge become much less important to our self-image than it was two hundred years ago?>> Why does the attempt to found culture on nature, and moral obligation on knowledge of transcultural universals, seem so much less important to us than it seemed in the Enlightenment? Why is there so little resonance, and so little point, in asking whether human beings in fact have the rights listed in the Helsinki Declaration? Why, in short, has moral philosophy become such an inconspicuous part of our culture?

<<A simple answer is that between Kant's time and ours Darwin argued most of the intellectuals out of the view that human beings contain a special added ingredient. He convinced most of us that we were exceptionally talented animals, animals clever enough to take charge of our own future evolution.>> I think this answer is right as far as it goes, but it leads to a further question: Why did Darwin succeed, relatively speaking, so very easily? Why did he not cause the creative philosophical ferment caused by Galileo and Newton?

The revival by the New Science of the seventeenth century of a Democritean-Lucretian corpuscularian picture of nature scared Kant into inventing transcendental philosophy, inventing a brand-new kind of knowledge, which could demote the corpuscularian world picture to the status of "appearance." <<Kant's example encouraged the idea that the philosopher, as an expert on the nature and limits of knowledge, can serve as supreme cultural arbiter.[31] By the time of Darwin, however, this idea was already beginning to seem quaint. The historicism which dominated the intellectual world of the early nineteenth century had created an antiessentialist mood. So when Darwin came along, he fitted into the evolutionary niche which Herder and Hegel had begun to colonize. Intellectuals who populate this niche look to the future rather than to eternity. They prefer new ideas about how change can be effected to stable criteria for determining the desirability of change. They are the ones who think both Plato and Nietzsche outmoded.>>

The best explanation of both Darwin's relatively easy triumph, and our own increasing willingness to substitute hope for knowledge, is that the nineteenth and twentieth centuries saw, among the Europeans and Americans, an extraordinary increase in wealth, literacy, and leisure. This increase made possible an unprecedented acceleration in the rate of moral progress. Such events as the French Revolution and the ending of the trans-Atlantic slave trade prompted nineteenth-century intellectuals in the rich democracies to say: It is enough for us to know that we live in an age in

[31] Fichte's *Vocation of Man* is a useful reminder of the need that was felt, circa 1800, for a cognitive discipline called philosophy that would rescue utopian hope from natural science. It is hard to think of an analogous book written in reaction to Darwin. Those who couldn't stand what Darwin was saying tended to go straight back past the Enlightenment to traditional religious faith. The unsubtle, unphilosophical opposition, in nineteenth-century Britain and France, between science and faith suggests that most intellectuals had become unable to believe that philosophy might produce some sort of superknowledge, knowledge that might trump the results of physical and biological inquiry.

which human beings can make things much better for ourselves.[32] We do not need to dig behind this historical fact to nonhistorical facts about what we really are.

<<In the two centuries since the French Revolution, we have learned that human beings are far more malleable than Plato or Kant had dreamed. The more we are impressed by this malleability, the less interested we become in questions about our ahistorical nature.>> The more we see a chance to recreate ourselves, the more we read Darwin not as offering one more theory about what we really are but as providing reasons why we need not ask what we really are. <<Nowadays, to say that we are clever animals is not to say something philosophical and pessimistic but something political and hopeful, namely: If we can work together, we can make ourselves into whatever we are clever and courageous enough to imagine ourselves becoming.>> This sets aside Kant's question "What is Man?" and substitutes the question "What sort of world can we prepare for our great-grandchildren?."

<<The question "What is Man?" in the sense of "What is the deep ahistorical nature of human beings?" owed its popularity to the standard answer to that question: We are the *rational* animal, the one which can know as well as merely feel. The residual popularity of this answer accounts for the residual popularity of Kant's astonishing claim that sentimentality has nothing to do with morality, that there is something distinctively and transculturally human called "the sense of moral obligation" which has nothing to do with love, friendship, trust, or social solidarity.>> As long as we believe *that,* people like Rabossi are going to have a tough time convincing us that human rights foundationalism is an outmoded project.

To overcome this idea of a *sui generis* sense of moral obligation, it would help to stop answering the question "What makes us different from the other animals?" by saying "We can know, and they can merely feel." We should substitute "We can feel *for each other* to a much greater extent than they can." This substitution would let us disentangle Christ's suggestion that love matters more than knowledge from the neo-Platonic suggestion that knowledge of the truth will make us free. For as long as we think that there is an ahistorical power which makes for righteousness—a power called truth, or rationality—we shall not be able to put foundationalism behind us.

<<The best, and probably the only, argument for putting foundationalism behind us is the one I have already suggested: It would be more efficient to do so, because it would let us concentrate our energies on manipulating sentiments, on sentimental education.>> That sort of education sufficiently acquaints people of different kinds with one another so that they are less tempted to think of those different from themselves as only quasi-human. The goal of this manipulation of sentiment is to expand the reference of the terms "our kind of people" and "people like us."

All I can do to supplement this argument from increased efficiency is to offer a suggestion about how Plato managed to convince us that knowledge of universal

[32] Some contemporary intellectuals, especially in France and Germany, take it as obvious that the Holocaust made it clear that the hopes for human freedom which arose in the nineteenth century are obsolete—that at the end of the twentieth century we postmodernists know that the Enlightenment project is doomed. But even these intellectuals, in their less preachy and sententious moments, do their best to further that project. So they should, for nobody has come up with a better one. It does not diminish the memory of the Holocaust to say that our response to it should not be a claim to have gained a new understanding of human nature or of human history, but rather a willingness to pick ourselves up and try again.

truths mattered as much as he thought it did. <<Plato thought that the philosopher's task was to answer questions like: "Why should I be moral? Why is it rational to be moral? Why is it in my interest to be moral? Why is it in the interest of human beings as such to be moral?." He thought this because he believed the best way to deal with people like Thrasymachus and Callicles was to demonstrate to them that they had an interest of which they were unaware, an interest in being rational, in acquiring self-knowledge. Plato thereby saddled us with a distinction between the true and the false self. That distinction was, by the time of Kant, transmuted into a distinction between categorical, rigid, moral obligation and flexible, empirically determinable, self-interest.>> Contemporary moral philosophy is still lumbered with this opposition between self-interest and morality, an opposition which makes it hard to realize that my pride in being a part of the human rights culture is no more external to my self than my desire for financial success.

<<It would have been better if Plato had decided, as Aristotle was to decide, that there was nothing much to be done with people like Thrasymachus and Callicles, and that the problem was how to avoid having children who would be like Thrasymachus and Callicles. By insisting that he could reeducate people who had matured without acquiring appropriate moral sentiments by invoking a higher power than sentiment, the power of reason, Plato got moral philosophy off on the wrong foot.>> He led moral philosophers to concentrate on the rather rare figure of the psychopath, the person who has no concern for any human being other than himself. Moral philosophy has systematically neglected the much more common case: the person whose treatment of a rather narrow range of featherless bipeds is morally impeccable, but who remains indifferent to the suffering of those outside this range, the ones he or she thinks of as pseudohumans.[33]

<<Plato set things up so that moral philosophers think they have failed unless they convince the rational egotist that he should not be an egotist—convince him by telling him about his true, unfortunately neglected, self.>> But the rational egotist is not the problem. The problem is the gallant and honorable Serb who sees Muslims as circumcised dogs. It is the brave soldier and good comrade who loves and is loved by his mates, but who thinks of women as dangerous, malevolent whores and bitches.

<<Plato thought that the way to get people to be nicer to each other was to point out what they all had in common—rationality.>> But it does little good to point out, to the people I have just described, that many Muslims and women are good at mathematics or engineering or jurisprudence. Resentful young Nazi toughs were quite aware that many Jews were clever and learned, but this only added to the pleasure they took in beating them up. Nor does it do much good to get such people to read Kant, and agree that one should not treat rational agents simply as means. For everything turns on who counts as a fellow human being, as a rational agent in the only relevant sense—the sense in which rational agency is synonomous with membership in *our* moral community.

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[33] Nietzsche was right to remind us that "these same men who, amongst themselves, are so strictly constrained by custom, worship, ritual gratitude and by mutual surveillance and jealousy, who are so resourceful in consideration, tenderness, loyalty, pride and friendship, when once they step outside their circle become little better than uncaged beasts of prey". *The Genealogy of Morals*, trans. Golffing (Garden City, N.Y.: Doubleday, 1956), 174.

For most white people, until very recently, most Black people did not so count. For most Christians, up until the seventeenth century or so, most heathen did not so count. For the Nazis, Jews did not so count. For most males in countries in which the average annual income is under four thousand dollars, most females still do not so count. Whenever tribal and national rivalries become important, members of rival tribes and nations will not so count. <<Kant's account of the respect due to rational agents tells you that you should extend the respect you feel for people like yourself to all featherless bipeds. This is an excellent suggestion, a good formula for secularizing the Christian doctrine of the brotherhood of man. But it has never been backed up by an argument based on neutral premises, and it never will be. Outside the circle of post-Enlightenment European culture, the circle of relatively safe and secure people who have been manipulating each others' sentiments for two hundred years, most people are simply unable to understand why membership in a biological species is supposed to suffice for membership in a moral community.>> This is not because they are insufficiently rational. It is, typically, because they live in a world in which it would be just too risky—indeed, would often be insanely dangerous—to let one's sense of moral community stretch beyond one's family, clan, or tribe.

To get whites to be nicer to Blacks, males to females, Serbs to Muslims, or straights to gays, to help our species link up into what Rabossi calls a "planetary community" dominated by a culture of human rights, it is of no use whatever to say, with Kant: Notice that what you have in common, your humanity, is more important than these trivial differences. For the people we are trying to convince will rejoin that they notice nothing of the sort. Such people are *morally* offended by the suggestion that they should treat someone who is not kin as if he were a brother, or a nigger as if he were white, or a queer as if he were normal, or an infidel as if she were a believer. They are offended by the suggestion that they treat people whom they do not think of as human as if they were human. When utilitarians tell them that all pleasures and pains felt by members of our biological species are equally relevant to moral deliberation, or when Kantians tell them that the ability to engage in such deliberation is sufficient for membership in the moral community, they are incredulous. They rejoin that these philosophers seem oblivious to blatantly obvious moral distinctions, distinctions any decent person will draw.

This rejoinder is not just a rhetorical device, nor is it in any way irrational. It is heartfelt. The identity of these people, the people whom we should like to convince to join our Eurocentric human rights culture, is bound up with their sense of who they are *not*. Most people—especially people relatively untouched by the European Enlightenment—simply do not think of themselves as, first and foremost, a human being. Instead, they think of themselves as being a certain *good* sort of human being—a sort defined by explicit opposition to a particularly bad sort. It is crucial for their sense of who they are that they are *not* an infidel, *not* a queer, *not* a woman, *not* an untouchable. Just insofar as they are impoverished, and as their lives are perpetually at risk, they have little else than pride in not being what they are not to sustain their self-respect. Starting with the days when the term "human being" was synonomous with "member of our tribe," we have always thought of human beings in terms of paradigm members of the species. We have contrasted *us*, the *real* humans, with rudimentary, or perverted, or deformed examples of humanity.

We Eurocentric intellectuals like to suggest that we, the paradigm humans, have overcome this primitive parochialism by using that paradigmatic human faculty, reason. So we say that failure to concur with us is due to "prejudice." Our use of these terms in this way may make us nod in agreement when Colin McGinn tells us, in the introduction to his recent book,[34] that learning to tell right from wrong is not as hard as learning French. The only obstacles to agreeing with his moral views, McGinn explains, are "prejudice, vested interest and laziness."

One can see what McGinn means: <<If, like many of us, you teach students who have been brought up in the shadow of the Holocaust, brought up believing that prejudice against racial or religious groups is a terrible thing, it is not very hard to convert them to standard liberal views about abortion, gay rights, and the like.>> You may even get them to stop eating animals. All you have to do is convince them that all the arguments on the other side appeal to "morally irrelevant" considerations. You do this by manipulating their sentiments in such a way that they imagine themselves in the shoes of the despised and oppressed. Such students are already so nice that they are eager to define their identity in nonexclusionary terms. The only people they have trouble being nice to are the ones they consider irrational—the religious fundamentalist, the smirking rapist, or the swaggering skinhead.

<<Producing generations of nice, tolerant, well-off, secure, other-respecting students of this sort in all parts of the world is just what is needed—indeed *all* that is needed—to achieve an Enlightenment utopia. The more youngsters like this we can raise, the stronger and more global our human rights culture will become. But it is not a good idea to encourage these students to label "irrational" the intolerant people they have trouble tolerating. For that Platonic-Kantian epithet suggests that, with only a little more effort, the good and rational part of these other people's souls could have triumphed over the bad and irrational part.>> It suggests that we good people know something these bad people do not know, and that it is probably their own silly fault that they do not know it. All they have to do, after all, is to think a little harder, be a little more self-conscious, a little more rational.

But the bad people's beliefs are not more or less "irrational" than the belief that race, religion, gender, and sexual preference are all morally irrelevant—that these are all trumped by membership in the biological species. As used by moral philosophers like McGinn, the term "irrational behavior" means no more than "behavior of which we disapprove so strongly that our spade is turned when asked *why* we disapprove of it." <<It would be better to teach our students that these bad people are no less rational, no less clearheaded, no more prejudiced, than we good people who respect otherness. The bad people's problem is that they were not so lucky in the circumstances of their upbringing as we were.>> Instead of treating as irrational all those people out there who are trying to find and kill Salman Rushdie, we should treat them as deprived.

<<Foundationalists think of these people as deprived of truth, of moral knowledge. But it would be better—more specific, more suggestive of possible remedies—to think of them as deprived of two more concrete things: security and sympathy.>> By "security" I mean conditions of life sufficiently risk-free as to make one's difference from others inessential to one's self-respect, one's sense of worth. These

[34] Colin McGinn, *Moral Literacy: or, How to Do the Right Thing* (London: Duckworth, 1992), 16.

conditions have been enjoyed by Americans and Europeans—the people who dreamed up the human rights culture—much more than they have been enjoyed by anyone else. By "sympathy" I mean the sort of reaction that the Athenians had more of after seeing Aeschylus' *The Persians* than before, the sort that white Americans had more of after reading *Uncle Tom's Cabin* than before, the sort that we have more of after watching TV programs about the genocide in Bosnia. Security and sympathy go together, for the same reasons that peace and economic productivity go together. The tougher things are, the more you have to be afraid of, the more dangerous your situation, the less you can afford the time or effort to think about what things might be like for people with whom you do not immediately identify. Sentimental education only works on people who can relax long enough to listen.

<<If Rabossi and I are right in thinking human rights foundationalism outmoded, then Hume is a better advisor than Kant about how we intellectuals can hasten the coming of the Enlightenment utopia for which both men yearned. Among contemporary philosophers, the best advisor seems to me to be Annette Baier.>> Baier describes Hume as "the woman's moral philosopher" because Hume held that "corrected (sometimes rule-corrected) sympathy, not law-discerning reason, is the fundamental moral capacity."[35] <<Baier would like us to get rid of both the Platonic idea that we have a true self, and the Kantian idea that it is rational to be moral. In aid of this project, she suggests that we think of "trust" rather than "obligation" as the fundamental moral notion. This substitution would mean thinking of the spread of the human rights culture not as a matter of our becoming more aware of the requirements of the moral law, but rather as what Baier calls "a progress of sentiments."[36] This progress consists in an increasing ability to see the similarities between ourselves and people very unlike us as outweighing the differences.>> It is the result of what I have been calling "sentimental education." <<The relevant similarities are not a matter of sharing a deep true self which instantiates true humanity, but are such little, superficial, similarities as cherishing our parents and our children—similarities that do not interestingly distinguish us from many nonhuman animals.>>

To accept Baier's suggestions, however, we should have to overcome our sense that sentiment is too weak a force, and that something stronger is required. This idea that reason is "stronger" than sentiment, that only an insistence on the unconditionality of moral obligation has the power to change human beings for the better, is very persistent. I think that this persistence is due mainly to a semiconscious realization that, if we hand our hopes for moral progress over to sentiment, we are in effect handing them over to *condescension.* For we shall be relying on those who have the power to change things—people like the rich New England abolitionists, or rich bleeding hearts like Robert Owen and Friedrich Engels—rather than on something that has power over *them*. We shall have to accept the fact that the fate of the women of Bosnia depends on whether TV journalists manage to do for them what Harriet Beecher

[35] Baier, "Hume, the Women's Moral Theorist?", in Eva Kittay and Diana Meyers, eds., *Women and Moral Theory* (Totowa, N.J.: Rowman and Littlefield, 1987), 40.

[36] Baier's book on Hume is entitled *A Progress of Sentiments*: *Reflections on Hume's Treatise* (Cambridge, Mass.: Harvard University Press, 1991). Baier's view of the inadequacy of most attempts by contemporary moral philosophers to break with Kant comes out most clearly when she characterizes Allan Gibbard (in his book *Wise Choices*, *Apt Feelings*) as focusing "on the feelings that a patriarchal religion has bequeathed to us", and says that "Hume would judge Gibbard to be, as a moral philosopher, basically a divine disguised as a fellow expressivist" (312).

Stowe did for black slaves, whether these journalists can make us, the audience back in the safe countries, feel that these women are more like us, more like real human beings, than we had realized.

<<To rely on the suggestions of sentiment rather than on the commands of reason is to think of powerful people gradually ceasing to oppress others, or ceasing to countenance the oppression of others, out of mere niceness, rather than out of obedience to the moral law.>> But it is revolting to think that our only hope for a decent society consists in softening the self-satisfied hearts of a leisure class. We want moral progress to burst up from below, rather than waiting patiently upon condescension from the top. The residual popularity of Kantian ideas of "unconditional moral obligation"—obligation imposed by deep ahistorical noncontingent forces—seems to me almost entirely due to our abhorrence for the idea that the people on top hold the future in their hands, that everything depends on them, that there is nothing more powerful to which we can appeal against them.

<<Like everyone else, I too should prefer a bottom-up way of achieving utopia, a quick reversal of fortune which will make the last first. But I do not think this is how utopia will in fact come into being.>> Nor do I think that our preference for this way lends any support to the idea that the Enlightenment project lies in the depths of every human soul.

<<So why does this preference make us resist the thought that sentimentality may be the best weapon we have? I think Nietzsche gave the right answer to this question: We resist out of resentment. We r*esent* the idea that we shall have to wait for the strong to turn their piggy little eyes to the suffering of the weak.>> We desperately hope that there is something stronger and more powerful that will *hurt* the strong if they do *not*—if not a vengeful God, then a vengeful aroused proletariat, or, at least, a vengeful superego, or, at the very least, the offended majesty of Kant's tribunal of pure practical reason. <<The desperate hope for a noncontingent and powerful ally is, according to Nietzsche, the common core of Platonism, of religious insistence on divine omnipotence, and of Kantian moral philosophy.[37]>>

Nietzsche was, I think, right on the button when he offered this diagnosis. <<What Santayana called "supernaturalism," the confusion of ideals and power, is all that lies behind the Kantian claim that it is not only nicer, but more rational, to include strangers within our moral community than to exclude them from it. If we agree with Nietzsche and Santayana on this point, however, we do not thereby acquire any reason to turn our backs on the Enlightenment project, as Nietzsche did. Nor do we acquire any reason to be sardonically pessimistic about the chances of this project, in the manner of admirers of Nietzsche like Santayana, Ortega, Heidegger, Strauss, and Foucault.>>

<<For even though Nietzsche was absolutely right to see Kant's insistence on unconditionality as an expression of resentment, he was absolutely wrong to treat Christianity, and the age of the democratic revolutions, as signs of human degeneration.>> He and Kant, alas, shared something with each other which neither shared with Harriet Beecher Stowe—something which Iris Murdoch has called "dryness" and which Jacques Derrida has called "phallogocentrism." <<The common element in the

[37] Nietzsche's diagnosis is reinforced by Elizabeth Anscombe's famous argument that atheists are not entitled to the term "moral obligation".

thought of both men was a desire for purity. This sort of purity consists in being not only autonomous, in command of oneself, but also in having the kind of self-conscious self-sufficiency which Sartre describes as the perfect synthesis of the in-itself and the for-itself. This synthesis could only be attained, Sartre pointed out, if one could rid oneself of everything sticky, slimy, wet, sentimental, and womanish.>>

Although this desire for virile purity links Plato to Kant, the desire to bring as many different kinds of people as possible into a cosmopolis links Kant to Stowe. Kant is, in the history of moral thinking, a transitional stage between the hopeless attempt to convict Thrasymachus of irrationality and the hopeful attempt to see every new featherless biped who comes along as one of us. <<Kant's mistake was to think that the only way to have a modest, damped-down, nonfanatical version of Christian brotherhood after letting go of the Christian faith was to revive the themes of pre-Christian philosophical thought. He wanted to make knowledge of a core self do what can be done only by the continual refreshment and re-creation of the self, through interaction with selves as unlike itself as possible.>>

Kant performed the sort of awkward balancing act required in transitional periods. His project mediated between a dying rationalist tradition and a vision of a new, democratic world, the world of what Rabossi calls "the human rights phenomenon." With the advent of this phenomenon, Kant's balancing act has become outmoded and irrelevant. <<We are now in a good position to put aside the last vestiges of the ideas that human beings are distinguished by the capacity to know rather than by the capacities for friendship and intermarriage, distinguished by rigorous rationality rather than by flexible sentimentality. If we do so, we shall have dropped the idea that assured knowledge of a truth about what we have in common is a prerequisite for moral education, as well as the idea of a specifically moral motivation.>> If we do all these things, we shall see Kant's *Foundations of the Metaphysics of Morals* as a placeholder for *Uncle Tom's Cabin*—a concession to the expectations of an intellectual epoch in which the quest for quasi-scientific knowledge seemed the only possible response to religious exclusionism.[38]

<<Unfortunately, many philosophers, especially in the English-speaking world, are still trying to hold on to the Platonic insistence that the principal duty of human beings is to *know*. That insistence was the lifeline to which Kant and Hegel thought

[38] See Jane Tompkins, *Sensational Designs: The Cultural Work of American Fiction, 1790-1860* (New York: Oxford University Press, 1985), for a treatment of the sentimental novel that chimes with the point I am trying to make here. In her chapter on Stowe, Tompkins says that she is asking the reader "to set aside some familiar categories for evaluating fiction—stylistic intricacy, psychological subtlety, epistemological complexity—and to see the sentimental novel not as an artifice of eternity answerable to certain formal criteria and to certain psychological and philosophical concerns, but as a political enterprise, halfway between sermon and social theory, that both codifies and attempts to mold the values of its time" (126).

The contrast that Tompkins draws between authors like Stowe and "male authors such as Thoreau, Whitman and Melville, who are celebrated as models of intellectual daring and honesty" (124), parallels the contrast I tried to draw between public utility and private perfection in my *Contingency, Irony and Solidarity* (Cambridge, England: Cambridge University Press, 1989). I see *Uncle Tom's Cabin* and *Moby Dick* as equally brilliant achievements, achievements that we should not attempt to rank hierarchically, because they serve such different purposes. Arguing about which is the better novel is like arguing about which is the superior philosophical treatise: Mill's *On Liberty* or Kierkegaard's *Philosophical Fragments*.

we had to cling.[39] Just as German philosophers in the period between Kant and Hegel saw themselves as saving "reason" from Hume, many English-speaking philosophers now see themselves saving reason from Derrida.>> But with the wisdom of hindsight, and with Baier's help, we have learned to read Hume not as a dangerously frivolous iconoclast but as the wettest, most flexible, least phallogocentric thinker of the Enlightenment. Someday, I suspect, our descendants may wish that Derrida's contemporaries had been able to read him not as a frivolous iconoclast, but rather as a sentimental educator, another of "the women's moral philosophers."[40]

If one follows Baier's advice one will not see it as the moral educator's task to answer the rational egotist's question "Why should I be moral?" but rather to answer the much more frequently posed question "Why should I care about a stranger, a person who is no kin to me, a person whose habits I find disgusting?". The traditional answer to the latter question is "Because kinship and custom are morally irrelevant, irrelevant to the obligations imposed by the recognition of membership in the same species." This has never been very convincing, since it begs the question at issue: whether mere species membership is, in fact, a sufficient surrogate for closer kinship. Furthermore, that answer leaves one wide open to Nietzsche's discomfiting rejoinder: *That* universalistic notion, Nietzsche will sneer, would only have crossed the mind of a slave—or, perhaps, the mind of an intellectual, a priest whose self-esteem and livelihood both depend on getting the rest of us to accept a sacred, unarguable, unchallengeable paradox.

A better sort of answer is the sort of long, sad, sentimental story which begins "Because this is what it is like to be in her situation—to be far from home, among strangers," or "Because she might become your daughter-in-law," or "Because her mother would grieve for her." Such stories, repeated and varied over the centuries, have induced us, the rich, safe, powerful, people, to tolerate, and even to cherish, powerless people—people whose appearance or habits or beliefs at first seemed an insult to our own moral identity, our sense of the limits of permissible human variation.

To people who, like Plato and Kant, believe in a philosophically ascertainable truth about what it is to be a human being, the good work remains incomplete as long as we have not answered the question "Yes, but am I under a *moral obligation* to her?." To people like Hume and Baier, it is a mark of intellectual immaturity to raise that question. But we shall go on asking that question as long as we agree with Plato that it is our ability to know that makes us human.

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[39] Technically, of course, Kant denied knowledge in order to make room for moral faith. But what is transcendental moral philosophy if not the assurance that the noncognitive imperative delivered via the common moral consciousness shows the existence of a "fact of reason"—a fact about what it is to be a human being, a rational agent, a being that is something more than a bundle of spatio-temporal determinations? Kant was never able to explain how transcendental knowledge could be knowledge, but he was never able to give up the attempt to claim such knowledge. On the German project of defending reason against Hume, see Fred Beiser, *The Fate of Reason*: *German Philosophy From Kant to Fichte* (Cambridge, Mass.: Harvard University Press, 1987).

[40] I have discussed the relation between Derrida and feminism in "Deconstruction; Ideology and Feminism: A Pragmatist View", forthcoming in *Hypatia,* 8 (1003) 96-103, and also in my reply to Alexander Nehamas in *Lire Rorty* (Paris: éclat, 1992). Richard Bernstein is, I think, basically right in reading Derrida as a moralist, even though Thomas McCarthy is also right in saying that "deconstruction" is of no political use.

<<Plato wrote quite a long time ago, in a time when we intellectuals had to pretend to be successors to the priests, had to pretend to know something rather esoteric. Hume did his best to josh us out of that pretense. Baier, who seems to me both the most original and the most useful of contemporary moral philosophers, is still trying to josh us out of it. I think Baier may eventually succeed, for she has the history of the last two hundred years of moral progress on her side. These two centuries are most easily understood not as a period of deepening understanding of the nature of rationality or of morality, but rather as one in which there occurred an astonishingly rapid progress of sentiments, in which it has become much easier for us to be moved to action by sad and sentimental stories.>>

This progress has brought us to a moment in human history in which it is plausible for Rabossi to say that the human rights phenomenon is a "fact of the world." This phenomenon may be just a blip. But it may mark the beginning of a time in which gang rape brings forth as strong a response when it happens to women as when it happens to men, or when it happens to foreigners as when it happens to people like us.

Luis Ronaldo CUSCUL PIVARAL, et al., v. GUATEMALA

Preliminary Objection, Merits, Reparations, and Costs, Judgment
Inter-Am. Ct. H.R. (ser. C) No. 359
Inter-American Court of Human Rights
August 23, 2018

[T]he Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges:

Eduardo Ferrer Mac-Gregor Poisot, President
Humberto Antonio Sierra Porto, Judge
Elizabeth Odio Benito, Judge
Eugenio Raúl Zaffaroni, Judge, and
Patricio Pazmiño Freire, Judge

. . . delivers this judgment . . . .

I. Introduction of the Case and Purpose of the Dispute

[P] 1. *The case submitted to the Court*. On December 3, 2016, . . . the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Inter-American Court the *case of Cuscul Pivaral et al.* against the Republic of Guatemala (hereinafter "the State" or "Guatemala"). According to the Commission, the case refers to the presumed international responsibility of the State for the violation of various rights established in the American Convention to the detriment of 49 presumed victims who were diagnosed with HIV between 1992 and 2003. The Commission established that, up until 2006 and 2007, there had been a total lack of public medical care for this group of individuals who were living with HIV and also in poverty, and determined that this failure had had a serious impact on their health . . . . According to the Commission, starting in 2006-2007, the State implemented some treatment for people living with HIV, but the care provided was neither comprehensive nor adequate. The Commission therefore considered that these shortcomings continued to violate the rights to health, life and personal integrity of the surviving victims. The Commission also determined that

the death of eight of the presumed victims occurred as a result of opportunistic illnesses, or during the time that they presumably did not receive the care they required from the State, or following deficient care. The Commission added that the application for amparo filed before the Constitutional Court on July 26, 2002, did not provide the presumed victims with effective judicial protection. Lastly, it concluded that the mental and moral integrity of the next of kin and/or those closest to the presumed victims had been violated. . . .

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VIII. Merits

VIII-1 Right to Health . . . In Relation to
The Obligations to Respect and Ensure Rights
(Articles 26 . . . And 1(1) of the American Convention)

[***]

B. Considerations of the Court

72. Based on the positions of the parties and the proven facts, the Court notes that, in this case, the central dispute refers to whether the State is responsible for: (i) the violation of Article 26 of the American Convention, owing to the violation of the right to health of the presumed victims as people living with HIV [and] (iv) the violation of the principle of progressivity contained in Article 26 of the American Convention, owing to the alleged retrogressive measures adopted that prejudiced the full realization of the right to health of people living with HIV in Guatemala.

73. In this regard, the Court notes that the main legal problem set forth by the parties to this case relates to the scope of the right to health, understood as an autonomous right derived from Article 26 of the American Convention, and to the competence of this Court to rule on violations of this rights based on Articles 62 and 63 of the Convention. . . . Indeed, this approach represented a change in the Court's case law in relation to previous cases where the Commission or the representatives had argued violations of the economic, social, cultural and environmental rights (ESCER), which were analyzed based on their connectivity with a civil or political right. . . .

74. Based on the above, and owing to the importance of this matter for the legal certainty of the inter-American system, the Court finds it pertinent to clarify the change in its case law in this area by an interpretation of Article 26 of the Convention and of its relationship to Articles 1(1), 2, 62 and 63 of this instrument. Consequently, in this section, the Court will rule as follows: (a) on the justiciability of the ESCER; (b) on the right to health as an autonomous and justiciable right; [and] (c) on the violation of the right to health in this case, and (d) on the violation of the rights to personal integrity and to life in this case.

B.1. The justiciability of economic, social, cultural and environmental rights

75. The Court will proceed to interpret Article 26 of the Convention and its relationship to Articles 1(1), 2, 62 and 63 of the American Convention, in order to decide the following: (i) whether Article 26 recognizes rights; (ii) the scope of State obligations in relation to these rights, and (iii) whether the Court has competence to examine violations of such rights. . . .

B.1.1. Literal Interpretation

76. First, the Court must make an interpretation based on the ordinary meaning of the terms set out in Article 26 of the Convention . . . .

77. [I]n a text concerning human rights, the appropriate method involves an interpretation based on objective criteria related to the text itself, as opposed to subjective criteria relating merely to the intention of the parties, because such treaties are not traditional multilateral treaties concluded on the basis of a reciprocal exchange of rights for the benefit of the contracting parties; rather, their object and purpose are the protection of human rights before the State and before other States.

78. In this regard, the Court considers that the ordinary meaning that should be given to the rule established in Article 26 of the Convention is that the States undertook to realize "rights" derived from the economic, social, educational, scientific and cultural rights set forth in the Charter of the Organization of American States (hereinafter "the OAS Charter"). Accordingly, the Court notes that, even though the OAS Charter establishes "principles" and "goals" aimed at comprehensive development, it also refers to certain "rights" both explicitly and implicitly. In this way, from a literal interpretation of the text of Article 26, it can be affirmed that it refers precisely to the obligation of the States to achieve the realization of the "rights" that it is possible to derive from the OAS Charter. The text of the provision should be interpreted in such a way that its terms acquire meaning and a specific significance, which, in the case of Article 26, means understanding that the States agreed to adopt measures in order to fully realize the "rights" recognized in the OAS Charter.

79. Furthermore, the Court considers that the mention in Article 26 that the States undertake "to adopt measures," "with a view to achieving progressively . . . the full realization of the rights" derived from the OAS Charter should be understood as a formulation referring to the nature of the obligation that emanates from this norm, and not to the inexistence of State obligations, strictly speaking. The Court recalls that obligations exist—worded in similar terms to Article 26—that are recognized in other articles of the Convention, without any dispute as to whether these impose obligations that can be enforced at the international level. In particular, the Court recalls that Article 2 of the Convention recognizes the existence of the programmatic commitment of the States to adopt "such legislative or other measures as may be necessary to give effect to [the] rights and freedoms" recognized by the Convention, which has led the Court to assess in its case law whether the State has complied with the adoption of such "measures."

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81. [The] progressive implementation of such measures may be subject to accountability and, if appropriate, compliance with the respective commitment made by the State may be claimed before the courts called on to decide eventual human rights violations.

B.1.2. Internal Context-Systematic Interpretation

82. Second, the Court finds it pertinent to refer to the context of Article 26 of the Convention. In this regard, the Court underlines that, according to the systematic criterion, norms must be interpreted as part of a whole, the meaning and scope of which must be established based on the legal system to which they belong. In this regard, the Court has considered that, when interpreting a treaty, it should take into

account not only the agreements and instruments formally related to it . . . , but also the system of which it forms part . . . ; that is, the inter-American system for the protection of human rights. When making a systematic interpretation of the Convention, it is necessary to take into account all the provisions of which it is composed and the agreements and instruments that are formally related to it, such as the American Declaration of the Rights and Duties of Man (hereinafter "the American Declaration"), because they permit verification of whether the interpretation given to a specific norm or term is coherent with the meaning of the other provisions.

83. In this regard, the Court underscores that the scope of the rights derived from Article 26 of the Convention should be understood in relation to the other articles of the American Convention and other instruments that are relevant for its interpretation. . . . Thus, the Court considers that the general obligations "to respect" and "to ensure" rights, together with the obligation relating to "domestic legal effects" of Article 2 of the Convention, apply to all rights, whether civil and political, or economic, social, cultural and environmental.

84. Consequently, since States have an obligation to respect and ensure the rights indicated in Article 26, in the terms of Article 1(1) of the Convention, the Court is competent to assess whether there has been a violation of a right derived from Article 26 in the terms of Articles 62 and 63 of the Convention. The latter article establishes that when there has been a violation of a right or freedom protected by the Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated and that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied. [The] Court considers that, where it is possible to identify an act or omission that can be attributed to the State which violates a right protected by Article 26, the Court may determine the State's responsibility for this act and establish the appropriate remedy.

85. The Court notes that the fact that the rights derived from Article 26 are subject to the general obligations of the American Convention results no only from formal matters, but also from the reciprocal indivisibility and interdependence of the civil and political rights and the economic, social, cultural and environmental rights. In this regard, the Court has recognized that both categories of rights should be understood integrally and indivisibly as human rights, without any hierarchy between them, enforceable in all cases before the competent authorities. Similarly, the Court notes that the Preamble to the Convention, as well as various articles of the American Declaration, reveal that both civil and political rights, and ESCER were recognized by the States in the region as essential rights of the individual. Likewise, the Preamble to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (hereinafter "Protocol of San Salvador") recognizes:

> the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified.

86. In this Court's opinion, the interdependence and indivisibility of the rights recognized by the American Convention denies any separation, categorization or hierarchy between rights for the effects of their respect, protection and guarantee. This condition refers not only to the recognition of the ESCER as human rights protected by Article 26, but also to aspects relating to the competence of this Court to examine violations of such rights based on this article. In this regard, the Court recalls that, based on Articles 62 and 63 of the Convention, it exercises full jurisdiction over all its articles and provisions and these include Article 26. Also, complementing this, the Court recalls that, as any other organ with jurisdictional functions, it has the inherent authority to determine the scope of its own competence (*compétence de la compétence*) . . . .

87. Despite the foregoing, the Court recognizes that a systematic interpretation of Article 26 of the Convention signifies respecting the limits of the Court's jurisdiction in relation to other instruments of the inter-American system that refer to the ESCER. In this regard, the Court notes the tensions that may exist as regards the Court's competence to examine violations of rights derived from the OAS Charter, by application of Articles 26, 1(1), 2, 62 and 63 of the Convention, and the competence recognized by Article 19(6) of the Protocol of San Salvador. . . . There can be no doubt that the intention of the States as regards the Court's competence to rule on violations of the Protocol of San Salvador are restricted to trade union rights and the right to education.

88. Nevertheless, the Court considers that the fact that Article 19(6) of the Protocol of San Salvador restricts the competence of this Court exclusively to examine violations of certain rights by means of the system of individual petitions, should not be interpreted as a precept that limits the scope of the rights protected by the Convention, or the possibility of the Court examining violations of those rights. To the contrary, the Court notes that a systematic interpretation of both treaties, made in good faith, leads to the conclusion that, since there is no express restriction in the Protocol of San Salvador that limits the Court's competence to examine violations of the Convention, the Court should not assume this limitation. Moreover, the Court recalls that the fact that States adopt protocols or treaties on specific matters, and define the competence of this Court to examine predefined aspects of such treaties, does not entail a limitation of the Court's competence to examine violations of the American Convention in relation to substantive aspects regulated in the two treaties. In this regard, the Court recalls that Article 77 of the Convention establishes the possibility that any State Party or the Commission may submit proposed protocols to the Convention "with a view to gradually including other rights and freedoms within its system of protection."

89. Accordingly, the Court considers that there are no indications that, with the adoption of the Protocol of San Salvador, the States sought to limit the Court's competence to examine violations of Article 26 of the American Convention. . . . Consequently, the Court finds that the mere existence of Article 19(6) of the Protocol of San Salvador does not allow conclusions to be inferred that would establish restrictions to the relationship between Articles 26, 1(1), 2, 62 and 63 of the Convention.

B.1.3. Teleological interpretation

90. Third, the Court must make a teleological interpretation of Article 26 of the Convention. The Court recalls that a teleological interpretation examines the purpose of the norms involved and, to this end, it is pertinent to analyze the object and purpose

of the treaty itself and, if appropriate, the purposes of the regional system of protection.

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93. . . . A teleological interpretation of the treaty would be similar to the conclusion reached by means of the literal and the systematic interpretation, in the sense that Article 26 recognizes the existence of "rights" that must be ensured by the State to all persons subject to their jurisdiction in the terms established by the American Convention. The purpose of the recognition of those rights and of the Court's competence to decide disputes regarding them is to consolidate a regime of personal liberty and social justice based on respect for the essential human rights recognized in the OAS Charter, which is clearly compatible with the object and purpose of the American Convention.

B.1.4. Supplementary Means of Interpretation

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95. In this regard, the Court recalls that the content of Article 26 of the Convention was the subject of intense debate during the preparatory work for the Convention. . . .

96. A review of the preparatory work of the Convention reveals also that the main considerations based on which it was adopted placed special emphasis on "giving the economic, social and cultural rights the maximum protection compatible with the specific conditions of most of the States of the Americas." Thus, in the discussions during the course of the preparatory work, it was also proposed to "enable the implementation [of those rights] by the action of the courts." The Court considers that these declarations by the States do not contradict the thesis that Article 26 does, indeed, recognize "rights" that are subject to the general obligations of the States by virtue of Articles 1(1) and 2 of the American Convention and that, consequently, they are justiciable.

B.1.5. Conclusion

97. The Court notes that a literal, systematic and teleological interpretation leads to the conclusion that Article 26 of the Convention protects the rights derived from the economic, social, educational, scientific and cultural standards set forth in the OAS Charter. The scope of such rights should be understood in relation to the other articles of the American Convention and they are therefore subject to the general obligations contained in Article 1(1) and 2 of the Convention and may be supervised by the Court in the terms of Articles 62 and 63 of this instrument. This conclusion is based not only on formal issues, but results from the interdependence and indivisibility of civil and political rights and economic, social, cultural and environmental rights, as well as their compatibility with the object and purpose of the Convention, which is the protection of the fundamental rights of the human being. In each specific case that calls for an analysis of the ESCER, it will be necessary to determine whether a human right protected by Article 26 of the American Convention can be explicitly derived from the OAS Charter, and also the scope of this protection.

B.2. The Right to Health As an Autonomous and Justiciable Right

98. The Court reiterates that the right to health is derived from the economic, social, educational, scientific and cultural standards set forth in the OAS Charter. It also reiterates the nature and scope of the obligations that derive from the protection of this right, as regards both those aspects that may be enforced immediately and those

that are of a progressive nature. In this regard, the Court recalls that, in the case of the former (obligations that are enforceable immediately), States must take effective measures to ensure access without discrimination to the services necessary for the right to health. In the case of the latter (obligations of a progressive nature), progressive realization means that States Parties have the concrete and constant obligation to make the most effective and rapid progress possible towards the full realization of the right, insofar as their available resources permit, by legislative or other appropriate means.

99. . . . The Court notes the existence of an interrelationship between the undertaking of States to ensure an efficient social security policy and their obligation to ensure health care, especially in the context of endemic diseases. Accordingly, the Court reiterates that the reference is sufficiently specific to consider that the OAS Charter implicitly recognizes the right to health.

100. Second, the Court must determine the scope of the right to health in light of the international corpus juris on the matter. The Court recalls that the obligations contained in Articles 1(1) and 2 of the American Convention constitute, in essence, the basis for determining the international responsibility of a State for violations of the rights recognized in the Convention, including those recognized by virtue of Article 26. However, the Convention itself refers expressly to the norms of general international law for its interpretation and application, specifically in Article 29, which establishes the pro persona principle. Thus, as has been the Court's consistent practice,104 when determining the compatibility of the acts and omissions of the State or its laws with the Convention or other treaties regarding which the Court has jurisdiction, the Court may interpret the obligations and rights they contain in light of other pertinent treaties and norms.

101. Consequently, the Court will use the sources, principles and criteria of the international corpus juris as special norms applicable to determine the content of the right to health.105 The Court indicates that it will use these norms as supplements to the Convention-based provisions in order to determine the right to health, and the corresponding rights for people living with HIV. In this regard, the Court indicates that it is not assuming a competence that it does not have over some treaties; neither is it according a treaty-based hierarchy to norms contained in other national and international instruments related to the ESCER.106 To the contrary, the Court is making an interpretation pursuant to the standards established by Article 29, and in keeping with its judicial practice, that allows it to update the meaning of the rights derived from the OAS Charter that are recognized by Article 26 of the Convention. Determination of the right to health will give special emphasis to the American Declaration . . .

102. Moreover, the Court has indicated on other occasions that human rights treaties are living instruments, and their interpretation must evolve over time in line with current conditions. . . . In this way, in order to determine the scope of the right to health for people living with HIV, as derived from the economic, social, education, scientific and cultural standards of the OAS Charter, the Court will refer to the relevant instrument of the international corpus juris.

B.3. The Content of the Right to Health

103. Based on the foregoing, the Court notes, first, that Article XI of the American Declaration recognizes that "[e]very person has the right to the preservation of his

health through sanitary and social measures relating to medical care, to the extent permitted by public and community resources." Similarly, Article 10 of the Protocol of San Salvador establishes that "everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being" and indicates that health is a "public good." The same article establishes that, among other measures to ensure the right to health, States must ensure "[u]niversal immunization against the principal infectious diseases," "[p]revention and treatment of endemic, occupational and other diseases," and "[s]atisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable."

104. As in the case of the obligations established by the OAS Charter, the American Declaration and the Protocol of San Salvador, in the universal sphere the ICESCR understands the right to health as "the enjoyment of the highest attainable standard of physical and mental health," and recognizes the State obligation to adopt measures for "[t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases."

105. In this regard, the Court has recognized that health is a fundamental human right essential for the adequate exercise of the other human rights, and that every individual has the right to enjoy the highest attainable standard of health that allows him or her to live a full life, understanding health not only as the absence of disease or illness, but also as a state of complete physical, mental and social well-being, derived from a lifestyle that allows the individual to achieve an overall balance. The Court has specified that the general obligation to protect health results in the State obligation to ensure access to essential health services, guaranteeing good quality and efficient medical care, and to promote the improvement of the health of the population as a whole.

106. The Court has also established that implementation of this obligation begins with a duty of regulation and, therefore, has indicated that States are responsible for regulating the provision of services (both public and private) and executing national programs to achieve good quality services on a permanent basis. The Court has taken into account General Comment No. 14 of the CESCR on the right to the highest attainable standard of health. In particular, in this document the Committee underlined that the right extended not only to timely and appropriate health care, but also the following interrelated and essential elements of availability, accessibility, acceptability and quality, the precise application of which would depend on the conditions prevailing in each State:

107. Based on the foregoing, the Court concludes that the right to health refers to the right of every human being to enjoy the highest attainable standard of physical, mental and social well-being. This right encompasses prompt and appropriate health care provided in keeping with the principles of availability, accessibility, acceptability and quality. The State's compliance with its obligation to respect and ensure this right should include special care for vulnerable and marginalized groups, and should be provided progressively in accordance with available resources and applicable domestic law. The Court will now refer to the specific obligations that arise in the case of health care for people living with HIV.

B.3.1. Standards Relating to the Right to Health Applicable to People Living with HIV

108. Access to drugs is an essential part of the right to enjoy the highest attainable standard of health. In this regard, the Court reiterates the criteria that access to drugs in the context of pandemics, such as HIV, tuberculosis and malaria, is one of the essential elements for the progressive achievement of the full exercise of the right of every person to enjoy the highest attainable standard of physical and mental health. In this regard, the Court has considered that States must take steps to provide for the regulation of HIV-related goods, services and information, so as to ensure that there are sufficient services for HIV prevention and care. It has also indicated that States must take the necessary measures to ensure for all persons the availability and accessibility of quality goods, services and information for HIV prevention, treatment, care and support, including antiretroviral therapy and other safe and effective medicines, diagnostics and related technologies for preventive, curative and palliative care of HIV, and related opportunistic infections, and conditions.

109. In this regard, the Court notes that, in the 2030 Agenda for Sustainable Development (hereinafter "the 2030 Agenda"), the United Nations General Assembly established the goal of ensuring healthy lives and promoting well-being for all at all ages, taking into account the vulnerability of different persons, such as those living with HIV/AIDS. Accordingly, the States, including Guatemala, agreed to take the necessary steps in order, by 2030, to end the epidemics of AIDS and other communicable diseases such as HIV. In addition, the States undertook to achieve universal health coverage, including access to essential medicines and vaccines for all.

110. The Court has also indicated that an effective response to HIV requires a comprehensive approach that includes a sustained sequence of prevention, treatment, care and support. First, this obligation requires the availability of sufficient quantities of antiretroviral drugs and other pharmaceutical products to treat HIV and opportunistic infections. On this point, expert witness Ricardo Boza Cordero explained that antiretroviral treatment controls the virus in the different bodily fluids, but does not eliminate it. Accordingly, antiretroviral treatment must be strictly monitored and provided for life once the infection has been diagnosed, because discontinuance of treatment could cause viral rebound with the aggravating factor that the new viral strains would be resistant to the drugs a patient was taking. Consequently, antiretroviral treatment must be permanent and constant based on the situation of the patients' health and their medical and clinical requirements.

111. Second, the Court recalls that the State obligation to ensure the right to health of people living with HIV requires diagnostic tests to treat the infection, and also the diagnosis and treatment of any related opportunistic infections and conditions that may occur. Performing laboratory tests that quantify the TCD4+ and TCD8+ lymphocytes in peripheral blood, and also the amount of HIV in plasma is essential for appropriate antiretroviral treatment. Accordingly, blood tests measuring CD4 counts and HIV viral load should be performed every six months or every year for patients living with HIV, and genotype testing is necessary when a patient is being treated with drugs in order to control possible resistance to antiretroviral drugs. In addition, treatment should extend to the related opportunistic infections and conditions that may appear when a patient's defenses are very low.

112. Third, the Court reiterates that care for people living with HIV includes a healthy diet and social and psychological support, as well as family, community and home-based care. Indeed, the care and support for people living with HIV extends beyond medicines and formal health-care systems, and requires the different needs of people living with HIV to be taken into account. In particular, social support that includes actions such as food provision, emotional support, and psychosocial counselling can improve adherence to antiretroviral therapy and the quality of life of people living with HIV. In addition, nutrition support helps the maintain the immune system, manage HIV-related infections, enhance the effectiveness of HIV treatment, sustain healthy levels of physical activity and support an optimal quality of life.

113. . . . HIV prevention technologies include condoms, lubricants, sterile injection material, antiretroviral drugs (for example, to prevent vertical transmission or as post-exposure prophylaxis) and, once HIV is diagnosed, safe and effective vaccines and microbicides. Universal access, based on human rights principles, requires that all these goods, services and information are not only available, acceptable and of good quality, but also that they are within physical reach and accessible to all. Similarly, the Court considers that access to medical treatment should take into account the technical advances in medical science.

114. Accordingly, the right to health of people living with HIV includes access to good quality goods, services and information for the prevention, treatment, care and support of the infection, including antiretroviral therapy and other drugs, diagnostic tests and related safe and effective technologies for the preventive, curative and palliative care of HIV, related opportunistic infections and diseases, as well as social and psychological support, family and community care, and access to prevention technologies.

115. Consequently, the first duty that results from the obligation to ensure the right to health is the duty to regulate protection of the right to health for people living with HIV. In this regard, the Court notes that the Guatemalan Constitution recognizes that the enjoyment of health is a fundamental human right, and that the State has the obligation to ensure health and social assistance for all its inhabitants . . . . In addition, the Court notes that the Health Code establishes the obligation of the State, through the Ministry of Public Health, to take steps to ensure the provision of free health services to Guatemalans, and establishes that the State must allocate the resources needed for the public funding of health services . . . . Regarding the treatment of sexually transmitted diseases and AIDS, the Court notes that the Health Code establishes that the Ministry of Health will support the development of specific STD and HIV/AIDS education, detection, prevention and control programs . . . .

116. In particular, the Court notes that the General Law to combat HIV/AIDS . . . recognizes HIV as an urgent national social problem. The law establishes that "[a]ny person diagnosed with HIV/AIDS shall receive immediate comprehensive care"; that the Ministry of Public Health must provide health care services to people living with HIV, and that such services must respond to their physical, psychological and social needs. Furthermore, this law establishes that the Ministry of Economy and Finance will implement a program that provides access to good quality antiretroviral drugs, at an accessible cost, to people living with HIV. Likewise, the Court notes that the Regulations to the General Law to combat HIV/AIDS . . . establish that the Ministry of Health must ensure that it has the basic equipment and inputs required to provide

good quality comprehensive care, and this requires the Ministry to provide good quality care in its health centers, including access to antiretroviral drugs for the treatment of HIV/AIDS in accordance with national protocols . . . .

117. Based on the above, the Court observes that the laws cited have established, at least since 1985, the right to health as a right protected by the Constitution, and since 1997, the Health Code has established the State's obligation to provide HIV education, detection, prevention and control services. The Court also notes that, in 2000, a specific law was enacted on the care and monitoring of HIV/AIDS. Consequently, the Court considers that the State adequately regulated the protection of the right to health for people living with HIV in Guatemala. The Court must now verify whether the State complied with its obligation to ensure the right to health of the presumed victims in this case. To this end, it will divide its analysis into two periods: (i) before 2004, and (ii) after 2004.

B.4. The Violation of the Right to Health

B.4.1. Analysis of the Medical Treatment Received by the Presumed Victims Prior to 2004

118. In this chapter, the dispute focuses on whether the State is internationally responsible for the violation of the right to health as a result of the medical care—or lack of it—provided to the presumed victims as people living with HIV. It also refers to whether the State should have adopted differentiated measures for the treatment of individuals in a situation of vulnerability or risk. Lastly, it refers to whether the State is responsible for the violation of the principle of progressivity with regard to the right to health. The Court will examine the facts of the case in light of the State's obligation to ensure the right to health of the presumed victims. To this end, the Court finds it necessary to differentiate two periods in the medical care provided to the presumed victims and the legal consequences of this care: (i) before 2004, and (ii) after 2004.

119. In this regard, in its brief answering the allegations, the State ratified the position it had assumed during the proceeding before the Commission. It indicated that, prior to 2004, most of the medical treatment in Guatemala was carried out by the Swiss organization Doctors Without Borders, and that the State only financed the treatment of 373 individuals. It also offered to take steps to assume the care in state hospitals of the presumed victims in this case who were being treated by Doctors Without Borders. In this regard, the Court notes that 48 of the presumed victims in this case had not received medical treatment by the State prior to 2004.135 Therefore, the Court finds it proved that, before 2004, these presumed victims had not received any kind of state medical treatment or that such treatment was ineffective to treat their condition as people living with HIV. Mr. Cabrera Morales was diagnosed in October 2001 and began receiving antiretroviral treatment provided by the IGSS in December 2001. However, the Court notes that his access to antiretroviral drugs, CD4 counts and viral load testing was irregular, that he did not receive genotype and phenotype testing, and that he had not received either social or psychological support, or family, community and home care in accordance with the standards established in this judgment (*supra* paras. 103 to 114). Thus, the medical treatment he received prior to 2004 lacked the elements of health care availability, accessibility and quality. Con-

sequently, the Court concludes that the State is responsible for violating the obligation to ensure the right to health pursuant to Article 26 of the American Convention, in relation to Article 1(1) of this instrument, of the 49 people named as victims in Annex 2 to this judgment.

120. The Court will now analyze whether the medical treatment received after 2004 was adequate according to the standards established for the right to health.

B.4.2. Analysis of the Medical Treatment
Received by the Presumed Victims after 2004

121. First, in this case, the Court recalls that medical treatment for people living with HIV requires the availability of sufficient quantities of antiretroviral drugs and other pharmaceutical products for the treatment of opportunistic infections. In this regard, the evidence reveals that 31 of the presumed victims had irregular, inadequate or non-existent access to antiretroviral drugs provided by the State. The Court therefore notes the following: (i) some presumed victims had no access to antiretroviral drugs, either for a prolonged period between the first HIV diagnosis and the start of treatment or because the treatment was insufficient once they obtained access to it; (ii) in other cases, the patients suffered from shortages or lack of consistency in the supply of their medication; (iii) lastly, in the case of some presumed victims, therapeutical problems were detected because they developed resistance to the antiretroviral treatment or it was shown that they required a change in their treatment program and this was not provided. Regarding the other presumed victims, the Court has insufficient information to determine their situation with regard to the antiretroviral treatment.

122. Second, the Court recalls that the State obligation to ensure the right to health of people living with HIV calls for the performance of diagnostic testing to treat the infection and the opportunistic diseases, and that this is essential for prescribing the appropriate antiretroviral treatment. Also, the lack of periodic testing engenders a risk that the patient will receive inadequate treatment or that the virus will develop resistance to the antiretroviral drugs, increasing the risk of opportunistic infections. In the instant case, the Court notes that 39 of the presumed victims did not have access to periodic CD4 counts viral load, phenotype and genotype testing and, in some cases, the patients had undergone no tests whatsoever. Specifically, the Court notes that in some cases, CD4 counts and/or viral load tests had not been performed; in other cases, the presumed victims had not undergone genotype and/or phenotype testing,141 and most presumed victims had not undergone periodic tests142 in keeping with the standards established for the adequate care and monitoring required to ensure comprehensive medical treatment for people living with HIV or, at one time, they themselves had had to cover the cost of such tests.143 In addition, the Court notes that, as a result of the foregoing, numerous victims had contracted opportunistic infections which were not treated (infra, paras. 159 and 164).

123. Third, the Court recalls that care for people living with HIV includes good quality nutrition, social and psychological support, and social, community and home-based care. In this case, the Court notes that 22 of the presumed victims received no social support during their treatment, or this was insufficient, or it was only provided by a non-governmental organization or support group. This included deficiencies in the nu-

tritional, psychological, community and home-based support. Regarding the other presumed victims, the Court has insufficient information to determine their situation in relation to the social support received.

124. Fourth, the Court recalls that one of the elements of the right to health is that the most vulnerable or marginalized sectors of the population should have access to health care facilities, goods and services, which should be within their geographical and financial reach (*supra* para. 106). In this case, the Court notes that: (i) Corina Dianeth Robledo Alvarado had to go into debt due to the expenses arising from a five-hour journey between her home and the Roosevelt Clinic; (ii) Dora Marina Martínez Sofoifa had to travel in the early morning hours from her home to the clinic for her appointments and then wait in the emergency ward, due to the distance, costs and dangers of the area where she lived; (iii) Francisco Sop Quiej declared that he had had to ask for loans from his family and friends to cover the cost of his two-hour journey to the clinic which cost 60 quetzals, and he could not always afford this; (iv) Zoila Marina Pérez Ruíz had to travel five hours to the clinic, and stopped attending her appointments due to lack of financial resources, and (v) the journey to the clinic took Miguel Lucas Vaíl five hours and cost 150 quetzals.

125. The Court considers that, in the case of the five presumed victims, the distance to the health clinic and their precarious financial situation constituted a barrier to their access to the health centers, and this had an impact on their possibility of receiving medical care and, therefore, on their possibility of beginning or continuing their treatment satisfactorily. The Court notes that the financial situation of the presumed victims was a determinant factor in their possibility of accessing the health care facilities, goods and services and that the State failed to take steps to mitigate this impact. Consequently, the Court considers that Corina Dianeth Robledo Alvarado, Dora Marina Martínez Sofoifa, Zoila Marina Pérez Ruíz, Francisco Sop Quiej and Miguel Lucas Vaíl did not have adequate access to medical care owing to their financial situation and the remoteness of their place of residence. Regarding the other presumed victims, the Court lacks sufficient information to determine whether their financial situation or the geographical location of their homes constituted obstacle to receiving medical care.

126. The Court considers that, since the irregular, inadequate or total lack of access to antiretroviral drugs (*supra* para. 121), the lack of access to periodic CD4 counts, and viral load, phenotype and genotype testing (*supra* para. 122), the inadequate or total lack of social support (*supra* para. 123), and the impossibility of access to the health centers for financial reasons or the location of the homes of some of the presumed victims (*supra* para. 125) has been proved, the State failed to comply with its obligation to guarantee the right to health because its omissions are incompatible with the elements of the availability, accessibility and quality of health care. The elements of availability and quality require the existence of a sufficient quantity of the goods, services and medicines needed for health care, which should also be of a good quality and appropriate from the medical perspective, which did not occur in this case. The element of accessibility requires that the health care facilities, goods and services are accessible, in law and in fact, for the most vulnerable and marginalized sectors, and that they are located at a reasonable geographical distance, a situation that did not occur in this case.

127. Consequently, the Court concludes that the State failed to ensure the right to health . . . . Therefore, the State is responsible for the violation of the obligation to ensure the right to health in accordance with Article 26 of the American Convention, in relation to Article 1(1) of this instrument.

[***]

IX. Reparations
(Application of Article 63(1) of the American Convention)

[***]

199. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (restitutio in integrum), which [consists] in the restoration of the previous situation. If this is not feasible, [which] occurs in most cases of human rights violations, the Court will determine measures to ensure the rights that have been infringed and to redress the consequences of the violations that have occurred. . . .

[***]

A. Injured Party

203. The Court considers that "injured party," in the terms of Article 63(1) of the American Convention, refers to those who have been declared victims of the violation of any right recognized therein. Therefore, the Court considers that the victims and their next of kin are the "injured party" and, in their capacity as victims of the violations declared in this judgement, they will be considered the beneficiaries of the reparations ordered by the Court.

B. Measures of rehabilitation and satisfaction and guarantees of non-repetition

[***]

B.1.2. Considerations of the Court

209. In this judgment, the Court has declared that the State is responsible for the violation of the obligation to ensure the right to health owing to the State's omissions concerning the medical treatment of the 49 victims in the case . . . . Consequently, the Court finds it necessary to establish a measure of reparation that provides adequate medical care in keeping with the standards set out in this judgment.

210. Accordingly, the Court establishes the obligation of the State to provide, free of charge, and immediately, promptly, adequately and effectively through its specialized public health institutions or specialized health personnel, medical and psychological or psychiatric treatment to the direct victims of violations of the right to health . . . . This treatment must include the following: (i) the free supply, for life, of the drugs they may eventually require, both those necessary to combat HIV, and those required to combat opportunistic diseases (*supra* para. 110); (ii) diagnostic tests for treating HIV and for the diagnosis and treatment of other diseases that may occur (*supra* para. 111); (iii) social support, including providing the food required for the treatment, emotional support, psycho-social counseling, and nutritional support (*supra* para. 112), and (iv) condoms, lubricants, sterile injection equipment and technologies for the prevention of HIV (*supra* para.113). If the State does not have these inputs, it must have recourse to private institutions or specialized institutions of civil society. In addition,

the State must provide immediate medical care to the victims who suffer from lipodystrophy, including the surgery required to treat this condition.

211. Furthermore, in this judgment, the Court has declared that the State failed to comply with its obligation to ensure the right to health of Corina Dianeth Robledo Alvarado, Dora Marina Martínez Sofoifa, Zoila Marina Pérez Ruíz, Francisco Sop Quiej and Miguel Lucas Vaíl because it did not adopt positive measures to provide them with access to health care centers. Consequently, the Court finds it opportune to order that the medical [treatment] be provided in the medical center nearest to the place of residence of the victims in this case for the time necessary. The State must assume their food and transport expenses on the day they attend the medical center.

212. Additionally, the Court observes that, in this judgment, it declared that the right to personal integrity of 63 of the victims' next of kin had been violated owing to their feelings of pain, anguish and uncertainty as a result of the lack of opportune medical care for their next of kin (*supra* para. 192). Consequently, the Court establishes the State's obligation to provide, free of charge and immediately, adequately, comprehensively and effectively, through its specialized health institutions, psychological or psychiatric treatment for the victims' next of kin who request this, following their informed consent, and including the free supply of any medication they may eventually require, taking into consideration the needs of each of them. Also, the respective treatments must be provided, insofar as possible, in the centers nearest to their places of residence for all the time necessary. The victims who request this measure of reparation, or their legal representatives, have six months from notification of this judgment to advise the State of their intention to receive psychological or psychiatric care.

213. The Court recalls the need for the State to act with special promptness to comply with the measures ordered in the preceding paragraphs, because the preservation of the health, . . . of the victims in this case depends on compliance with them. The State must confirm to the Court that it is complying with the measures indicated in the preceding paragraphs on a permanent basis.

B.2 Measures of Satisfaction

B.2.1. Public Act to Acknowledge International Responsibility

[***]

B.2.1.2. Considerations of the Court

215. The Court finds it necessary that the State organize a public act to acknowledge its international responsibility for the facts of this case to make amends to the victims. During this act it must refer to the human rights violations declared in this judgment. Also, the act must take place during a public ceremony in the presence of senior State officials and the victims. The State and the victims and/or their representatives must reach [agreement] on the method of complying with this public act, as well as on its [characteristics], such as the date and place.

B.2.2. Publication and Dissemination of the Judgment

[***]

B.2.2.2. Considerations of the Court

217. International case law has established that the judgment constitutes, per se, a form of reparation. Nevertheless, the Court finds it pertinent to order, as it has in other cases, that the State make the following publications within six months of notification of this judgment: (i) the official summary of the judgment prepared by the Court, once, in the official gazette and in a national newspaper with widespread circulation, in an appropriate and legible letter size, and (ii) this judgment in its entirety, available for at least one year on the official websites of the Ministry of Public Health and of the Guatemalan Social Security Institute, in a way that the public can access from the home page of these websites.

218. The victims must advise, within three months of notification of this judgment, whether they wish their names to be included in the publications indicated in the preceding paragraph. The State must advise the Court immediately when it has made each of the publications ordered, regardless of the one year time frame for presenting its first report ordered in the operative paragraphs of this judgment.

B.2.3. Scholarships

[***]

B.2.3.2. Considerations of the Court

220. The Court has considered it appropriate to order as a measure of satisfaction that the State grant scholarships in public establishments to those victims whose personal development has suffered as a result of human rights violations. Based on the financial situation of the victims and their next of kin, the Court finds it opportune to order the State to grant scholarships for university studies in public education establishments in Guatemala to the daughters and sons of the direct victims who request this. These scholarships should also cover the payment of the material required to carry out these studies. The victims must advise whether they wish to access these scholarships within three [months] of notification of this judgment. This measure must be complied with within one year of notification of the judgment.

B.3. Guarantees of Non-Repetition

[***]

B.3.1. Considerations of the Court

224. The Court takes note of and assesses positively the legislative measures and public policies that the State has adopted to combat the HIV epidemic in Guatemala. Nevertheless, and taking into consideration the violations that occurred in this case, the information available concerning the lack of medical [treatment] for a sector of the population living with HIV in Guatemala, and the Goals and targets assumed by the States under the 2030 Agenda (*supra* para. 109), the Court finds it pertinent to order the following measures of reparation as guarantees of non-repetition.

225. First, the Court considers that the State should implement effective mechanisms for periodic supervision and monitoring of its public hospitals to ensure that they are providing comprehensive health care to people living with HIV, in keeping wth domestic law and the provisions of this judgment (*supra* paras. 103 to 114). To this end, the State must set up an information system on the scope of the HIV epidemic in the country, which should contain statistical information on the people attended by the

public health system, as [well] as statistical information on the sex, age, ethnicity, language and socio-economic status of patients. It must also establish a system that allows a diagnosis to be made of the care provided to the population living with HIV and, to this end, it must [establish] the number of establishments that treat this population, their geographical location and infrastructure. This diagnosis will provide the basis for the elaboration of the mechanism to improve the accessibility, availability and quality of the health care services for people living with HIV referred to in the following paragraph.

226. The State must design a mechanism to ensure the accessibility, availability and quality of antiretroviral drugs, diagnostic tests, and health services for people living with HIV. This mechanism must achieve the following minimum objectives, which must be reached by actions taken by State entities and its goals will be measured based on indicators established under a [participative] public policy: (i) to increase the availability, accessibility and quality of antiretroviral drugs, diagnostic tests for the HIV detection, and tests for the diagnosis and treatment of opportunistic diseases; (ii) to improve programs for the care of people living with HIV and to increase the coverage of care; (iii) to increase and improve urgent and immediate measures relating to health care for people living with HIV, and (iv) to improve the information available for decision making by all the competent authorities. In addition, to ensure that the design and implementation of this mechanism are effective, the State must invite the medical community, people living with HIV who are users of the health system and the organizations that represent them, and the Guatemalan Ombudsman, to take part in establishing care priorities, taking decisions, and the planning and evaluation of strategies to improve health care.

227. Second, the Court finds that the State must implement a training program for health system [officials] who work in hospitals and health care centers that treat people with HIV in Guatemala on international standards and domestic laws regarding comprehensive treatment for people living with HIV. This training must include information on best care practices, patients' rights, and the obligations of the authorities. In addition, this training must be provided by medical and legal experts for a reasonable time and must be implemented with a gender perspective.

228. Third, the State must guarantee that pregnant women have access to HIV testing, and undergo this if they so wish. The State must provide periodic monitoring for pregnant women living with HIV, as well as adequate medical treatment to avoid vertical transmission of the virus, without prejudice to the provisions of paragraph 226 of this judgement. To this end, as it has in other cases, the Court orders the State to design a publication or a booklet with a clear and accessible summary of the ways to prevent HIV transmission and on the risk of vertical transmission of the virus, as well as on the resources available to minimize this risk. This publication should be made available in all public and private hospitals in Guatemala to both patients and medical personnel. Also, access to this publication or booklet should be provided through civil society organizations that work in this area.

229. Fourth, as a way of contributing to non-repetition of facts such as those of this case, the Court finds it appropriate to order the State to conduct a national awareness-raising campaign addressed at people living with HIV, public officials, and the general public, on the rights of people living with HIV, on the obligations that the authorities have to provide care to them, and about the need to respect people living with this

condition. This campaign must be aimed at combating the stigma and lack of information about the causes of HIV and the consequences for the health of people living with HIV. In addition, the campaign must have a gender perspective and be comprehensible for the whole population.

230. The State must report every year, for three years, on the progress made on the above guarantees of non-repetition (*supra* paras. 225 to 229). The Court will assess this information when monitoring compliance with the judgment and will rule in this regard.

C. Compensation

C.1. Pecuniary Damage

[***]

C.1.2. Considerations of the Court

234. [T]he Court observes that, in the absence of evidentiary support, it is unable to quantify the exact amounts that the victims expended due to the facts. Nevertheless, the Court recognizes that the victims have incurred diverse expenses for medical treatment and care as a result of their health situation, and therefore establishes, in equity, the sum of US$5,000.00 (five thousand United States dollars) for each of the 49 direct victims . . . for pecuniary damage.

C.2. Non-Pecuniary or Moral Damage

[***]

C.2.1. Considerations of the Court

238. [T]his Court has developed the concept of non-pecuniary damage and has established that this may include both the pain and suffering caused to the direct victims and their close family members, the impairment of values that are very significant for the individual, and also changes of a non-pecuniary nature in the living conditions of the victims or their next of kin.

239. Accordingly, bearing in mind the circumstances of this case, the suffering that the violations committed caused to the victims, as well as the other consequences of a non-pecuniary nature that they experienced, the Court finds it pertinent to establish, in equity, for non-pecuniary damage, compensation equivalent to US$60,000 (sixty thousand United States dollars) for each deceased victim, US$30,000 (thirty thousand United States dollars) for each surviving victim, and US$10,000 (ten thousand United States dollars) for each of the next of kin declared victims in this case.

C.3. Costs and Expenses

[***]

C.3.2. Considerations of the Court

242. The Court reiterated that, based on its case law, costs and expenses form part of the concept of reparation, because the actions undertaken by the victims to obain justice, at both the domestic and the international level, entail expenditure that must be compensated when the international responsibility of the State has been declared in a judgment. Regarding reimbursement of costs and expenses, the Court must make a prudent assessment of their scope, which includes the expenses originating before the

authorities of the domestic jurisdiction, and also those arising during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the equity principle and taking into account the expenses indicated by the parties, provide their quantum is reasonable.

243. In this case, the file does not contain sufficient supporting evidence on the costs and expenses incurred by the victims and their representatives. However, the representatives have indicated some amounts calculated based on a few vouchers and tables they themselves prepared. On this basis, and in the absence of all the official vouchers for the expenses incurred by the victims and their representatives, the Court [establishes], in equity, that the State should pay a total of US$3,000 (three thousand United States dollars) for the costs and expenses incurred in the litigation of this case by the representative María Cristina Calderón; US$10,000 (ten thousand United States dollars) for the costs and expenses incurred in the litigation of this case by the Asociación de Salud Integral, and US$25,000 (twenty-five thousand United States dollars) for the costs and expenses incurred in the litigation of this case by CEJIL. These sums must be paid directly to each of the representatives of the presumed victims in this case.

D. Reimbursement of Expenses to the Legal Assistance Fund

244. In this case, in an order of July 24, 2017, the President of the Court granted financial support from the Victims' Legal Assistance Fund of the Court for the presentation of five statements, either at the hearing or by affidavit.

245. On the basis of the violations declared in this judgment and compliance with the requirements to access the Court's Assistance Fund, the Court orders the State to reimburse the sum of US$2,176.36 (two thousand one hundred and seventy-six United States dollars and thirty-six cents) to the Fund for the expenses incurred. This amount must be reimbursed within [six months] of notification of this judgement.

E. Method of Compliance with the Payments Ordered

246. The State shall make the payment of the compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses established in this judgment directly to the persons indicated herein, within one year of notification of this judgement.

247. Should any beneficiary be deceased or die before they receive the respective amount, this shall be delivered directly to their heirs, in keeping with the applicable domestic law.

248. The State shall comply with its pecuniary obligations by payment in United States dollars or the equivalent in domestic currency, using the exchange rate on the New York Stock Exchange (United States of America) on the day before payment to make the respective calculation.

249. If, for reasons that can be attributed to the beneficiaries of the compensation or their heirs it is not possible to pay the amounts established within the said time frame, the State shall deposit the said amounts in their favor in a deposit account or certificate in a solvent Guatemalan financial institution, in United States dollars, and in

the most favorable conditions allowed by banking law and practice. If the corresponding compensation remains unclaimed after ten years, the amount shall be returned to the State with the accrued interest.

250. The amounts allocated in this judgment as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses shall be [delivered] to the persons indicated in full, as established in this judgment, without any reductions due to eventual taxes and charges.

251. If the State falls into arrears, including with reimbursement of expenses to the Victims' Legal Assistance Fund, it shall pay interest on the amount owed corresponding to banking interest on arrears in the Republic of Guatemala.

X. Operative Paragraphs

[***]

17. The State shall, within one year of notification of this judgment, provide the Court with a report on the measures adopted to comply with it.

18. The Court will monitor full compliance with this judgment, in exercise of its authority and in fulfillment of its obligations under the American Convention on Human Rights, and will close this case when the State has complied fully with it.

[***]

Done, at San José, Costa Rica, on August 23, 2018, in the Spanish language.

Separate Opinion of
Judge Eduardo Ferrer Mac-Gregor Poisot

Judge Elizabeth Odio Benito and Judge Patricio Pazmiño Freire adhered to this opinion of Judge Eduardo Ferrer Mac-Gregor Poisot.

I. The Principle of Progressivity

A. The international responsibility of the State
for violating the principle of progressivity in this case

[***]

8. [T]he criteria expressed in the judgment, in addition to its value in relation to care for people living with HIV in Guatemala, open an important door so that, in future, the Commission and the victims' representatives may submit arguments to the Inter-American Court concerning either State inactivity as regards protection of the ESCER, or the existence of retrogressive measures in their protection that can be attributed to the State. However, this must be done respecting the methodological challenges involved in evaluating State policy in the area of the protection of the social rights in a democratic society. For the Commission and the victims' representatives the challenge lies in being able to prove that the State effectively adopted retrogressive measures that affected the realization of one or several ESCER protected by Article 26 of the American Convention. This will involve formulating arguments that demonstrate the explicit or implicit recognition of a right protected under Article 26 of the Pact of San José, as well as the submission of the necessary evidence to prove that the State's actions truly involved an unjustified lack of action and/or a retrogression in the realization of that right. Meanwhile, the State must justify that its actions

have tended towards the full realization of the right or that they were not retrogressive, and if they were retrogressive, prove that this retrogressivity was justified based on the standards recognized in international law.

9. In any case, States must continue their efforts to ensure the transparency of the way in which the ESCER are protected in their territory. . . .

10. These criteria form the basis for the States to present information on compliance with their obligations in the area of the rights contained in the Protocol of San Salvador, and can also be important elements to evaluate State compliance with the ESCER in relation to Article 26 of the Convention. . . . The important point—for the purposes of this opinion—is that the allegations concerning the failure to realize the ESCER are formulated as solid legal arguments, and based on the data and other evidentiary material that proves the way in which the State has complied—or failed to comply—with the effective realization of the rights in the terms of Article 26 of the American Convention.

[***]

IV. Conclusion

[***]

45. This case is important if we consider that, forty years after the entry into force of the American Convention, it is the first time that the Court has addressed both dimensions of an ESCER (immediate enforceability and progressivity) and established measures of reparation in relation to both dimensions. . . .

[***]

Partially Dissenting Opinion of
Judge Humberto Antonio Sierra Porto

[***]

9. . . . Article 26 only refers to an objective of achieving progressively the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards to the extent of available resources, and does not allude to any obligation of an instantaneous nature under which it would be considered that each State had the same possibility of complying fully and instantaneously with the ESCER. Specifically, the idea and spirit that underly this provision of the Convention is that not all States are in the same position to comply with those rights and that the particular domestic circumstances and effective possibilities should be taken into account when requiring their implementation.

10. The judgment in this case refers to the progressive obligation contained in Article 26 of the Convention, specifically regarding the right to health . . . . On this point, I would like to state that I do not share the Court's conclusion because the arguments concerning the "State inaction" to determine whether the content of Article 26 of the Convention had been prejudiced do not infer a notion of retrogressivity. According to the judgment, the right to health is not being violated due to retrogression, because the violation of the international standard arises from State inaction when implementing the ESCER progressively; that is, from a failure to implement the right to health effectively. I consider that, if that reasoning were to be accepted as valid, it would change the nature of the obligation of progressivity into another very different

one which would be the obligation to comply with the implementation of an ESCER, such as the right to health, within a reasonable time.

II. Guarantees of Non-Repetition and Public Health Policies in this Case

11. In this case, after determining that the State had violated Article 26 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of the individuals named as victims in Annex 2 to the judgment, the Court ordered the State to "implement mechanisms to supervise and monitor health care services, improve the accessibility, availability and quality of health care services for people living with HIV, guarantee the provision of antiretroviral drugs and any other medication required by all those affected, offer the population HIV diagnostic tests, implement a training program for health system officials, guarantee adequate medical care for pregnant women living with HIV, and organize a national awareness-raising campaign, in the terms of paragraphs 225 to 230 of this judgment."24

12. [T]he State has an obligation to put in place measures that consist in implementing information systems and diagnostic mechanisms that allow it to ensure access to antiretroviral drugs for the whole population. [It does not bear an] obligation to provide antiretroviral drugs and other prescribed medicines to all those living with HIV as an obligation of result, regardless of any consideration relating to the availability of resources or of reasonableness, from a public policy perspective.

13. In addition, as can be seen, the reparations ordered are not only addressed at redressing the harm suffered by the victims, but are also aimed at the creation of a public health policy for all those living with HIV. Even though this practice of ordering diverse administrative or public policy measures, with an impact that goes beyond the victims of the case in question, is not new in the Court's case law, I consider that there are reasons that require, at least, a cautious approach to this type of measure when rights of a social benefit nature are at stake, such as the right to health. . . . Indeed, although this case relates to the right to health, specifically in relation to people living with HIV, it is necessary to remember that people who need access to housing, food, water, employment opportunities and social security, among other matters, live side by side with them. . . .

14. This does not mean making a judgment on the justiciability of the right to health; rather, it relates to the analysis of the reasonableness of the measure ordered. In a context of scarce resources, as is the case of most countries in the region, it is essential to analyze how the introduction of a specific measure—with regard to health services, for example—may affect the State's capacity to guarantee other rights the content of which also relates to the provision of social benefits. This analysis may lead to the conclusion that, in certain cases, it is necessary to adopt an approach that takes into account the needs of society as a whole, instead of focusing on the particular needs of a specific group.

15. Furthermore, the entity that is in the best position to analyze the reasonableness of the measure should be taken into account. Although judges can and should use their powers to order measures that affect both domestic law and public policies, it is essential that such orders are made paying due regard to the role of the Legislature and the Executive in a democracy. Thus, it should be recalled that public policy should, of necessity, have a certain degree of flexibility that allows the Executive to make the

necessary changes and adjustments when appropriate, in response to material possibilities, social demand, and the particular context of the country. It is not the role of the courts to analyze which is the best option, or to elaborate detailed public policies to be implemented in a specific country, but rather to analyze whether such policies comply with the Constitution and internal laws in the case of domestic courts, and with the American Convention in the case of this Court. In other words, the orders issued by the judges should not, therefore, be formulated in ways that preclude the Executive from making such legitimate public policy choices, insofar as these are aligned with the requirements and provisions of domestic law and the American Convention.

16. In this regard, ordering measures aimed at affecting public policy in the area of health should take into account the country's context, the resources available, and the effect that the prioritization of a certain right or group may have on the other economic, social and cultural rights of the population as a whole. In light of these particularities, I consider that it is the States themselves, through their competent organs as provided for in domestic law, that are in the best position to decide how to invest available resources in order to ensure both the right to health, and other rights recognized in their domestic law and in the American Convention. . . . The courts should not interfere in the decisions of those organs that are better equipped to take them, unless such decisions violate the rights recognized in domestic law or the American Convention. . . .

17. All these issues should be adequately taken into account by this Court when ordering reparations, which need to achieve a balance between the objective pursued—that is, full redress for the violations suffered by the victims—and the need to accord the State the necessary margin of flexibility and action when rights of a social benefit nature, such as the right to health, are involved. Accordingly, in a region where resources are limited and, moreover, where there are significant disparities within the region as regards available resources, the role of a regional human rights court such as the Inter-American Court cannot be to order inflexible measures. This is because, this could jeopardize not only the possibility of complying with the measures ordered, but also have a negative effect on the allocation of resources to other rights that it is equally or more urgent to satisfy.

18. Based on the above, I consider that the measure ordered by the Court, if it is interpreted in the sense of establishing an obligation to guarantee the provision of antiretroviral drugs and the other medication prescribed to those living with HIV as an obligation of results, and irrespective of any consideration concerning the reasonableness of the allocation of resources, is contrary to the social benefit nature of the right to health, and to the role entrusted to this Court by the American Convention.

Thomas E. DOBBS, State Health Officer of the Mississippi Department of Health, et al., v. JACKSON WOMEN'S HEALTH ORG., et al.

142 S. Ct. 2228
United States Supreme Court
June 24, 2022

Judges: Alito, J., delivered the opinion of the Court, in which Thomas, Gorsuch, Kavanaugh, and Barrett, JJ., joined. Thomas, J., and Kavanaugh, J., filed concurring

opinions. Roberts, C. J., filed an opinion concurring in the judgment. Breyer, Sotomayor, and Kagan, JJ., filed a dissenting opinion.

Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed.

For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided *Roe* v. *Wade*, 410 U. S. 113 (1973). Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized such a right, and its survey of history ranged from the constitutionally irrelevant (*e.g.*, its discussion of abortion in antiquity) to the plainly incorrect (*e.g.*, its assertion that abortion was probably never a crime under the common law). After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature. [***2241]**

[***]

Eventually, in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833 (1992), the Court revisited *Roe* . . . .

[*2242] . . . *Casey* threw out *Roe*'s trimester scheme and substituted a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an "undue burden" on a woman's right to have an abortion. The decision provided no clear guidance about the difference between a "due" and an "undue" burden. . . .

[***]

. . . The State of Mississippi asks us to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as "viable" outside the womb. . . .

[H] We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. . . .

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

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

I

[***]

[P] Respondents are an abortion clinic, Jackson Women's Health Organization, and one of its doctors. On the day the Gestational Age Act was enacted, respondents filed suit in Federal District Court against various Mississippi officials, alleging that the Act violated this Court's precedents establishing a constitutional right to abortion. The District Court granted summary judgment in favor of respondents and permanently enjoined enforcement of the Act . . . . The Fifth Circuit affirmed. . . .

We granted certiorari. . . .

II

[R] We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion. . . .

We therefore turn to the question that the *Casey* plurality did not consider, and we address that question in three steps. First, we explain the standard that our cases have used in determining whether the Fourteenth Amendment's reference to "liberty" protects a particular right. Second, we examine whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as "ordered liberty." Finally, we consider whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents.

A

1

. . . The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text. . . .

[***]

[We] briefly address one additional constitutional provision that some of respondents' *amici* have now offered as yet another potential home for the abortion right: the Fourteenth Amendment's Equal Protection Clause. See Brief for United States as *Amicus Curiae* 24 (Brief for United States); see also Brief for Equal Protection Constitutional Law Scholars as *Amici Curiae*. Neither *Roe* nor *Casey* saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the "heightened scrutiny" that applies to such classifications. . . . Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures.

[***]

2

The underlying theory on which this argument rests—that the Fourteenth Amendment's Due Process Clause provides substantive, as well as procedural, protection for "liberty"—has long been controversial. But our decisions have held that the Due Process Clause protects two categories of substantive rights.

The first consists of rights guaranteed by the first eight Amendments. Those Amendments originally applied only to the Federal Government, . . . but this Court has held that the Due Process Clause of the Fourteenth Amendment "incorporates" the great majority of those rights and thus makes them equally applicable to the States. . . . The second category—which is the one in question here—comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.

In deciding whether a right falls into either of these categories, the Court has . . . engaged in a careful analysis of the history of the right at issue.

[***]

Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the "liberty" protected by the Due Process Clause because the term "liberty" alone provides little guidance. "Liberty" is a capacious term. . . .

In interpreting what is meant by the Fourteenth Amendment's reference to "liberty," we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. . . .

. . . Instead, guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the *Fourteenth Amendment* means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.

B

1

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*.

Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a *crime* in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, **[*2249]** and the remaining States would soon follow.

Roe either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis. It is therefore important to set the record straight.

2

a

We begin with the common law, under which abortion was a crime at least after "quickening"—*i.e.*, the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.

Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*. . . .

That the common law did not condone even pre-quickening abortions is confirmed by what one might call a proto-felony-murder rule. . . .

[*2251] In sum, although common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, none endorsed the practice. Moreover, we are aware of no common-law case or authority, and the parties have not pointed to any, that remotely suggests a positive *right* to procure an abortion at any stage of pregnancy.

b

In this country, the historical record is similar. . . .

The few cases available from the early colonial period corroborate that abortion was a crime. . . . And by the 19th century, courts frequently explained that the common law made abortion of a quick child a crime. . . .

c

The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. At that time, there were no scientific methods for detecting pregnancy in its early stages . . . .

[***]

At any rate, the original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century. . . .

In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. . . . By 1868, the year when the [***2253]** Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening. . . . Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910. . . .

The trend in the Territories that would become the last 13 States was similar: All of them criminalized abortion at all stages of pregnancy between 1850 (the Kingdom of Hawaii) and 1919 (New Mexico). . . . By the end of the 1950s, according to the *Roe* Court's own count, statutes in all but four States and the District of Columbia prohibited abortion . . . .

This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court's own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother. . . .

d

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment [***2254]** persisted from the earliest days of the common law until 1973. . . .

3

Respondents and their *amici* have no persuasive answer to this historical evidence.

[***]

[*2257] C

1

Ordered liberty sets limits and defines the boundary between competing interests. . . . Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.

Nor does the right to obtain an abortion have a sound basis in precedent. . . .

[***]

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

2

. . . Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless.

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

Americans who believe that abortion should be restricted press countervailing arguments about modern developments. They note that attitudes about the pregnancy of unmarried women have changed drastically; that federal and state laws ban discrimination on the basis of pregnancy; that leave for pregnancy and childbirth are [***2259]** now guaranteed by law in many cases; that the costs of medical care associated with pregnancy are covered by insurance or government assistance; that States have increasingly adopted "safe haven" laws, which generally allow women to drop off babies anonymously; and that a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home. They also claim that

many people now have a new appreciation of fetal life and that when prospective parents who want to have a child view a sonogram, they typically have no doubt that what they see is their daughter or son.

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

D

1

The dissent is very candid that it cannot show that a constitutional right to abortion has any foundation . . . . The dissent does not identify *any* pre-*Roe* authority that supports such a right—no state constitutional provision or statute, no federal or state judicial precedent, not even a scholarly treatise. . . . Nor does the dissent dispute the fact that abortion was illegal at common law at least after quickening; that the 19th century saw a [***2260]** trend toward criminalization of pre-quickening abortions; that by 1868, a supermajority of States (at least 26 of 37) had enacted statutes criminalizing abortion at all stages of pregnancy; that by the late 1950s at least 46 States prohibited abortion "however and whenever performed" except if necessary to save "the life of the mother," *Roe*, 410 U.S., at 139; and that when *Roe* was decided in 1973 similar statutes were still in effect in 30 States. . . .

The dissent's failure to engage with this long tradition is devastating to its position. . . .

. . . As explained, for more than a century after 1868 . . . , it was firmly established that laws prohibiting abortion like the Texas law at issue in *Roe* were permissible exercises of state regulatory authority. And today, another half century later, more than half of the States have asked us to overrule *Roe* and *Casey*. The dissent cannot establish that a right to abortion has *ever* been part of this Nation's tradition.

2

[***]

[*2261] So without support in history or relevant precedent, *Roe*'s reasoning cannot be defended even under the dissent's proposed test, and the dissent is forced to rely solely on the fact that a constitutional right to abortion was recognized in *Roe* and later decisions that accepted *Roe*'s interpretation. Under the doctrine of *stare decisis*, those precedents are entitled to careful and respectful consideration, and we engage in that analysis below. [Nonetheless:] There are occasions when past decisions should be overruled, and as we will explain, this is one of them.

3

The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life. . . .

. . . The dissent has much to say about the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women. These are important concerns. However, the dissent evinces no similar regard for a State's interest in protecting prenatal life. . . .

Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin. According to the dissent, the Constitution *requires* the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that "'theory of life.'" *Post*, at 8.

III

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends. It protects the interests of [***2262]** those who have taken action in reliance on a past decision. . . . And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past. . . .

We . . . place a high value on having the matter "settled right." In addition, when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. . . . Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.

Some of our most important constitutional decisions have overruled prior precedents. . . .

[***]

On many other occasions, this Court has overruled important constitutional decisions. . . . Without these decisions, [***2264]** American constitutional law as we know it would be unrecognizable, and this would be a different country.

No Justice of this Court has ever argued that the Court should *never* overrule a constitutional decision, but overruling a precedent is a serious matter. It is not a step that should be taken lightly. Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision. . . .

[*2265] In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the "workability" of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.

A

The nature of the Court's error. An erroneous interpretation of the Constitution is always important, but some are more damaging than others.

[***]

Roe was also egregiously wrong and deeply damaging. For reasons already explained, *Roe*'s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.

Roe was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people. [T]he Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people. *Casey* described itself as calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side. Those on the losing side—those who sought to advance the State's interest in fetal life—could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*. . . . Together, *Roe* and *Casey* represent an error that cannot be allowed to stand.

[***]

B

The quality of the reasoning. Under our precedents, the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered. . . . In Part II, *supra*, we explained why *Roe* was incorrectly decided, but that decision was more than just wrong. It stood on exceptionally weak grounds.

Roe found that the Constitution implicitly conferred a right to obtain an abortion, but it failed to ground its decision in text, history, or precedent. It relied on an erroneous historical narrative; it devoted great attention to and presumably relied on matters that have no bearing on the meaning of the Constitution; it disregarded the fundamental difference between the precedents on which it relied and the question before the Court; it concocted an elaborate set of rules, with different restrictions for each trimester of pregnancy, but it did not explain how this veritable code could be teased out of anything in the Constitution, the history of abortion laws, prior precedent, or any other cited source; and its most important rule (that States cannot protect fetal life prior to "viability") was never raised by any party and has never been plausibly explained. *Roe*'s reasoning quickly drew scathing scholarly criticism, even from supporters of broad access to abortion.

The *Casey* plurality, while reaffirming *Roe*'s central holding, pointedly refrained from endorsing most of its reasoning. It revised the textual basis for the abortion right, silently abandoned *Roe*'s erroneous historical narrative, and jettisoned the trimester framework. But it replaced that scheme with an arbitrary "undue burden" test and relied on an exceptional version of *stare decisis* that, as explained below, this Court had never before applied and has never invoked since.

1

a

The weaknesses in *Roe*'s reasoning are well-known. Without any grounding in the constitutional text, history, or precedent, it imposed on the entire country a detailed set of rules much like those that one might expect to find in a statute or regulation. . . . Dividing pregnancy into three trimesters, the Court imposed special rules for each. . . .

This elaborate scheme was the Court's own brainchild. Neither party advocated the trimester framework; nor did either party or any *amicus* argue that "viability" should mark the point at which the scope of the abortion right and a State's regulatory authority should be substantially transformed. . . .

b

Not only did this scheme resemble the work of a legislature, but the Court made little effort to explain how these rules could be deduced from any of the sources [***2267]** on which constitutional decisions are usually based. We have already discussed *Roe*'s treatment of constitutional text, and the opinion failed to show that history, precedent, or any other cited source supported its scheme.

Roe featured a lengthy survey of history, but much of its discussion was irrelevant, and the Court made no effort to explain why it was included. For example, multiple paragraphs were devoted to an account of the views and practices of ancient civilizations where infanticide was widely accepted. . . . When it came to the most important historical fact—how the States regulated abortion when the Fourteenth Amendment was adopted—the Court said almost nothing. . . .

Roe's failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong. Relying on two discredited articles by an abortion advocate, the Court erroneously suggested . . . that the common law had probably never really treated post-quickening abortion as a crime. . . . This erroneous understanding appears to have played an important part in the Court's thinking . . .

After surveying history, the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee. . . . The Court did not explain why these sources shed light on the meaning of the Constitution, and not one of them adopted or advocated anything like the scheme that *Roe* imposed on the country.

Finally, after all this, the Court turned to precedent. . . .

. . . But none of these decisions [invoked] involved what is distinctive about abortion: its effect on what *Roe* termed "potential life."

[W]hat remains are precisely the sort of considerations that legislative bodies often take into account when they draw lines that accommodate competing interests. The scheme *Roe* produced *looked* like legislation, and the Court provided the sort of explanation that might be expected from a legislative body.

c

What *Roe* did not provide was any cogent justification for the lines it drew. Why, for example, does a State have no authority to regulate first trimester abortions for the purpose of protecting a woman's health? The Court's only explanation was that mortality rates for abortion at that stage were lower than the mortality rates for childbirth. . . . But the Court did not explain why mortality rates were the only factor that a State could legitimately consider. Many health and safety regulations aim to avoid adverse health consequences short of death. And the Court did not explain why it departed from the normal rule that courts defer to the judgments of legislatures "in

areas fraught with medical and scientific uncertainties." *Marshall* v. *United States*, 414 U. S. 417, 427.

An even more glaring deficiency was *Roe*'s failure to justify the critical distinction it drew between pre- and post-viability abortions. . . .

. . . The definition of a "viable" fetus is one that is capable of surviving outside the womb, but why is this the point at which the State's interest becomes compelling? If, as *Roe* held, a State's interest in protecting prenatal life is compelling "after viability," 410 U. S., at 163, 93, why isn't that interest "equally compelling before viability"? *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 519 (1989) (plurality opinion) (quoting *Thornburgh [v. American College of Obstetricians and Gynecologists]*, 476 U. S., [***2269]** [747,] 795 (White, J., dissenting)). *Roe* did not say, and no explanation is apparent.

This arbitrary line has not found much support among philosophers and ethicists who have attempted to justify a right to abortion. Some have argued that a fetus should not be entitled to legal protection until it acquires the characteristics that they regard as defining what it means to be a "person." Among the characteristics that have been offered as essential attributes of "personhood" are sentience, self-awareness, the ability to reason, or some combination thereof. By this logic, it would be an open question whether even born individuals, including young children or those afflicted with certain developmental or medical conditions, merit protection as "persons." But even if one takes the view that "personhood" begins when a certain attribute or combination of attributes is acquired, it is very hard to see why viability should mark the point where "personhood" begins.

The most obvious problem with any such argument is that viability is heavily dependent on factors that have nothing to do with the characteristics of a fetus. One is the state of neonatal care at a particular point in time. Due to the development of new equipment and improved practices, the viability line has changed over the years. In the 19th century, a fetus may not have been viable until the 32d or 33d week of pregnancy or even later. When *Roe* was decided, viability was gauged at roughly 28 weeks. . . . Today, respondents draw the line at 23 or 24 weeks. Brief for Respondents 8. So, according to *Roe*'s logic, States now have a compelling interest in protecting a fetus with a gestational age of, say, 26 weeks, but in 1973 States did [***2270]** not have an interest in protecting an identical fetus. How can that be?

[***]

The viability line, which *Casey* termed *Roe*'s central rule, makes no sense, and it is telling that other countries almost uniformly eschew such a line. The Court thus asserted raw judicial power to impose, as a matter of constitutional law, a uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy.

d

All in all, *Roe*'s reasoning was exceedingly weak, and academic commentators, including those who agreed with the decision as a matter of policy, were unsparing in their criticism. . . .

Despite *Roe*'s weaknesses, its reach was steadily extended in the years that followed. . . .

[***]

2

When *Casey* revisited *Roe* almost 20 years later, very little of *Roe*'s reasoning was defended or preserved. The Court abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendment's Due Process Clause. 505 U. S., at 846. The Court did not reaffirm *Roe*'s erroneous account of abortion history. In fact, none of the Justices in the majority said anything about the history of the abortion right. And as for precedent, the Court relied on essentially the same body of cases that *Roe* had cited. Thus, with respect to the standard grounds for constitutional decisionmaking—text, history, and precedent—*Casey* did not attempt to bolster *Roe*'s reasoning.

[***]

[*2272] *Casey*, in short, either refused to reaffirm or rejected important aspects of *Roe*'s analysis, failed to remedy glaring deficiencies in *Roe*'s reasoning, endorsed what it termed *Roe*'s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than *Roe*'s status as precedent, and imposed a new and problematic test with no firm grounding in constitutional text, history, or precedent.

As discussed below, *Casey* also deployed a novel version of the doctrine of *stare decisis*. . . . This new doctrine did not account for the profound wrongness of the decision in *Roe*, and placed great weight on an intangible form of reliance with little if any basis in prior case law. *Stare decisis* does not command the preservation of such a decision.

C

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

1

[***]

2

[***]

3

[***]

Casey has generated a long list of Circuit conflicts. . . .

[***2275**]

Casey's "undue burden" test has proved to be unworkable. . . .

D

Effect on other areas of law. *Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions. . . .

[***]

The Court's abortion cases have diluted the strict standard for facial constitutional challenges. They have ignored the Court's third-party standing doctrine. [***2276]** They have disregarded standard *res judicata* principles. They have flouted the ordinary rules on the severability of unconstitutional provisions, as well as the rule that statutes should be read where possible to avoid unconstitutionality. And they have distorted First Amendment doctrines.

[***]

E

Reliance interests. We last consider whether overruling *Roe* and *Casey* will upend substantial reliance interests. . . .

1

[***]

2

[***]

[*2277] When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter. That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women. The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women. Compare Brief for Petitioners 34-36; Brief for Women Scholars et al. as *Amici Curiae* 13-20, 29-41, with Brief for Respondents 36-41; Brief for National Women's Law Center et al. as *Amici Curiae* 15-32. The contending sides also make conflicting arguments about the status of the fetus. This Court has neither the authority nor the expertise to adjudicate those disputes . . . .

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

3

[T]o ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right.

Nothing in this opinion should be understood to cast [***2278]** doubt on precedents that do not concern abortion.

IV

Having shown that traditional *stare decisis* factors do not weigh in favor of retaining *Roe* or *Casey*, we must address one final argument that featured prominently in the *Casey* plurality opinion.

The argument was cast in different terms, but stated simply, it was essentially as follows. The American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle . . . . There is a special danger that the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial "watershed" decision, such as *Casey*, 505 U. S., at 866-867 . . . .

This analysis starts out on the right foot but ultimately veers off course. The *Casey* plurality was certainly right that it is important for the public to perceive that our decisions are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach. But we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work. . . . That is true both when we initially decide a constitutional issue *and* when we consider whether to overrule a prior decision. . . .

. . . The Court has no authority to decree that an erroneous precedent is *permanently* exempt from evaluation under traditional *stare decisis* principles. A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command. . . .

The *Casey* plurality also misjudged the practical limits of this Court's influence. *Roe* certainly did not succeed in ending division on the issue of abortion. . . . And for the past 30 years, *Casey* has done the same.

Neither decision has ended debate over the issue of a constitutional right to obtain an abortion. Indeed, in this case, 26 States expressly ask us to overrule *Roe* and *Casey* and to return the issue of abortion to the people and their elected representatives. This Court's inability to end debate on the issue should not have been surprising. This Court cannot bring about the permanent resolution of a rancorous national controversy simply by dictating a settlement and telling the people to move on. . . .

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

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

V

A

1

[*2280**]

Precedents should be respected, but sometimes the Court errs, and occasionally the Court issues an important decision that is egregiously wrong. When that happens, *stare decisis* is not a straitjacket. . . .

2

[***]

[A]s we have explained, *Casey* broke new ground when it treated the national controversy provoked by *Roe* as a ground for refusing to reconsider that decision, and no subsequent case has relied on that factor. Our decision today simply applies longstanding *stare decisis* factors instead of applying a version of the doctrine that seems to apply only in abortion cases.

3

[*2281] [T]here is a further point that the dissent ignores: Each precedent is subject to its own *stare decisis* analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence.

B

1

We now turn to the concurrence in the judgment, which reproves us for deciding whether *Roe* and *Casey* should be retained or overruled. . . . The concurrence . . . would hold only that if the Constitution protects any such right, the right ends once women have had "a reasonable opportunity" to obtain an abortion, *post*, at 1. The concurrence does not specify what period of time is sufficient to provide such an opportunity, but it would hold that 15 weeks, the period allowed under Mississippi's law, is enough—at least "absent rare circumstances." *Post*, at 2, 10.

There are serious problems with this approach, and it is revealing that nothing like it was recommended by either party. . . .

2

The concurrence's most fundamental defect is its failure to offer any principled basis for its approach. [A] new rule that discards the viability rule cannot be defended on *stare decisis* grounds.

The concurrence concedes that its approach would "not be available" if "the rationale of *Roe* and *Casey* were inextricably entangled with and dependent upon the viability standard." *Post*, at 7. But the concurrence asserts that the viability line is separable from the constitutional right they recognized, and can therefore be "discarded" without disturbing any past precedent. *Post*, at 7-8. That is simply incorrect.

[***]

For all these reasons, *stare decisis* cannot justify the new "reasonable opportunity" rule propounded by the concurrence. If that rule is to become the law of the land, it must stand on its own, but the concurrence makes no attempt to show that this rule represents a correct interpretation of the Constitution. . . . [***2283]** Nor does it propound any other theory that could show that the Constitution supports its new rule. And if the Constitution protects a woman's right to obtain an abortion, the opinion does not explain why that right should end after the point at which all "reasonable" women will have decided whether to seek an abortion. . . .

3

[***]

Even if the Court ultimately adopted the new rule suggested by the concurrence, we would be faced with the difficult problem of spelling out what it means. For example, if the period required to give women a "reasonable" opportunity to obtain an abortion were pegged, as the concurrence seems to suggest, at the point when a certain percentage of women make that choice, see *post*, at 1-2, 9-10, we would have to identify the relevant percentage. It would also be necessary to explain what the concurrence means when it refers to "rare circumstances" that might justify an exception. *Post*, at 10. And if this new right aims to give women a reasonable opportunity to get an abortion, it would be necessary to decide whether factors other than promptness in deciding might have a bearing on whether such an opportunity was available.

In sum, the concurrence's quest for a middle way would only put off the day when we would be forced to confront the question we now decide. The turmoil wrought by *Roe* and *Casey* would be prolonged. It is far better—for this Court and the country—to face up to the real issue without further delay.

VI

We must now decide what standard will govern if state abortion regulations undergo constitutional challenge and whether the law before us satisfies the appropriate standard.

A

Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history. . . .

[***]

B

These legitimate interests justify Mississippi's Gestational Age Act. . . . These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents' constitutional challenge must fail.

VII

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

[*2285] The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the opinion of the Court because it correctly holds that there is no constitutional right to abortion. . . . The Court well explains why, under our substantive due process precedents, the purported right to abortion is not a form of "liberty" protected by the Due Process Clause. . . .

I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause. Considerable historical evidence indicates that "due process of law" merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property. . . .[T]he Due Process Clause at most guarantees *process*. . . .

. . . The resolution of this case is thus straightforward. Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion.

The Court today declines to disturb substantive due process jurisprudence generally or the doctrine's application in other, specific contexts. . . .

For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. . . . After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions [***2302]** guarantee the myriad rights that our substantive due process cases have generated. . . . To answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects *any* rights that are not enumerated in the Constitution and, if so, how to identify those rights. . . . That said, even if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach. See *ante*, at 15, n. 22.

[***]

Because the Court properly applies our substantive due process precedents to reject the fabrication of a constitutional right to abortion, and because this case does not present the opportunity to reject substantive due process entirely, I join the Court's opinion. . . . Substantive due process conflicts with [the Constitution's] textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.

JUSTICE KAVANAUGH, concurring.

I write separately to explain my additional views about why *Roe* was wrongly decided, why *Roe* should be overruled at this time, and the future implications of today's decision.

Abortion is a profoundly difficult and contentious issue because it presents an irreconcilable conflict between the interests of a pregnant woman who seeks an abortion and the interests in protecting fetal life. The interests on both sides of the abortion issue are extraordinarily weighty.

On the one side, many pro-choice advocates forcefully argue that the ability to obtain an abortion is critically important for women's personal and professional lives, and for women's health. They contend that the widespread availability of abortion has been essential for women to advance in society and to achieve greater equality over the last 50 years. And they maintain that women must have the freedom to choose for themselves whether to have an abortion.

On the other side, many pro-life advocates forcefully argue that a fetus is a human life. They contend that all human life should be protected as a matter of human dignity and fundamental morality. And they stress that a significant percentage of Americans with pro-life views are women.

When it comes to abortion, one interest must prevail over the other at any given point in a pregnancy. Many Americans of good faith would prioritize the interests of the pregnant woman. Many other Americans of good faith instead would prioritize the interests in protecting fetal life—at least unless, for example, an abortion is necessary to save the life of the mother. Of course, many Americans are conflicted or have nuanced views that may vary depending on the particular time in pregnancy, or the particular circumstances of a pregnancy.

The issue before this Court, however, is not the policy or morality of abortion. The issue before this Court is what the Constitution says about abortion. The Constitution does not take sides on the issue of abortion. The text of the Constitution does not refer to or encompass abortion. To be sure, this Court has held that the Constitution protects unenumerated rights that are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty. But a right to abortion is not deeply rooted in American history and tradition, as the Court today thoroughly explains.

[*2305] On the question of abortion, the Constitution is therefore neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address.

Because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral. The nine unelected Members of this Court do not possess the constitutional authority to override the democratic process and to decree either a pro-life or a pro-choice abortion policy for all 330 million people in the United States.

Instead of adhering to the Constitution's neutrality, the Court in *Roe* took sides on the issue and unilaterally decreed that abortion was legal throughout the United States up to the point of viability (about 24 weeks of pregnancy). The Court's decision today properly returns the Court to a position of neutrality and restores the people's authority to address the issue of abortion through the processes of democratic self-government established by the Constitution.

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

tution legalizes pre-viability abortion throughout the United States. But both positions are wrong as a constitutional matter, in my view. The Constitution neither outlaws abortion nor legalizes abortion.

To be clear, then, the Court's decision today *does not outlaw* abortion throughout the United States. On the contrary, the Court's decision properly leaves the question of abortion for the people and their elected representatives in the democratic process. Through that democratic process, the people and their representatives may decide to allow or limit abortion. . . .

Today's decision therefore does not prevent the numerous States that readily allow abortion from continuing to readily allow abortion. That includes, if they choose, the *amici* States supporting the plaintiff in this Court: New York, California, Illinois, Maine, Massachusetts, Rhode Island, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Michigan, Wisconsin, Minnesota, New Mexico, Colorado, Nevada, Oregon, Washington, and Hawaii. By contrast, other States may maintain laws that more strictly limit abortion. After today's decision, all of the States may evaluate the competing interests and decide how to address this consequential issue.

[*2306] In arguing for a *constitutional* right to abortion that would override the people's choices in the democratic process, the plaintiff Jackson Women's Health Organization and its *amici* emphasize that the Constitution does not freeze the American people's rights as of 1791 or 1868. I fully agree. To begin, I agree that constitutional rights apply to situations that were unforeseen in 1791 or 1868—such as applying the First Amendment to the Internet or the Fourth Amendment to cars. Moreover, the Constitution authorizes the creation of new rights—state and federal, statutory and constitutional. But when it comes to creating new rights, the Constitution directs the people to the various processes of democratic self-government contemplated by the Constitution—state legislation, state constitutional amendments, federal legislation, and federal constitutional amendments. . . .

The Constitution does not grant the nine unelected Members of this Court the unilateral authority to rewrite the Constitution to create new rights and liberties based on our own moral or policy views. . . .

This Court therefore does not possess the authority either to declare a constitutional right to abortion *or* to declare a constitutional prohibition of abortion. . . .

In sum, the Constitution is neutral on the issue of abortion and allows the people and their elected representatives to address the issue through the democratic process. In my respectful view, the Court in *Roe* therefore erred by taking sides on the issue of abortion.

II

The more difficult question in this case is *stare decisis*—that is, whether to overrule the *Roe* decision.

The principle of *stare decisis* requires respect for the Court's precedents and for the accumulated wisdom of the judges who have previously addressed the same issue. *Stare decisis* is rooted in Article III of the Constitution and is fundamental to the American judicial system and to the stability of American law.

Adherence to precedent is the norm, and *stare decisis* imposes a high bar before [***2307]** this Court may overrule a precedent. This Court's history shows, however, that *stare decisis* is not absolute, and indeed cannot be absolute. . . .

[***]

But that history alone does not answer the critical question: When precisely should the Court overrule an erroneous constitutional precedent? The history of *stare decisis* in this Court establishes that a constitutional precedent may be overruled only when (i) the prior decision is not just wrong, but is egregiously wrong, (ii) the prior decision has caused significant negative jurisprudential or real-world consequences, and (iii) overruling the prior decision would not unduly upset legitimate reliance interests. . . .

Applying those factors, I agree with the Court today that *Roe* should be overruled. The Court in *Roe* erroneously assigned itself the authority to decide a critically important moral and policy issue that the Constitution does not grant this Court the authority to decide. . . .

Of course, the fact that a precedent is wrong, even egregiously wrong, does not alone mean that the precedent should be overruled. But as the Court today explains, *Roe* has caused significant negative jurisprudential and real-world consequences. By taking sides on a difficult and contentious issue on which the Constitution is neutral, *Roe* overreached and exceeded this Court's constitutional authority; gravely distorted the Nation's understanding of this Court's proper constitutional role; and caused significant harm to what *Roe* itself recognized as the State's "important and legitimate interest" in protecting fetal life. 410 U. S., at 162. All of that explains why tens of millions of Americans—and the 26 States that explicitly **[*2308]** ask the Court to overrule *Roe*—do not accept *Roe* even 49 years later. Under the Court's longstanding *stare decisis* principles, *Roe* should be overruled.

But the *stare decisis* analysis here is somewhat more complicated because of *Casey*. In 1992, 19 years after *Roe*, *Casey* acknowledged the continuing dispute over *Roe*. The Court sought to find common ground that would resolve the abortion debate and end the national controversy. After careful and thoughtful consideration, the *Casey* plurality reaffirmed a right to abortion through viability (about 24 weeks), while also allowing somewhat more regulation of abortion than *Roe* had allowed.

I have deep and unyielding respect for the Justices who wrote the *Casey* plurality opinion. And I respect the *Casey* plurality's good-faith effort to locate some middle ground or compromise that could resolve this controversy for America.

But as has become increasingly evident over time, *Casey*'s well-intentioned effort did not resolve the abortion debate. The national division has not ended. In recent years, a significant number of States have enacted abortion restrictions that directly conflict with *Roe*. Those laws cannot be dismissed as political stunts or as outlier laws. Those numerous state laws collectively represent the sincere and deeply held views of tens of millions of Americans who continue to fervently believe that allowing abortions up to 24 weeks is far too radical and far too extreme . . .. In this case, moreover, a majority of the States—26 in all—ask the Court to overrule *Roe* and return the abortion issue to the States.

In short, *Casey*'s *stare decisis* analysis rested in part on a predictive judgment about the future development of state laws and of the people's views on the abortion issue.

But that predictive judgment has not borne out. As the Court today explains, the experience over the last 30 years conflicts with *Casey*'s predictive judgment and [***2309]** therefore undermines *Casey*'s precedential force.

In any event, although *Casey* is relevant to the *stare decisis* analysis, the question of whether to overrule *Roe* cannot be dictated by *Casey* alone. . . .

In sum, I agree with the Court's application today of the principles of *stare decisis* and its conclusion that *Roe* should be overruled.

III

After today's decision, the nine Members of this Court will no longer decide the basic legality of pre-viability abortion for all 330 million Americans. That issue will be resolved by the people and their representatives in the democratic process in the States or Congress. But the parties' arguments have raised other related questions, and I address some of them here.

First is the question of how this decision will affect other precedents involving issues such as contraception and marriage . . . I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents.

Second, as I see it, some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel. May a State retroactively impose liability or punishment for an abortion that occurred before today's decision takes effect? In my view, the answer is no based on the Due Process Clause or the *Ex Post Facto* Clause. . . .

Other abortion-related legal questions may emerge in the future. But this Court will no longer decide the fundamental question of whether abortion must be allowed throughout the United States through 6 weeks, or 12 weeks, or 15 weeks, or 24 weeks, or some other line. The Court will no longer decide how to evaluate the interests of the pregnant woman and the interests in protecting fetal life throughout pregnancy. Instead, those difficult moral and policy questions will be decided, as the Constitution dictates, by the people and their elected representatives through the constitutional processes of democratic self-government.

***

[*2310] The *Roe* Court took sides on a consequential moral and policy issue that this Court had no constitutional authority to decide. By taking sides, the *Roe* Court distorted the Nation's understanding of this Court's proper role in the American constitutional system and thereby damaged the Court as an institution. . . .

The Court's decision today properly returns the Court to a position of judicial neutrality on the issue of abortion, and properly restores the people's authority to resolve the issue of abortion through the processes of democratic self-government established by the Constitution.

To be sure, many Americans will disagree with the Court's decision today. That would be true no matter how the Court decided this case. Both sides on the abortion issue believe sincerely and passionately in the rightness of their cause. Especially in those

difficult and fraught circumstances, the Court must scrupulously adhere to the Constitution's neutral position on the issue of abortion.

Since 1973, more than 20 Justices of this Court have now grappled with the divisive issue of abortion. I greatly respect all of the Justices, past and present, who have done so. Amidst extraordinary controversy and challenges, all of them have addressed the abortion issue in good faith after careful deliberation, and based on their sincere understandings of the Constitution and of precedent. I have endeavored to do the same.

In my judgment, on the issue of abortion, the Constitution is neither pro-life nor pro-choice. The Constitution is neutral, and this Court likewise must be scrupulously neutral. The Court today properly heeds the constitutional principle of judicial neutrality and returns the issue of abortion to the people and their elected representatives in the democratic process.

CHIEF JUSTICE ROBERTS, concurring in the judgment.

[***]

. . . I agree with the Court that the viability line established by *Roe* and *Casey* should be discarded under a straightforward *stare decisis* analysis. That line never made any sense. Our abortion precedents describe the right at issue as a woman's right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further—certainly not all the way to viability. Mississippi's law allows a woman three months to obtain an abortion, well **[*2311]** beyond the point at which it is considered "late" to discover a pregnancy. . . . I see no sound basis for questioning the adequacy of that opportunity.

But that is all I would say, out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more. Perhaps we are not always perfect in following that command, and certainly there are cases that warrant an exception. But this is not one of them. Surely we should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of *stare decisis*. The Court's opinion is thoughtful and thorough, but those virtues cannot compensate for the fact that its dramatic and consequential ruling is unnecessary to decide the case before us.

I

Let me begin with my agreement with the Court, on the only question we need decide here: whether to retain the rule from *Roe* and *Casey* that a woman's right to terminate her pregnancy extends up to the point that the fetus is regarded as "viable" outside the womb. I agree that this rule should be discarded.

First, this Court seriously erred in *Roe* in adopting viability as the earliest point at which a State may legislate to advance its substantial interests in the area of abortion. See *ante*, at 50-53. *Roe* set forth a rigid three-part framework anchored to viability, which more closely resembled a regulatory code than a body of constitutional law. That framework, moreover, came out of thin air. . . .

It is thus hardly surprising that neither *Roe* nor *Casey* made a persuasive or even colorable argument for why the time for terminating a pregnancy must extend to viability. The Court's jurisprudence on this issue is a textbook illustration of the perils of deciding a question neither presented nor briefed. . . .

Twenty years later, the best defense of the viability line the *Casey* plurality could conjure up was workability. . . . [***2312]** The dissent, which would retain the viability line, offers no justification for it either.

[***]

In short, the viability rule was created outside the ordinary course of litigation, is and always has been completely unreasoned, and fails to take account of state interests since recognized as legitimate. . . . The Court rightly rejects the arbitrary viability rule today.

[*2313] II

None of this, however, requires that we also take the dramatic step of altogether eliminating the abortion right first recognized in R*oe*. . . .

[***]

. . . It is only where there is no valid narrower ground of decision that we should go on to address a broader issue, such as whether a constitutional decision should be overturned. . . .

[*2314] Here, there is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all. . . .

Of course, such an approach would not be available if the rationale of *Roe* and *Casey* was inextricably entangled with and dependent upon the viability standard. It is not. . . .

To be sure, in reaffirming the right to an abortion, *Casey* termed the viability rule *Roe*'s "central holding." 505 U. S., at 860. Other cases of ours have repeated that language. . . . But simply declaring it does not make it so. The question in *Roe* was whether there was any right to abortion in the Constitution. . . . How far the right extended was a concern that was separate and subsidiary, and—not surprisingly—entirely unbriefed.

The Court in *Roe* just chose to address both issues in one opinion: . . . The viability line is a separate rule fleshing out the metes and bounds of *Roe*'s core holding. Applying principles of *stare decisis*, I would excise that additional rule—and only that rule—from our jurisprudence.

The majority lists a number of cases that have stressed the importance of the [***2315]** viability rule to our abortion precedents. . . . I agree that—whether it was originally holding or dictum—the viability line is clearly part of our "past precedent," and the Court has applied it as such in several cases since *Roe*. *Ante*, at 73. My point is that *Roe* adopted two distinct rules of constitutional law: one, that a woman has the right to choose to terminate a pregnancy; two, that such right may be overridden by the State's legitimate interests when the fetus is viable outside the womb. The latter is

obviously distinct from the former. I would abandon that timing rule, but see no need in this case to consider the basic right.

The Court contends that it is impossible to address *Roe*'s conclusion that the Constitution protects the woman's right to abortion, without also addressing *Roe*'s rule that the State's interests are not constitutionally adequate to justify a ban on abortion until viability. . . .

Overruling the subsidiary rule is sufficient to resolve this case in Mississippi's favor. The law at issue allows abortions up through fifteen weeks, providing an adequate opportunity to exercise the right *Roe* protects. By the time a pregnant woman has reached that point, her pregnancy is well into the second trimester. Pregnancy tests are now inexpensive and accurate, and a woman ordinarily discovers she is pregnant by six weeks of gestation. . . . Almost all know by the end of the first trimester. . . . Safe and effective abortifacients, moreover, are now readily available, particularly during those early stages. . . . Given all this, it is no surprise that the vast majority of abortions happen in the first trimester. . . . Presumably most of the remainder would also take place earlier if later abortions were not a legal option. . . .

III

[***]

The Court's decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases. A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case.

. . . It cannot reasonably be argued that women have shaped their lives in part on the assumption that they would be able to abort up to viability, as opposed to fifteen weeks.

[***]

The Court says we should consider whether to overrule *Roe* and *Casey* now, because if we delay we would be forced to consider the issue again in short order. . . . But under the narrower approach proposed here, state laws outlawing abortion altogether would still violate binding precedent. And to the extent States have laws that set the cutoff date earlier than fifteen weeks, any litigation over that timeframe would proceed free of the distorting effect that the viability rule has had on our constitutional debate. The same could be true, for that matter, with respect to legislative consideration in the States. We would then be free to exercise our discretion in deciding whether and when to take up the issue, from a more informed perspective.

***

Both the Court's opinion and the dissent display a relentless freedom from doubt on the legal issue that I cannot share. I am not sure, for example, that a ban on terminating a pregnancy from the moment of **[*2317]** conception must be treated the same under the Constitution as a ban after fifteen weeks. . . . I would decide the question we granted review to answer—whether the previously recognized abortion right bars all abortion restrictions prior to viability, such that a ban on abortions after fifteen weeks of pregnancy is necessarily unlawful. The answer to that question is no, and there is no need to go further to decide this case.

I therefore concur only in the judgment.

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

For half a century, *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be. . . . Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

Roe and *Casey* well understood the difficulty and divisiveness of the abortion issue. . . . So the Court struck a balance, as it often does when values and goals compete. It held that the State could prohibit abortions after fetal viability, so long as the ban contained exceptions to safeguard a woman's life or health. It held that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. . . .

Today, the Court discards that balance. It says that from the very moment of fertilization, a woman has no rights to speak of. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs. An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of scrutiny known to the law. And because, as the Court has often stated, protecting fetal life is rational, States will feel free to enact all manner of restrictions. The Mississippi law at issue here bars abortions after the 15th week of pregnancy. Under the majority's ruling, though, another State's law could do so after ten weeks, or five or three or one—or, again, from the moment **[*2318]** of fertilization. States have already passed such laws, in anticipation of today's ruling. More will follow. Some States have enacted laws extending to all forms of abortion procedure, including taking medication in one's own home. They have passed laws without any exceptions for when the woman is the victim of rape or incest. Under those laws, a woman will have to bear her rapist's child or a young girl her father's—no matter if doing so will destroy her life. So too, after today's ruling, some States may compel women to carry to term a fetus with severe physical anomalies—for example, one afflicted with Tay-Sachs disease, sure to die within a few years of birth. States may even argue that a prohibition on abortion need make no provision for protecting a woman from risk of death or physical harm. Across a vast array of circumstances, a State will be able to impose its moral choice on a woman and coerce her to give birth to a child.

Enforcement of all these draconian restrictions will also be left largely to the States' devices. A State can of course impose criminal penalties on abortion providers, including lengthy prison sentences. But some States will not stop there. Perhaps, in the wake of today's decision, a state law will criminalize the woman's conduct too, incarcerating or fining her for daring to seek or obtain an abortion. And as Texas has recently shown, a State can turn neighbor against neighbor, enlisting fellow citizens in the effort to root out anyone who tries to get an abortion, or to assist another in doing so.

The majority tries to hide the geographically expansive effects of its holding. Today's decision, the majority says, permits "each State" to address abortion as it pleases. *Ante*, at 79. That is cold comfort, of course, for the poor woman who cannot get the money to fly to a distant State for a procedure. Above all others, women lacking financial resources will suffer from today's decision. In any event, interstate restrictions will also soon be in the offing. After this decision, some States may block women from traveling out of State to obtain abortions, or even from receiving abortion medications from out of State. Some may criminalize efforts, including the provision of information or funding, to help women gain access to other States' abortion services. Most threatening of all, no language in today's decision stops the Federal Government from prohibiting abortions nationwide, once again from the moment of conception and without exceptions for rape or incest. . . .

Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. . . . But no longer. As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Some women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or [***2319]** the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. . . . In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. . . . They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. . . . The lone rationale for what the majority does today is that the right to elect an abortion is not "deeply rooted in history": Not until *Roe*, the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. *Ante*, at 32. The same could be said, though, of most of the rights the majority claims it is not tampering with. So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.

One piece of evidence on that score seems especially salient: The majority's cavalier approach to overturning this Court's precedents. *Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility.

Those qualities are not evident in today's opinion. The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives. The legal framework *Roe* and *Casey* developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed. Indeed, the Court in *Casey* already found all of that to be true. *Casey* is a precedent about precedent. It reviewed the same arguments made here in support of overruling *Roe*, and it found that doing so was not warranted. The **[*2320]** Court reverses course today for one reason and one reason only: because the composition of this Court has changed. . . . Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent.

I

We start with *Roe* and *Casey*, and with their deep connections to a broad swath of this Court's precedents. To hear the majority tell the tale, *Roe* and *Casey* are aberrations: They came from nowhere, went nowhere—and so are easy to excise from this Nation's constitutional law. That is not true. After describing the decisions themselves, we explain how they are rooted in—and themselves led to—other rights giving individuals control over their bodies and their most personal and intimate associations. The majority does not wish to talk about these matters for obvious reasons; to do so would both ground *Roe* and *Casey* in this Court's precedents and reveal the broad implications of today's decision. But the facts will not so handily disappear. *Roe* and *Casey* were from the beginning, and are even more now, embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. Those legal concepts, one might even say, have gone far toward defining what it means to be an American. For in this Nation, we do not believe that a government controlling all private choices is compatible with a free people. . . . We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once.

A

Some half-century ago, *Roe* struck down a state law making it a crime to perform an abortion unless its purpose was to save a woman's life. The *Roe* Court knew it was treading on difficult and disputed ground. . . . But by a 7-to-2 vote, the Court held that in the earlier stages of pregnancy, that contested and contestable choice must belong to a woman, in consultation with her family and doctor. . . . **[*2321]**

[***]

Then, in *Casey*, the Court considered the matter anew, and again upheld *Roe*'s core precepts. *Casey* is in significant measure a precedent about the doctrine of precedent—until today, one of the Court's most important. . . .

Central to that conclusion was a full-throated restatement of a woman's right to choose. Like *Roe*, *Casey* grounded that right in the Fourteenth Amendment's guaran-

tee of "liberty." That guarantee encompasses realms of conduct not specifically referenced in the Constitution . . . So too, *Casey* reasoned, the liberty clause protects the decision of a woman confronting an unplanned pregnancy. Her decision about abortion was central, in the same way, to her capacity to chart her life's course. . . .

In reaffirming the right *Roe* recognized, the Court took full account of the diversity of views on abortion, and the importance of various competing state interests. . . .

So *Casey* again struck a balance, differing from *Roe*'s in only incremental ways. . . . At the same time, *Casey* decided, based on two decades of experience, that the *Roe* framework did not give States sufficient ability to regulate abortion prior to viability. . . .

. . . *Roe* and *Casey* invoked powerful state interests in that protection, operative at every stage of the pregnancy and overriding the woman's liberty after viability. The strength of those state interests is exactly why the Court allowed greater restrictions on the abortion right than on other rights deriving from the Fourteenth Amendment. But what *Roe* and *Casey* also recognized—which today's majority does not—is that a woman's freedom and equality are likewise involved. That fact—the presence of countervailing interests—is what made the abortion question hard, and what necessitated balancing. . . . To the majority "balance" is a dirty word, as moderation is a foreign concept. The majority would allow States to ban abortion from conception onward because it does not think forced childbirth at all implicates a woman's rights to equality and freedom. Today's Court, that is, does not think there is anything of constitutional significance attached to a woman's control of her body and the path of her life. *Roe* and *Casey* thought that one-sided view misguided. In some sense, that is the difference in a nutshell between our precedents and the majority opinion. The constitutional regime we have lived in for the last 50 years recognized competing interests, and sought a balance between them. The constitutional regime we enter today erases the woman's interest and recognizes only the State's (or the Federal Government's).

B

[***]

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

As an initial matter, note a mistake in the just preceding sentence. We referred there to the "people" who ratified the Fourteenth Amendment: What rights did those "people" have in their heads at the time? But, of course, "people" did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community **[*2325]** embraced by the phrase "We the People." In 1868, the first wave of American feminists were explicitly told—of course by men—that it was not their time to seek constitutional protections. (Women would not get even the vote for another half-century.) To be sure, most women

in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women control over their bodies, most women could not imagine having that kind of autonomy. But that takes away nothing from the core point. Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.

[***]

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

The answer is that this Court has rejected the majority's pinched view of how to read our Constitution. . . . The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers' invitation. It has kept true to the Framers' principles by applying them in new ways, responsive to new societal understandings and conditions.

[*2326] Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of "liberty" and "equality" for all. And nowhere has that approach produced prouder moments, for this country and the Court. . . . The Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply.

That does not mean anything goes [but] that applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. . . . [***2327]**

[***]

And that conclusion still held good, until the Court's intervention here. It was settled at the time of *Roe*, settled at the time of *Casey*, and settled yesterday that the Constitution places limits on a State's power to assert control over an individual's body and most personal decisionmaking. A multitude of decisions supporting that principle led to *Roe*'s recognition and *Casey*'s reaffirmation of the right to choose; and *Roe* and *Casey* in turn supported additional protections for intimate and familial relations. The majority has embarrassingly little to say about those precedents. . . . The Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives. Especially women's lives, where they safeguard a right to self-determination.

[*2328] And eliminating that right, we need to say before further describing our precedents, is not taking a "neutral" position, as JUSTICE KAVANAUGH tries to argue. *Ante*, at 2-3, 5, 7, 11-12 (concurring opinion). His idea is that neutrality lies in giving the abortion issue to the States, where some can go one way and some another. [However], the Court does not act "neutrally" when it leaves everything up to the States. Rather, the Court acts neutrally when it protects the right against all comers. And to apply that point to the case here: When the Court decimates a right women have held for 50 years, the Court is not being "scrupulously neutral." It is instead taking sides: against women who wish to exercise the right, and for States (like Mississippi) that want to bar them from doing so. JUSTICE KAVANAUGH cannot obscure that point by appropriating the rhetoric of even-handedness. His position just is what it is: A brook-no-compromise refusal to recognize a woman's right to choose, from the first day of a pregnancy. And that position, as we will now show, cannot be squared with this Court's longstanding view that women indeed have rights (whatever the state of the world in 1868) to make the most personal and consequential decisions about their bodies and their lives.

[***]

And liberty may require it, this Court has repeatedly said, even when those living in 1868 would not have recognized the claim—because they would not have seen the person making it as a full-fledged member of the community. Throughout our history, the sphere of protected liberty has expanded, bringing in individuals formerly excluded. In that way, the constitutional values of liberty and equality go hand in hand; they do not inhabit the hermetically sealed containers the majority portrays. . . .

Casey similarly recognized the need to extend the constitutional sphere of liberty to a previously excluded group. The Court then understood, as the majority today does not, that the men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens. . . . Without the ability to decide whether and when to have children, women could not—in the way men took for granted—determine how they would live their lives, and how they would contribute to the society around them.

For much that reason, *Casey* made clear that the precedents *Roe* most closely tracked were those involving contraception. Over the course of three cases, the Court had held that a right to use and gain access to contraception was part of the Fourteenth Amendment's guarantee of liberty. {T]he views of others could not automatically prevail against a woman's right to control her own body and make her own choice about whether to bear, and probably to raise, a child. . . .

Faced with all these connections between *Roe/Casey* and judicial decisions recognizing other constitutional rights, the majority tells everyone not to worry. It can (so it says) neatly extract the right to choose from the constitutional edifice without affecting any associated rights. (Think of someone telling you that the Jenga tower simply will not collapse.) . . . Should the audience for these too-much-repeated protestations be duly satisfied? We think not.

[***]

. . . According to the majority, no liberty interest is present—because (and only because) the law offered no protection to the woman's choice in the [***2332]** 19th century.

But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things. . . .

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

Consider, as our last word on this issue, contraception. The Constitution, of course, does not mention that word. And there is no historical right to contraception, of the kind the majority insists on. To the contrary, the American legal landscape in the decades after the Civil War was littered with bans on the sale of contraceptive devices. . . . But once again, the future significance of today's opinion will be decided in the future. At the least, today's opinion will fuel the fight to get contraception, and any other issues with a moral dimension, out of the Fourteenth Amendment and into state legislatures.

[*2333] Anyway, today's decision, taken on its own, is catastrophic enough. As a matter of constitutional method, the majority's commitment to replicate in 2022 every view about the meaning of liberty held in 1868 has precious little to recommend it. Our law in this constitutional sphere, as in most, has for decades upon decades proceeded differently. It has considered fundamental constitutional principles, the whole course of the Nation's history and traditions, and the step-by-step evolution of the Court's precedents. It is disciplined but not static. It relies on accumulated judgments, not just the sentiments of one long-ago generation of men (who themselves believed, and drafted the Constitution to reflect, that the world progresses). And by doing so, it includes those excluded from that olden conversation, rather than perpetuating its bounds.

As a matter of constitutional substance, the majority's opinion has all the flaws its method would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today. Because those laws prevented women from charting the course of their own lives, the majority says States can do the same again. Because in 1868, the government could tell a pregnant woman—even in the first days of her pregnancy—that she could do nothing but bear a child, it can once more impose that command. Today's decision strips women of agency over what even the majority agrees is a contested and contestable moral issue. It forces her to carry out the State's will, whatever the circumstances and whatever the harm it will wreak on her and her family. In the Fourteenth Amendment's terms, it takes away her liberty. Even before we get to *stare decisis*, we dissent.

II

By overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to

the rule of law. "*Stare decisis*" . . . maintains a stability that allows people to order their lives under the law. . . .

[*[*2334]**]

The majority today lists some 30 of our cases as overruling precedent, and argues that they support overruling *Roe* and *Casey*. But none does . . . In some, the Court only partially modified or clarified a precedent. And in the rest, the Court relied on one or more of the traditional *stare decisis* factors in reaching its conclusion. The Court found, for example, (1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old. (The majority is wrong when it says that we insist on a test of changed law or fact alone, although that is present in most of the cases. . . . None of those factors apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives.

First, for all the reasons we have given, *Roe* and *Casey* were correct. [T]he Court protected women's liberty and women's equality in a way comporting with our Fourteenth Amendment precedents. *Casey*, 505 U. S., at 850, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Contrary to the majority's view, the legal status of abortion in the 19th century does not weaken those decisions. . . . However divisive, a right is not at the people's mercy.

. . . After assessing the traditional *stare decisis* factors, *Casey* reached the only conclusion possible—that *stare decisis* operates powerfully here. It still does. The standards *Roe* and *Casey* set out are perfectly workable. No changes in either law or fact have eroded the two decisions. And tens of millions of American women have [***2335]** relied, and continue to rely, on the right to choose. So under traditional *stare decisis* principles, the majority has no special justification for the harm it causes.

And indeed, the majority comes close to conceding that point. The majority barely mentions any legal or factual changes that have occurred since *Roe* and *Casey*. It suggests that the two decisions are hard for courts to implement, but cannot prove its case. . . . It makes radical change too easy and too fast, based on nothing more than the new views of new judges. The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.

A

Contrary to the majority's view, there is nothing unworkable about *Casey*'s "undue burden" standard. . . . And it has given rise to no more conflict in application than many standards this Court and others unhesitatingly apply every day.

General standards, like the undue burden standard, are ubiquitous in the law, and particularly in constitutional adjudication. When called on to give effect to the Constitution's broad principles, this Court often crafts flexible standards that can be applied case-by-case to a myriad of unforeseeable circumstances. . . . The *Casey* undue burden standard is the same. . . . Applying general standards to particular cases is, in many contexts, just what it means to do law.

And the undue burden standard has given rise to no unusual difficulties. Of course, it has provoked some disagreement among judges. . . .That much is to be expected in the

application of any legal standard. But the majority vastly overstates the divisions among judges applying the standard. . [***2336]** . . That is about it, as far as we can see. And that is not much. This Court mostly does not even grant certiorari on one-year-old, one-to-one Circuit splits, because we know that a bit of disagreement is an inevitable part of our legal system. To borrow an old saying that might apply here: Not one or even a couple of swallows can make the majority's summer.

Anyone concerned about workability should consider the majority's substitute standard. . . . This Court will surely face critical questions about how that test applies. Must a state law allow abortions when necessary to protect a woman's life and health? And if so, exactly when? How much risk to a woman's life can a State force her to incur, before the Fourteenth Amendment's protection of life kicks in? Suppose a patient with pulmonary hypertension has a 30-to-50 percent risk of dying with ongoing pregnancy; is that enough? And short of death, how much illness or injury can the State require her to accept, consistent with the Amendment's protection of liberty and [***2337]** equality? Further, the Court may face questions about the application of abortion regulations to medical care most people view as quite different from abortion. What about the morning-after pill? IUDs? In vitro fertilization? And how about the use of dilation and evacuation or medication for miscarriage management? . . .

Finally, the majority's ruling today invites a host of questions about interstate conflicts. . . . Can a State bar women from traveling to another State to obtain an abortion? Can a State prohibit advertising out-of-state abortions or helping women get to out-of-state providers? Can a State interfere with the mailing of drugs used for medication abortions? The Constitution protects travel and speech and interstate commerce, so today's ruling will give rise to a host of new constitutional questions. . . .

In short, the majority does not save judges from unwieldy tests or extricate them from the sphere of controversy. To the contrary, it discards a known, workable, and predictable standard in favor of something novel and probably far more complicated. It forces the Court to wade further into hotly contested issues, including moral and philosophical ones, that the majority criticizes *Roe* and *Casey* for addressing.

B

When overruling constitutional precedent, the Court has almost always pointed to major legal or factual changes undermining a decision's original basis. . . . The majority briefly invokes the current controversy over abortion. . . . But it has to acknowledge that the same dispute has existed for decades: Conflict [***2338]** over abortion is not a change but a constant. (And as we will later discuss, the presence of that continuing division provides more of a reason to stick with, than to jettison, existing precedent. . . . In the end, the majority throws longstanding precedent to the winds without showing that anything significant has changed to justify its radical reshaping of the law. . . .

1

Subsequent legal developments have only reinforced *Roe* and *Casey*. The Court has continued to embrace all the decisions *Roe* and *Casey* cited . . . *Roe* and *Casey* have themselves formed the legal foundation for subsequent decisions protecting these profoundly personal choices. . . . In sum, *Roe* and *Casey* are inextricably interwoven with decades of precedent about the meaning of the Fourteenth Amendment . . .

Moreover, no subsequent factual developments have undermined *Roe* and *Casey*. Women continue to experience unplanned pregnancies and unexpected developments in pregnancies. Pregnancies continue to have enormous physical, social, and economic consequences. Even an uncomplicated pregnancy imposes significant strain on the body, unavoidably involving significant physiological change and excruciating pain. For some women, pregnancy and childbirth can mean life-altering physical ailments or even death. Today, as noted earlier, the risks of carrying a pregnancy to term dwarf those of having an abortion. . . . Pregnancy and childbirth may also impose large-scale financial costs. . . . Many women, however, still do not have adequate healthcare coverage before and after pregnancy; and, even when insurance coverage is available, healthcare services may be far away. [***2339]** Women also continue to face pregnancy discrimination that interferes with their ability to earn a living. Paid family leave remains inaccessible to many who need it most. Only 20 percent of private-sector workers have access to paid family leave, including a mere 8 percent of workers in the bottom quartile of wage earners.

The majority briefly notes the growing prevalence of safe haven laws and demand for adoption, see *ante*, at 34, and nn. 45-46, but, to the degree that these are changes at all, they too are irrelevant. Neither reduces the health risks or financial costs of going through pregnancy and childbirth. Moreover, the choice to give up parental rights after giving birth is altogether different from the choice not to carry a pregnancy to term. The reality is that few women denied an abortion will choose adoption. The vast majority will continue, just as in *Roe* and *Casey*'s time, to shoulder the costs of childrearing. Whether or not they choose to parent, they will experience the profound loss of autonomy and dignity that coerced pregnancy and birth always impose.

[W]e are sure some have made gains since *Roe* and *Casey* in providing support for women and children. But a state-by-state analysis by public health professionals shows that States with the most restrictive abortion policies also continue to invest the least in women's and children's health. . . .

The only notable change we can see since *Roe* and *Casey* cuts in favor of adhering to precedent: It is that American abortion law has become more and more aligned with other nations. The majority, like the Mississippi Legislature, claims that the United States is an extreme outlier when it comes to abortion regulation. . . . The global trend, however, has been toward increased provision of legal and safe abortion care. A number of countries, including New Zealand, the Netherlands, and Iceland, permit abortions up to a roughly similar time as *Roe* and *Casey* set. . . . Most Western European countries impose restrictions on abortion after 12 to 14 weeks, but they often have liberal exceptions to those time limits, including to prevent harm to a woman's physical or mental health. . . . They also typically make access to early abortion easier, for example, by helping cover its cost. Perhaps most notable, [***2341]** more than 50 countries around the world—in Asia, Latin America, Africa, and Europe—have expanded access to abortion in the past 25 years. . . . In light of that worldwide liberalization of abortion laws, it is American States that will become international outliers after today.

In sum, the majority can point to neither legal nor factual developments in support of its decision. Nothing that has happened in this country or the world in recent decades undermines the core insight of *Roe* and *Casey*. It continues to be true that, within the

constraints those decisions established, a woman, not the government, should choose whether she will bear the burdens of pregnancy, childbirth, and parenting.

2

[*[*2342]**]

[*2343] That is just as much so today, because *Roe* and *Casey* continue to reflect, not diverge from, broad trends in American society. It is, of course, true that many Americans, including many women, opposed those decisions when issued and do so now as well. Yet the fact remains: *Roe* and *Casey* were the product of a profound and ongoing change in women's roles in the latter part of the 20th century. . . .

C

The reasons for retaining *Roe* and *Casey* gain further strength from the overwhelming reliance interests those decisions have created. . . .

. . . Indeed, all women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe*'s and *Casey*'s protections.

The disruption of overturning *Roe* and *Casey* will therefore be profound. Abortion is a common medical procedure and a familiar experience in women's lives. About 18 percent of pregnancies in this country end in abortion, and about one quarter of [***2344]** American women will have an abortion before the age of 45. Those numbers reflect the predictable and life-changing effects of carrying a pregnancy, giving birth, and becoming a parent. As *Casey* understood, people today rely on their ability to control and time pregnancies when making countless life decisions: where to live, whether and how to invest in education or careers, how to allocate financial resources, and how to approach intimate and family relationships. Women may count on abortion access for when contraception fails. They may count on abortion access for when contraception cannot be used, for example, if they were raped. They may count on abortion for when something changes in the midst of a pregnancy, whether it involves family or financial circumstances, unanticipated medical complications, or heartbreaking fetal diagnoses. Taking away the right to abortion, as the majority does today, destroys all those individual plans and expectations. In so doing, it diminishes women's opportunities to participate fully and equally in the Nation's political, social, and economic life. . . .

The majority's response to these obvious points exists far from the reality American women actually live. . . . Even the most effective contraceptives fail, and effective contraceptives are not universally accessible. Not all sexual activity is consensual and not all contraceptive choices are made by the party who risks pregnancy. . . . The Mississippi law at issue here, for example, has no exception for rape or incest, even for underage women. Finally, the majority ignores, as explained above, that some women decide to have an abortion because their circumstances change during a pregnancy. . . . Human bodies care little for hopes and plans. Events can occur after conception, from unexpected medical risks to changes in family circumstances, which profoundly alter what it means to carry a pregnancy to term. In all these situations, women have expected that they will get to decide, perhaps in consultation with their families or doctors but free from state interference, whether to continue a pregnancy. For those who will now have to undergo that pregnancy, the loss of *Roe* and *Casey* could be disastrous.

That is especially so for women without money. . . . In States that bar abortion, women of means will still be able to travel to obtain the services they need. It is women who cannot afford to do so who will suffer most. These are the women most likely to seek abortion care in the first place. Women living below the federal poverty line experience unintended pregnancies at rates five times higher than higher income women do, and nearly half of women who seek abortion care live in households below the poverty line. . . . Even with *Roe*'s protection, these women face immense obstacles to raising the money needed to obtain abortion care early in their pregnancy. . . . After today, in States where legal abortions are not available, they will lose any ability to obtain safe, legal abortion care. They will not have the money to make the trip necessary; or to obtain childcare for that time; or to take time off work. Many will endure the costs and risks of pregnancy and giving birth against their wishes. Others will turn in desperation to illegal and unsafe abortions. They may lose not just their freedom, but their lives.

Finally, the expectation of reproductive control is integral to many women's identity and their place in the Nation. . . . That expectation . . . reflects that she is an autonomous person, and that society and the law recognize her as such. Like many constitutional rights, the right to choose situates a woman in relationship to others and to the government. It helps define a **[*2346]** sphere of freedom, in which a person has the capacity to make choices free of government control . . . Beyond any individual choice about residence, or education, or career, her whole life reflects the control and authority that the right grants.

Withdrawing a woman's right to choose whether to continue a pregnancy does not mean that no choice is being made. It means that a majority of today's Court has wrenched this choice from women and given it to the States. To allow a State to exert control over one of "the most intimate and personal choices" a woman may make is not only to affect the course of her life, monumental as those effects might be. . . . Women have relied on *Roe* and *Casey* in this way for 50 years. Many have never known anything else. When *Roe* and *Casey* disappear, the loss of power, control, and dignity will be immense.

The Court's failure to perceive the whole swath of expectations *Roe* and *Casey* created reflects an impoverished view of reliance. . . . By disclaiming any need to consider broad swaths of individuals' interests, the Court arrogates to itself the authority to overrule established legal principles without even acknowledging the costs of its decisions for the individuals who live under the law, costs that this Court's *stare decisis* doctrine instructs us to privilege when deciding whether to change course.

. . . The interests women have in *Roe* and *Casey* are perfectly, viscerally concrete. Countless women will now make different decisions about careers, education, relationships, and whether to try to become pregnant than they would have when *Roe* served as a backstop. Other women will carry pregnancies to term, with all the costs and risk of harm that involves, when they would previously have chosen to obtain an abortion. For millions of women, *Roe* and *Casey* have been critical in giving them control of their bodies and their lives. Closing our eyes to the suffering today's decision will impose will not make that suffering disappear. . . . *Stare decisis* requires that the Court calculate the costs of a decision's repudiation on those who have relied on the decision, not on those who have disavowed it. . . .

More broadly, the majority's approach to reliance cannot be reconciled with our Nation's understanding of constitutional rights. The majority's insistence on a "concrete," economic showing would preclude a finding of reliance on a wide variety of decisions recognizing constitutional rights—such as the right to express opinions, or choose whom to marry, or decide how to educate children. The Court, on the majority's logic, could transfer those choices to the State without having to consider a person's settled understanding that the law makes them hers. That must be wrong. All those rights, like the right to obtain an abortion, profoundly affect and, indeed, anchor individual lives. . . .

All those rights, like the one here, also have a societal dimension, because of the role constitutional liberties play in our structure of government. . . . Rescinding an individual right in its entirety and conferring it on the State, an action the Court takes today for the first time in history, affects all who have relied on our constitutional system of government and its structure of individual liberties protected from state oversight. *Roe* and *Casey* have of course aroused controversy and provoked disagreement. But the right those decisions conferred and reaffirmed is part of society's understanding of constitutional law and of how the Court has defined the liberty and equality that women are entitled to claim.

After today, young women will come of age with fewer rights than their mothers and grandmothers had. The majority accomplishes that result without so much as considering how women have relied on the right to choose or what it means to take that right away. The majority's refusal even to consider the life-altering consequences of reversing *Roe* and *Casey* is a stunning indictment of its decision.

D

One last consideration counsels against the majority's ruling: the very controversy surrounding *Roe* and *Casey*. . . . *Casey* applied traditional principles of *stare decisis*—which the majority today ignores—in reaffirming *Roe*. *Casey* carefully assessed changed circumstances (none) and reliance interests (profound). It considered every aspect of how *Roe*'s framework operated. It adhered to the law in its analysis, and it reached the conclusion that the law required. . . . *Casey*'s reason for acknowledging public conflict was the exact opposite of what the majority insinuates. *Casey* addressed the national controversy in order to emphasize how important it was, in that case of all cases, [***2348]** for the Court to stick to the law. Would that today's majority had done likewise.

. . . Here, more than anywhere, the Court needs to apply the law—particularly the law of *stare decisis*. . . . When . . . contestation takes place—but when there is no legal basis for reversing course—the Court needs to be steadfast, to stand its ground. That is what the rule of law requires. And that is what respect for this Court depends on.

[***]

. . . We fear that today's decision, departing from *stare decisis* for no legitimate reason, is its own loaded weapon. Weakening *stare decisis* threatens to upend bedrock legal doctrines, far beyond any single decision. Weakening *stare decisis* creates profound legal instability. And as *Casey* recognized, weakening *stare decisis* in a hotly contested case like this one calls into question this Court's commitment to legal principle. It

makes the Court appear not restrained but aggressive, not modest but grasping. In all those ways, today's decision takes aim, we fear, at the rule of law.

III

. . . *Roe* has stood for fifty years. *Casey*, a precedent about precedent specifically confirming *Roe*, has stood for thirty. And the doctrine of *stare decisis*—a critical element of the rule of law—stands foursquare behind their continued existence. The right those decisions established and preserved is embedded in our constitutional law, both originating in and leading to other rights protecting bodily **[*2349]** integrity, personal autonomy, and family relationships. The abortion right is also embedded in the lives of women—shaping their expectations, influencing their choices about relationships and work, supporting (as all reproductive rights do) their social and economic equality. Since the right's recognition (and affirmation), nothing has changed to support what the majority does today. Neither law nor facts nor attitudes have provided any new reasons to reach a different result than *Roe* and *Casey* did. All that has changed is this Court.

[***]

. . . (We believe that THE CHIEF JUSTICE's opinion is wrong too, but no one should think that there is not a large difference between upholding a 15-week ban on the **[*2350]** grounds he does and allowing States to prohibit abortion from the time of conception.) Now a new and bare majority of this Court—acting at practically the first moment possible—overrules *Roe* and *Casey*. It converts a series of dissenting opinions expressing antipathy toward *Roe* and *Casey* into a decision greenlighting even total abortion bans. . . . It eliminates a 50-year-old constitutional right that safeguards women's freedom and equal station. It breaches a core rule-of-law principle, designed to promote constancy in the law. In doing all of that, it places in jeopardy other rights, from contraception to same-sex intimacy and marriage. And finally, it undermines the Court's legitimacy.

Casey itself made the last point in explaining why it would not overrule *Roe*—though some members of its majority might not have joined *Roe* in the first instance. . . .

[***]

. . . In overruling *Roe* and *Casey*, this Court betrays its guiding principles.

With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent.

Puerto Rico Federal Relations Act of 1950, Pub. L. No. 81-600

Whereas the Congress of the United States by a series of enactments has progressively recognized the right of self-government of the people of Puerto Rico; and

Whereas under the terms of these congressional enactments an increasingly large measure of self-government has been achieved: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, fully recognizing the principle of government by consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption.

Sec. 2. This Act shall be submitted to the qualified voters of Puerto Rico for acceptance or rejection through an island-wide referendum to be held in accordance with the laws of Puerto Rico. Upon the approval of this Act by a majority of the voters participating in such referendum, the Legislature of Puerto Rico is authorized to call a constitutional convention to draft a constitution for the said island of Puerto Rico.

Sec. 3. Upon adoption of the constitution by the people of Puerto Rico, the President of the United States is authorized to transmit such constitution to the Congress of the United States if he finds that such constitution conforms with the applicable provisions of this Act and the Constitution of the United States.

Upon approval by the Congress the constitution shall become effective in accordance with its terms.

[***]

UNITED STATES v. Jose Luis VAELLO MADERO

142 S. Ct. 1539 (2022)
United States Supreme Court
April 21, 2022

Judges: Kavanaugh, J., delivered the opinion of the Court, in which Roberts, C. J., and Thomas, Breyer, Alito, Kagan, Gorsuch, and Barrett, JJ., joined. Thomas, J., and Gorsuch, J., filed concurring opinions. Sotomayor, J., filed a dissenting opinion.

JUSTICE KAVANAUGH delivered the opinion of the Court.

The United States includes five Territories: American Samoa, Guam, the Northern Mariana Islands, the U. S. Virgin Islands, and Puerto Rico. This case involves Puerto Rico, which became a U. S. Territory in 1898 in the wake of the Spanish-American War.

For various historical and policy reasons, including local autonomy, Congress has not required residents of Puerto Rico to pay most federal income, gift, estate, and excise taxes. Congress has likewise not extended certain federal benefits programs to residents of Puerto Rico.

[I] The question presented is whether the equal-protection component of the Fifth Amendment's Due Process Clause requires Congress to make Supplemental Security Income benefits available to residents of Puerto Rico to the same extent that Congress makes those benefits available to residents of the States. In light of the text of the Constitution, longstanding historical practice, and this Court's precedents, the answer is no.

***

The Territory Clause of the Constitution states that Congress may "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." Art. IV, §3, cl. 2. The text of the Clause affords Congress broad authority to legislate with respect to the U. S. Territories.

Exercising that authority, Congress sometimes legislates differently with respect to the Territories, including Puerto Rico, than it does with respect to the States. That longstanding congressional practice reflects both national and local considerations. In tackling the many facets of territorial governance, Congress must make numerous

policy judgments that account not only for the needs of the United States as a whole but also for (among other things) the unique histories, economic conditions, social circumstances, independent policy views, and relative autonomy of the individual Territories.

Of relevance here, Congress must decide how to structure federal taxes and benefits for residents of the Territories. In doing **[*1542]** so, Congress has long maintained federal tax and benefits programs for residents of Puerto Rico and the other Territories that differ in some respects from the federal tax and benefits programs for residents of the 50 States.

On the tax side, for example, residents of Puerto Rico are typically exempt from most federal income, gift, estate, and excise taxes. See 39 Stat. 954, as amended, 48 U. S. C. §734; see, *e.g.*, 26 U. S. C. §§933, 2209, 4081-4084. At the same time, residents of Puerto Rico generally pay Social Security, Medicare, and unemployment taxes. 26 U. S. C. §§3121(e), 3306(j).

On the benefits side, residents of Puerto Rico are eligible for Social Security and Medicare. §3121(e); 42 U. S. C. §§410(h)-(i), 1301(a)(1). Residents of Puerto Rico are also eligible for federal unemployment benefits. 26 U. S. C. §3306(j); see also House Committee on Ways and Means, Green Book: Background Material and Data on the Programs Within the Jurisdiction of the Committee on Ways and Means, App. A (24th ed. 2018).

But just as not every federal tax extends to residents of Puerto Rico, so too not every federal benefits program extends to residents of Puerto Rico. One example is the Supplemental Security Income program, which Congress passed and President Nixon signed into law in 1972. 86 Stat. 1465. The Supplemental Security Income program provides benefits for, among others, those who are age 65 or older and cannot financially support themselves.

To be eligible for Supplemental Security Income, an individual must be a "resident of the United States," 42 U. S. C. §1382c(a)(1)(B)(i), which the statute defines as the 50 States and the District of Columbia, §1382c(e). A later statute included residents of the Northern Mariana Islands in the program. Note following 48 U. S. C. §1801; 90 Stat. 268. But residents of Puerto Rico are not eligible for Supplemental Security Income. Instead, the Federal Government provides supplemental income assistance to covered residents of Puerto Rico through a different benefits program—one that is funded in part by the Federal Government and in part by Puerto Rico. Notes following §§1381-1385.

[F] The dispute in this case concerns a claim for Supplemental Security Income benefits by a resident of Puerto Rico named Jose Luis Vaello Madero. In 2013, Vaello Madero moved from New York to Puerto Rico. While he lived in New York, Vaello Madero received Supplemental Security Income benefits. After moving to Puerto Rico, Vaello Madero no longer was eligible for Supplemental Security Income benefits. Yet for several years, the U. S. Government remained unaware of Vaello Madero's new residence and continued to pay him benefits. The overpayment totaled more than $28,000.

[P] Seeking to recover those errant payments, the U. S. Government sued Vaello Madero for restitution. In response, Vaello Madero invoked the U. S. Constitution.

Vaello Madero argued that Congress's exclusion of residents of Puerto Rico from the Supplemental Security Income program violated the equal-protection component of the Fifth Amendment's Due Process Clause.

Vaello Madero's constitutional argument prevailed in the District Court and the Court of Appeals, 956 F. 3d 12 (CA1 2020), and we granted certiorari, 592 U. S. ___, 141 S. Ct. 1462, 209 L. Ed. 2d 179 (2021). We respectfully disagree with those Courts. In our view, this Court's precedents, in addition to the constitutional text and historical practice discussed above, establish that Congress may distinguish the **[*1543]** Territories from the States in tax and benefits programs such as Supplemental Security Income, so long as Congress has a rational basis for doing so.

In *Califano* v. *Torres*, the Court addressed whether Congress's decision not to extend Supplemental Security Income to Puerto Rico violated the constitutional right to interstate travel. 435 U.S. 1, 98 S. Ct. 906, 55 L. Ed. 2d 65 (1978) (*per curiam*). Applying the deferential rational-basis test, the Court upheld Congress's decision. . . .

A few years later, in *Harris* v. *Rosario*, the Court again ruled that Congress's differential treatment of Puerto Rico in a federal benefits program did not violate the Constitution—this time, the equal-protection component of the Fifth Amendment's Due Process Clause. 446 U. S. 651, 100 S. Ct. 1929, 64 L. Ed. 2d 587 (1980) (*per curiam*). . . .

Those two precedents dictate the result here. The deferential rational-basis test applies. And Puerto Rico's *tax* status—in particular, the fact that residents of Puerto Rico are typically exempt from most federal income, gift, estate, and excise taxes—supplies a rational basis for likewise distinguishing residents of Puerto Rico from residents of the States for purposes of the Supplemental Security Income *benefits* program. . . . In devising tax and benefits programs, it is reasonable for Congress to take account of the general balance of benefits to and burdens on the residents of Puerto Rico. In doing so, Congress need not conduct a dollar-to-dollar comparison of how its tax and benefits programs apply in the States as compared to the Territories, either at the individual or collective level. . . . Congress need only have a rational basis for its tax and benefits programs. Congress has satisfied that requirement here.

Moreover, Vaello Madero's position would usher in potentially far-reaching consequences. For one, Congress would presumably need to extend not just Supplemental Security Income but also many other federal benefits programs to residents of the Territories in the same way that those programs cover residents of the States. And if this Court were to require identical treatment on the benefits side, residents of the States could presumably insist that federal *taxes* be imposed on residents of Puerto Rico and other Territories in the same way that those taxes are imposed on residents of the States. Doing that, however, would inflict significant new financial burdens on residents of Puerto Rico, with serious implications for the Puerto Rican people and the Puerto Rican economy. The Constitution does not require that extreme outcome.*

***

*The Court's decision today should not be read to imply that Congress may exclude residents of individual States from benefits programs. Congress has not done so, and that question is not presented in this case.

[*1544] The Constitution affords Congress substantial discretion over how to structure federal tax and benefits programs for residents of the Territories. Exercising that discretion, Congress *may* extend Supplemental Security Income benefits to residents of Puerto Rico. Indeed, the Solicitor General has informed the Court that the President supports such legislation as a matter of policy. But the limited question before this Court is whether, under the Constitution, Congress *must* extend Supplemental Security Income to residents of Puerto Rico to the same extent as to residents of the States. The answer is no. We therefore reverse the judgment of the U. S. Court of Appeals for the First Circuit.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the opinion of the Court. I write separately to address the premise that the Due Process Clause of the Fifth Amendment contains an equal protection component whose substance is "precisely the same" as the Equal Protection Clause of the Fourteenth Amendment. *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 638, n. 2. Although I have joined the Court in applying this doctrine, see *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 213-217 (1995), I now doubt whether it comports with the original meaning of the Constitution. Firmer ground for prohibiting the Federal Government from discriminating on the basis of race, at least with respect to civil rights, may well be found in the Fourteenth Amendment's Citizenship Clause.

I

Until the middle of the 20th century, this Court consistently recognized that the Fifth Amendment "contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress." *Detroit Bank* v. *United States*, 317 U. S. 329, 337 (1943); see also *LaBelle Iron Works* v. *United States*, 256 U. S. 377, 392, 41 S. Ct. 528, 65 L. Ed. 998, 56 Ct. Cl. 476, T.D. 3181 (1921). However, the Court did maintain that the Fifth Amendment's Due Process Clause prohibited "such discriminatory legislation by Congress as amounts to a denial of due process," *i.e.*, legislation that would fail rational-basis review. *Hirabayashi* v. *United States*, 320 U. S. 81, 100, 102 (1943).

In *Bolling* v. *Sharpe*, 347 U. S. 497, the Court began in earnest to fold an "equal protection" guarantee into the concept of "due process.". . . *Bolling* . . . read an equal protection principle into the Fifth Amendment's requirement that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." See 347 U. S., at 498-500.

Bolling's locating of an equal protection guarantee in the Fifth Amendment's Due Process Clause raises substantial questions. First, *Bolling*'s interpretation seemingly relies upon the *Lochner*-era theory **[*1545]** that "unreasonable discrimination" is "a denial of due process of law." 347 U. S., at 499 (citing *Buchanan* v. *Warley*, 245 U. S. 60 (1917)) . . . .

[***]

Second, *Bolling* reasoned that the "liberty" protected by the Due Process Clause covers "the full range of conduct which the individual is free to pursue," 347 U. S., at

499-500, and therefore guaranteed freedom from segregated schooling. That understanding of "liberty" likely sweeps too broadly. . . . Consequently, if "liberty" in the Due Process Clause does not include any rights to public benefits, it is unclear how that provision can constrain the regulation of access to those benefits.

Third, although the *Bolling* Court claimed that its decision "d[id] not imply that [due process and equal protection] are always interchangeable phrases," 347 U. S., at 499, 74 S. Ct. 693, 98 L. Ed. 884, its logic led this Court to later erase any distinction between them. . . .

Fourth, *Bolling* asserted that because the Constitution prohibits States from racially segregating public schools, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." 347 U. S., at 500, 74 S. Ct. 693, 98 L. Ed. 884. For one, such moral judgments lie beyond the commission of the federal courts. For another, the assertion is debatable at best. . . .

[*1547] In sum, the text and history of the Fifth Amendment's Due Process Clause provide limited support for reading into that provision an equal protection guarantee.

II

Even if the Due Process Clause has no equal protection component, the Constitution may still prohibit the Federal Government from discriminating on the basis of race, at least with respect to civil rights. While my conclusions remain tentative, I think that the textual source of that obligation may reside in the Fourteenth Amendment's Citizenship Clause. That Clause provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Amdt. 14, §1, cl. 1. . . . Thus, the Citizenship Clause could provide a firmer foundation for *Bolling*'s result than the Fifth Amendment's Due Process Clause.

A

In the years before the Fourteenth Amendment's adoption, jurists and legislators often connected citizenship with equality. Namely, the absence or presence of one entailed the absence or presence of the other. See Williams 513-515 (discussing political discourse during the 1820s). . . .

[***]

After the Civil War, the Nation again confronted the citizenship status of black Americans. Though they were no longer slaves in light of the Thirteenth Amendment, the question remained whether, by virtue of their freedom from bondage, these native-born men and women were "citizens." . . .

In response, Congress enacted the Civil Rights Act of 1866 to both repudiate *Dred Scott* and eradicate the Black Codes. The 1866 Act contained a citizenship clause similar to the Fourteenth Amendment's: "[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." Act of Apr. 9, 1866, 14 Stat. 27. The provision immediately succeeding that citizenship guarantee clarified that "such citizens, of every race and color" were entitled to

> "the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other." *Ibid.*

Fleshing out the implications of the citizenship declaration, this clause suggests that the right to be free of racial discrimination with respect to the enjoyment of certain rights is a constituent part of citizenship.

[***]

B

[***]

While the historical evidence above is by no means conclusive, it offers substantial support for the proposition that, by conferring citizenship, the Citizenship Clause guarantees citizens equal treatment by the Federal Government with respect to civil rights.

***

. . . The Citizenship Clause's conferral of the "dignity and glory of American citizenship" may well prohibit the Federal Government from denying citizens equality with respect to civil rights. Rather than continue to invoke the Fifth Amendment's Due Process Clause to justify *Bolling*, in an appropriate case, we should more carefully consider whether this interpretation of the Citizenship Clause would yield a similar, and more supportable, result.

JUSTICE GORSUCH, concurring.

A century ago in the Insular Cases, this Court held that the federal government could rule Puerto Rico and other Territories largely without regard to the Constitution. It is past time to acknowledge the gravity of this error and admit what we know to be true: The Insular Cases have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.

I

. . . Ostensibly waged to liberate Cuba and avenge the sinking of the *Maine*, the Spanish-American War proved a boon for the country's burgeoning colonial ambitions. . . . The aging Spanish empire was in no position to defend its island possessions, and several fell to American forces in quick succession. . . . Under the ensuing peace treaty signed in 1898, the United States took possession of Puerto Rico, Guam, and the Philippines. Treaty of Paris, Arts. 1-3, Dec. 10, 1898, 30 Stat. 1755-1756.

But these acquisitions, hard on the heels of the annexation of Hawaii, soon ignited a fierce debate. Some argued that our republican traditions prevented the United States from governing distant possessions as subservient colonies without regard to the Constitution. Others sought to devise new theories by which Congress could permanently rule the country's new acquisitions as a European power might, unrestrained by domestic law. . . .

Leading members of the legal academy provided influential support for those in the second camp. . . .

The debate over American colonialism made its first appearance in this Court in the form of a tax dispute in *Downes* v. *Bidwell*, 182 U. S. 244, 21 S. Ct. 770, 45 L. Ed. 1088 (1901). Pursuant to the Foraker Act, Congress erected a civil government in Puerto Rico and imposed a tax on goods exported to, or imported from, the new Territory. See Act of Apr. 12, 1900, ch. 191, §§ 2-3, 31 Stat. 77-78. After incurring a $659.35 tax bill, an importer challenged the Act as inconsistent with the Constitution's Tax Uniformity Clause, [***35] which provides that "all Duties, Imposts, and Excises shall be uniform throughout the United States." Art. I, § 8, cl. 1; *Downes*, 182 U. S., at 247, 249, 21 S. Ct. 770, 45 L. Ed. 1088.

To answer the question whether the Act complied with the Constitution, the Court resolved that it first had to decide whether the Constitution applied *at all* in Puerto Rico. Ultimately, a fractured set of opinions emerged. Employing arguments similar to those advanced by Professors Langdell and Thayer, Justice Brown [**513] saw things in the starkest terms. Applying the Constitution made sense in "contiguous territor[ies] inhabited only by people of the same race, or by scattered bodies of native Indians." *Id.*, at 282, 21 S. Ct. 770, 45 L. Ed. 1088. But it would not do for islands "inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought." *Id.*, at 287, 21 S. Ct. 770, 45 L. Ed. 1088. There, Justice Brown contended, "the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible." *Ibid.* On his view, the Constitution should reach Puerto Rico only if and when Congress so directed. *Id.*, at 279, 21 S. Ct. 770, 45 L. Ed. 1088.

Justice White offered a different theory that drew on Professor Lowell's thinking. See Developments in the Law—The [***36] U. S. Territories, 130 Harv. L. Rev. 1616, 1617-1620 (2017). To Justice White, the Constitution's application depended on "the situation of the territory and its relations to the United States." *Downes*, 182 U. S., at 293, 21 S. Ct. 770, 45 L. Ed. 1088 (concurring opinion). In some cases, Congress might express an intention to "incorporate" a Territory into the United States at a future date; in a Territory like that the Constitution must apply fully and immediately. *Id.*, at 339, 21 S. Ct. 770, 45 L. Ed. 1088. But in other cases, Justice White argued, only "fundamental" (if unspecified) aspects of the Constitution should have force. *Id.*, at 291, 21 S. Ct. 770, 45 L. Ed. 1088. In his judgment, Puerto Rico fell into this second category and remained "foreign to the United States" because, unlike Territories in the American West, Congress had not done enough to indicate its intention to "incorporate" the island. *Id.*, at 341-342, 21 S. Ct. 770, 45 L. Ed. 1088. Still, it would be a mistake to overstate the gap between the theories advanced by Justice White and Justice Brown. At bottom, both rested on a view about the Nation's "right" to acquire and exploit "an unknown island, peopled with an uncivilized race . . . for commercial and strategic reasons"—a right that "could not be practically exercised if the result [***37] would be to endow" full constitutional protections "on those absolutely unfit to receive [them]." *Id.*, at 306, 21 S. Ct. 770, 45 L. Ed. 1088 (White, J., concurring).

[*1554] In dissent, Chief Justice Fuller expressed astonishment that Congress could "keep [a Territory], like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period." *Id.*, at 372. Justice Harlan criticized the

Court for "engraft[ing] upon our republican institutions a colonial system such as exists under monarchical governments." *Id.*, at 380. And Justice Harlan dismissed Justice White's supposed middle ground, which he could find nowhere in the Constitution's terms: "I am constrained to say that this idea of 'incorporation' has some occult meaning which my mind does not apprehend." *Id.*, at 391.

Later decisions blurred the line between Justice Brown's approach and Justice White's even further. Eventually, a majority embraced Justice White's "incorporation" theory, including its suggestion that certain constitutional protections are "fundamental" and therefore apply even in far-flung "unincorporated" possessions. [**514] *Dorr* v. *United States*, 195 U. S. 138, 148-149, 24 S. Ct. 808, 49 L. Ed. 128 (1904). At the same time, it became clear that very few constitutional [***38] limits on the power of the federal government could be relied upon in the newly acquired Territories absent a clear congressional statement. See, *e.g.*, *Hawaii* v. *Mankichi*, 190 U. S. 197, 215-216, 23 S. Ct. 787, 47 L. Ed. 1016 (1903) (opinion of Brown, J.); *id.*, at 218-219, 23 S. Ct. 787, 47 L. Ed. 1016 (White, J., concurring); Cf. S. Laughlin, The Burger Court and the United States Territories, 36 U. Fla. L. Rev. 755, 773 (1984) ("[W]hile Justice White had won the battle over which doctrine should nominally prevail, Justice Brown had won the war").

Even the right to trial by jury, the Court concluded, was not fundamental enough to apply in unincorporated Territories like Puerto Rico. *Balzac* v. *Porto Rico*, 258 U. S. 298, 306, 308-310, 42 S. Ct. 343, 66 L. Ed. 627 (1922). It did not matter to the Court that, by the time it reached the question, Congress had already granted Puerto Ricans U. S. citizenship. See Act of Mar. 2, 1917, § 5, 39 Stat. 953. In the Court's estimation, the "locality [was] determinative of the application of the Constitution, . . . not the status of the people who live in it." *Balzac*, 258 U. S., at 309, 42 S. Ct. 343, 66 L. Ed. 627. And, on the Court's account, Puerto Rico's "localities" included "compact and ancient communities" that had not yet developed the "impartial attitude" or [***39] "conscious duty of participation" required of citizens by the "Anglo-Saxon" jury trial. *Id.*, at 310, 42 S. Ct. 343, 66 L. Ed. 627.

II

The flaws in the Insular Cases are as fundamental as they are shameful. Nothing in the Constitution speaks of "incorporated" and "unincorporated" Territories. Nothing in it extends to the latter only certain supposedly "fundamental" constitutional guarantees. Nothing in it authorizes judges to engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion.

The Insular Cases can claim support in academic work of the period, ugly racial stereotypes, and the theories of social Darwinists. But they have no home in our Constitution or its original understanding. . . .

The Insular Cases' departure from the Constitution's original meaning has never been much of a secret. Even commentators at the time understood that the notion of territorial incorporation was a thoroughly modern invention. The Insular Cases deviated, too, from this Court's prior and longstanding understanding of the Constitution . . . In between, this Court reached similar conclusions in case after case.

With the passage of time, this Court has come to admit discomfort with the Insular Cases . . . But instead of confronting their errors directly, this Court has devised a workaround. Employing the specious logic of the Insular Cases, the Court has proceeded to declare "fundamental"—and thus applicable even to "unincorporated" Territories—more and more of the Constitution's guarantees. . . .

That solution is no solution. It leaves the Insular Cases on the books. Lower courts continue to feel constrained to apply their terms. . . . And the fictions of the Insular Cases on which this workaround depends are just that. What provision of the Constitution could any judge rightly declare less than fundamental? On what basis could any judge profess the right to **[*1556]** draw distinctions between incorporated and unincorporated Territories, terms nowhere mentioned in the Constitution and which in the past have turned on bigotry? There are no good answers to these bad questions.

This workaround, too, has proven as ineffectual as it is inappropriate. Perhaps this Court can continue to drain the Insular Cases of some of their poison by declaring provision after provision of the Constitution "fundamental" and thus operative in "unincorporated" Territories. But even one hundred years on, that pitiable job remains unfinished. Still today under this Court's cases we are asked to believe that the right to a trial by jury remains insufficiently "fundamental" to apply to some 3 million U. S. citizens in "unincorporated" Puerto Rico. At the same time, the full panoply of constitutional rights apparently applies on the Palmyra Atoll, an uninhabited patch of land in the Pacific Ocean, because it represents our Nation's only remaining "incorporated" Territory. It is an implausible and embarrassing state of affairs.

The case before us only defers a long overdue reckoning. Rather than ask the Court to overrule the Insular Cases, both sides in this litigation work from the shared premise that the equal protection guarantee under which Mr. Vaello Madero brings his claim is a "fundamental" feature of the Constitution and thus applies in "unincorporated" Territories like Puerto Rico. . . . Proceeding on the parties' shared premise, the Court applies the Constitution and holds that the conduct challenged here does not offend its terms. All that may obviate the necessity of overruling the Insular Cases today. But it should not obscure what we know to be true about their errors, and in an appropriate case I hope the Court will soon recognize that the Constitution's application should never turn on a governmental concession or the misguided framework of the Insular Cases. . . . We should settle this question right.

To be sure, settling this question right would raise difficult new ones. Cases would no longer turn on the fictions of the Insular Cases but on the terms of the Constitution itself. Disputes are sure to arise about exactly which of its individual provisions applies in the Territories and how. Some of these new questions may prove hard to resolve. But at least they would be the right questions. And at least courts would employ legally justified tools to answer them, including not just the Constitution's text and its original understanding but the Nation's historical practices (or at least those uninfected by the Insular Cases). . . . Nor, in any event, can the difficulty of the task supply an excuse for neglecting it.

*

Because no party asks us to overrule the Insular Cases to resolve today's dispute, I join the Court's opinion. But the time has come to recognize that the Insular Cases rest on a rotten foundation. [***45] And I hope the day comes soon when the Court

squarely overrules them. We should follow Justice Harlan and settle this question right. Our fellow Americans in Puerto Rico deserve no less.

JUSTICE SOTOMAYOR, dissenting.

The Supplemental Security Income (SSI) program provides a guaranteed minimum income to certain vulnerable citizens who lack the means to support themselves. If they meet uniform federal eligibility criteria, recipients are entitled to SSI regardless of their contributions, or their State's contributions, to the United States Treasury, which funds the program. Despite these broad eligibility criteria, today the Court holds that Congress' decision to exclude citizen residents of Puerto Rico from this important safety-net program is consistent with the Fifth Amendment's equal protection guarantee. I disagree. In my view, there is no rational basis for Congress to treat needy citizens living anywhere in the United States so differently from others. To hold otherwise, as the Court does, is irrational and antithetical to the very nature of the SSI program and the equal protection of citizens guaranteed by the Constitution. I respectfully dissent.

I

Congress' enactment of the SSI program in 1972 represented a major change in the Federal Government's relationship with States and Territories in assisting low-income individuals. Prior to 1972, means-based assistance for people over the age of 64, blind people, or those with disabilities came in the form of programs administered and funded by States and supplemented with matching federal funds. . . . One of those programs was known as Aid to the Aged, Blind, and Disabled (AABD). Under AABD, the States and Territories set their own income and asset limits for individual participation and determined their own benefit amounts. . . . The Federal Government paid 75% of the benefits and 50% of the administrative costs, subject to a statutory cap on total expenditures. . . .

To provide a uniform, guaranteed minimum income for the neediest adults, Congress **[*1558]** established the SSI program in 1972. . . .Rather than dispensing money through block grants to the States, SSI provides monthly cash benefits directly to qualifying low-income individuals who are over 65 years old, blind, or disabled. The Federal Government sets uniform qualifications for eligibility and fully funds the program through mandatory appropriations from the general fund of the United States Treasury. . . . Unlike AABD benefits, SSI benefits do not vary based on the specific State or Territory that a beneficiary is located in, as long as the beneficiary is otherwise eligible. In sum, SSI created a fully nationalized assistance program with federal administration, federal determination of eligibility, and financed entirely from federal funds.

When Congress created SSI, it made the program available only to "resident[s] of the United States," and it defined United States as including "the 50 States and the District of Columbia." 42 U. S. C. §§1382c(a)(1)(B)(i), (e). Congress later extended the SSI program to residents of the Commonwealth of the Northern Mariana Islands. 90 Stat. 263, note following 48 U. S. C. §1801.

Although Puerto Rico is not a State, it has been part of the United States for well over a century, and people born in Puerto Rico are U. S. citizens. In other contexts, Congress has made clear that references to the "United States" include Puerto Rico.

See, *e.g.*, 52 U. S. C. §20310(8). In this context, however, Congress did not extend the SSI program to Puerto Rico and other Territories. Instead, Congress left in place the AABD program. . . .

Congress' decision not to include Puerto Rico in the SSI program has a significant impact on U. S. citizens in Puerto Rico. In 2021, 34,224 residents of Puerto Rico were enrolled in the AABD program; by contrast, in 2011, the Government Accountability Office estimates that over 300,000 Puerto Rico residents would have qualified for SSI. Brief for Hon. Jenniffer A. Gonzalez Colon, Resident Commissioner for Puerto Rico, as *Amicus Curiae* 28, 34. The 34,224 Puerto Rico residents enrolled in AABD in 2021 received an average of $82 per month, compared to the $574 per month that the average SSI recipient received in Fiscal Year 2020. *Id.*, at 29, 33. In other words, significantly fewer Puerto Rico residents are eligible for AABD than would be eligible for SSI, and the benefits they receive under AABD are hardly comparable to those they would likely receive under SSI.

II

Jose Luis Vaello Madero is a U. S. citizen who was born in Puerto Rico in 1954. In 1985, he moved to New York, and in 2012, while still living in New [**519] York, he began receiving SSI after suffering from a serious illness. Approximately one year later, Vaello Madero moved back to Puerto Rico. Vaello Madero continued to receive monthly SSI payments of between $733 [*1559] and $808 via direct deposit after he returned to Puerto Rico.

In June 2016, Vaello Madero, approaching his 62d birthday, went to a Social Security Administration office in Puerto Rico to apply for Title II Social Security benefits. As a result, the Social Security Administration learned that Vaello Madero had moved from New York to Puerto Rico, and within two months, the Administration reduced his SSI benefits to $0, retroactively effective to August 2013. By letter, the Administration notified Vaello Madero that he was "outside of the United States" while he was living in Puerto Rico. App. 39, 45.

In 2017, the United States filed suit against Vaello Madero to recover the $28,081 (plus interest, costs, and attorney's fees) that it calculated Vaello Madero had illegally cashed while he resided in Puerto Rico. As an affirmative defense to the suit, Vaello Madero claimed that excluding U. S. citizens who reside in Puerto Rico from the SSI program violated the equal protection guarantee of the Fifth Amendment. The United States District Court for the District of Puerto Rico agreed, granting summary judgment to Vaello Madero.

The Court of Appeals unanimously affirmed. . . .

The United States petitioned this Court for a writ of certiorari, which we granted. 592 U. S. ___, 141 S. Ct. 1462 (2021).

III

In general, the Equal Protection Clause guarantees that the Government will treat similarly situated individuals in a similar manner. Equal protection does not foreclose the Government's ability to classify persons or draw lines when creating and

applying laws, but it does guarantee that the Government cannot base those classifications upon impermissible criteria or use them arbitrarily to burden a particular group of individuals. . . .

Rational-basis review is a deferential standard . . . .

[Still:] Congress' decision to exclude millions of U. S. citizens who reside in Puerto Rico from the SSI program fails even this deferential test.[4]

A

[***]

The Court holds that our prior decisions in *Califano* v. *Torres*, 435 U. S. 1, 98 S. Ct. 906, 55 L. Ed. 2d 65 (1978) (*per curiam*), and *Harris* v. *Rosario*, 446 U. S. 651, 100 S. Ct. 1929, 64 L. Ed. 2d 587 (1980) (*per curiam*), require acceptance of this rationale. *Ante*, at 4-5. It is true that both *Califano* and *Harris* relied on Puerto Rico's tax status to justify the unequal treatment of its residents. See *Califano*, 435 U. S., at 5, n. 7, 98 S. Ct. 906, 55 L. Ed. 2d 65; *Harris*, 446 U. S., at 652, 100 S. Ct. 1929, 64 L. Ed. 2d 587. Neither case, however, stood for the principle that Puerto Rico's tax status could justify any and all unequal treatment of its residents, and neither addressed the claims at issue here. *Califano* resolved a claim under the right to travel, while *Harris* decided a challenge to the unequal distribution of block grants to the States and Puerto Rico under a separate benefits program. Those cases do not preclude an equal protection challenge to a uniform, federalized, direct-to-individual poverty reduction program like SSI. Moreover, as summary dispositions, *Califano* and *Harris* are not "of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). And both *Califano* and *Harris* rested on the mistaken premise that residents of Puerto Rico do not contribute at all to the Federal Treasury. *Califano*, 435 U. S., at 5, n. 7; *Harris*, 446 U. S., at 652. Here, the United States concedes that "residents of Puerto Rico make some contributions to the federal treasury." Brief for United States 19 (emphasis deleted).

Moreover, the Court overlooks the fact that SSI establishes a direct relationship between the recipient and the Federal Government. The Federal Government develops **[*1561]** uniform eligibility criteria, recipients apply for assistance directly to the Federal Government, and the Federal Government disburses funds directly and uniformly to recipients without regard to where they reside. Indeed, when it created SSI, Congress replaced existing programs that differed between States as well as between States and Territories and that involved States and Territories in administering the programs. Under the current system, the jurisdiction in which an SSI recipient resides has no bearing at all on the purposes or requirements of the SSI program. For this reason alone, it is irrational to tie an individual's entitlement to SSI to that individual's place of residency.

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[4] Because I would hold that this classification does not survive rational basis, I do not consider whether the differential treatment of citizens who reside in Puerto Rico requires a heightened standard of review, as the District Court held. See 356 F. Supp. 3d 208, 214-215 (PR 2019). In addition, because the Government disclaims any reliance on the Insular Cases, Tr. of Oral Arg. 8-9, I do not address those cases in my analysis. I do agree, however, with Justice Gorsuch's view that it "is past time to acknowledge the gravity" of the error of the Insular Cases. . . . Those cases were premised on beliefs both odious and wrong . . . .

While it is true that residents of Puerto Rico typically are exempt from paying some federal taxes, that distinction does not create a rational basis to distinguish between them and other SSI recipients. By definition, SSI recipients pay few if any taxes at all, as the First Circuit correctly recognized below . . . . 956 F. 3d, at 27. In fact, to qualify for SSI, recipients must have an income well below the standard deduction for single tax filers. *Ibid.* It is "antithetical to the entire premise of the program" to hold that Congress can exclude citizens who can scarcely afford to pay any taxes at all on the basis that they do not pay enough taxes. *Ibid.*

In some cases, it might be "reasonable for Congress to take account of the general balance of benefits to and burdens on" citizens when deciding eligibility for benefits. *Ante*, at 5. That is not a rational basis for this classification, however, because SSI is a means-tested program of last resort for the poorest Americans who lack the means even to pay taxes. Residents of Puerto Rico who would be eligible for SSI are like SSI recipients in every material respect: They are needy U. S. citizens living in the United States.

B

. . . It bears noting that tax status did not preclude Congress' extension of SSI to the Northern Mariana Islands, undermining that justification as a rational basis to distinguish Puerto Rico from the States. In any event, the Court identifies no federal program other than SSI that operates in such a uniform, nationalized, and direct manner. For instance, the Supplemental Nutrition Assistance Program is administered by local governments. See Brief for Public Benefits Scholars as *Amici Curiae* 8-9. That distinction alone may justify differential treatment by jurisdiction of residence.

[*1562] In fact, it is the Court's holding that might have dramatic repercussions. If Congress can exclude citizens from safety-net programs on the ground that they reside in jurisdictions that do not pay sufficient taxes, Congress could exclude needy residents of Vermont, Wyoming, South Dakota, North Dakota, Montana, and Alaska from benefits programs on the basis that residents of those States pay less into the Federal Treasury than residents of other States. Congress has never enacted a uniform, nationalized direct assistance program, and then excluded entire States on the basis that the taxpaying residents of that State do not pay sufficient federal taxes. The Court's holding today suggests that doing so would be constitutional and not a violation of the Constitution's promise of equal protection of citizens.

***

SSI is designed to support the neediest citizens. As a program of last resort, it is aimed at preventing the most severe poverty. In view of that core purpose, denying benefits to hundreds of thousands of eligible Puerto Rico residents because they do not pay enough in taxes is utterly irrational.

Congress' decision to deny to the U. S. citizens of Puerto Rico a social safety net that it provides to almost all other U. S. citizens is especially cruel given those citizens' dire need for aid. Puerto Rico has a disproportionately large population of seniors and people with disabilities. . . . The Census Bureau estimated that in 2019, 43.5% of residents of Puerto Rican residents lived below the poverty line—more than triple the national percentage of 12.3%. See C. Benson, American Community Survey Briefs,

Poverty: 2018 and 2019, p. 5 (Sept. 2020), https://www.census.gov/content/dam/Census/ library/publications/2020/acs/acsbr20-04.pdf.

Equal treatment of citizens should not be left to the vagaries of the political process. Because residents of Puerto Rico do not have voting representation in Congress, they cannot rely on their elected representatives to remedy the punishing disparities suffered by citizen residents of Puerto Rico under Congress' unequal treatment.

The Constitution permits Congress to "make all needful Rules and Regulations" respecting the Territories. Art. IV, §3, cl. 2. That constitutional command does not permit Congress to ignore the equally weighty constitutional command that it treat United States citizens equally. I respectfully dissent.

SIERRA CLUB, v. Rogers C. B. MORTON, Individually and as Secretary of the Interior of the United States, *et al.*

405 U.S. 727 (1972)
Supreme Court of the United States
April 19, 1972

Stewart, J., delivered the opinion of the Court, in which Burger, C. J., and White and Marshall, JJ., joined. Douglas . . . , Brennan . . . , and Blackmun, J[J]., filed dissenting opinions. Powell and Rehnquist, JJ., took no part in the consideration or decision of the case.

Mr. Justice STEWART delivered the opinion of the Court.

I

[F] The Mineral King Valley is an area of great natural beauty nestled in the Sierra Nevada Mountains in Tulare County, California, adjacent to Sequoia National Park. It has been part of the Sequoia National Forest since 1926, and is designated as a national game refuge by special Act of Congress. Though once the site of extensive mining activity, Mineral King is now used almost exclusively for recreational purposes. Its relative inaccessibility and lack of development have limited the number of visitors each year, and at the same time have preserved the valley's quality as a quasi-wilderness area largely uncluttered by the products of civilization.

The United States Forest Service, which is entrusted with the maintenance and administration of national forests, began in the late 1940's to give consideration to Mineral King as a potential site for recreational development. Prodded by a rapidly increasing demand for skiing facilities, the Forest Service published a prospectus in 1965, inviting bids from private developers for the construction and operation of a ski resort that would also serve as a summer recreation area. The proposal of Walt Disney Enterprises, Inc., was chosen from those of six bidders, and Disney received a three-year permit to conduct surveys and explorations in the valley in connection with its preparation of a complete master plan for the resort.

The final Disney plan, approved by the Forest Service in January 1969, outlines a $35 million complex of motels, restaurants, swimming pools, parking lots, and other structures designed to accommodate 14,000 visitors daily. This complex is to be constructed on 80 acres of the valley floor under a 30-year use permit from the Forest Service. Other facilities, including ski lifts, ski trails, a cog-assisted railway, and utility installations, are to be constructed on the mountain slopes and in other parts of

the valley under a revocable special-use permit. To provide access to the resort, the State of California proposes to construct a highway 20 miles in length. A section of this road would traverse Sequoia National Park, as would a proposed highvoltage power line needed to provide electricity for the resort. Both the highway and the power line require the approval of the Department of the Interior, which is entrusted with the preservation and maintenance of the national parks.

Representatives of the Sierra Club, who favor maintaining Mineral King largely in its present state, followed the progress of recreational planning for the valley with close attention and increasing dismay. They unsuccessfully sought a public hearing on the proposed development in 1965, and in subsequent correspondence with officials of the Forest Service and the Department of the Interior, they expressed the Club's objections to Disney's plan as a whole and to particular features included in it. **[P]** In June 1969 the Club filed the present suit in the United States District Court for the Northern District of California, seeking a declaratory judgment that various aspects of the proposed development contravene federal laws and regulations governing the preservation of national parks, forests, and game refuges, and also seeking preliminary and permanent injunctions restraining the federal officials involved from granting their approval or issuing permits in connection with the Mineral King project. The petitioner Sierra Club sued as a membership corporation with "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country," and invoked the judicial-review provisions of the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

After two days of hearings, the District Court granted the requested preliminary injunction. The respondents appealed, and the Court of Appeals for the Ninth Circuit reversed. 433 F.2d 24 (1970). . . . The court thus vacated the injunction. The Sierra Club filed a petition for a writ of certiorari which we granted, 401 U.S. 907 (1971), to review the questions of federal law presented.

II

[R] The first question presented is whether the Sierra Club has alleged facts that entitle it to obtain judicial review of the challenged action. Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. **[1]** Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged . . . a "personal stake in the outcome of the controversy," Baker v. Carr, 369 U.S. 186, 204 (1962). . . . **[2]** Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.

The Sierra Club relies upon § 10 of the Administrative Procedure Act (APA), 5 U.S.C. § 702, which provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Early decisions under this statute interpreted the language as adopting the various formulations of "legal interest" and "legal wrong" then prevailing as constitutional requirements of standing. **[3]** But, in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970), and Barlow v. Collins, 397 U.S. 159 (1970), decided the same day, we held more broadly that persons had standing to obtain judicial review of federal agency action under § 10 of the APA where they had alleged that the challenged action had caused them "injury in fact," and where the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies were claimed to have violated.

[4] [Palpable] economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review. [The] question . . . as to what must be alleged by persons who claim injury of a noneconomic nature to interests that are widely shared . . . , is presented in this case.

III

The injury alleged by the Sierra Club will be incurred entirely by reason of the change in the uses to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area. Thus, in referring to the road to be built through Sequoia National Park, the complaint alleged that the development 'would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations.' We do not question that this type of harm may amount to an 'injury in fact' sufficient to lay the basis for standing under § 10 of the APA. **[5]** Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.

The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort. **[6]** The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.

The Club apparently regarded an allegations of individualized injury as superfluous, on the theory that this was a "public" action involving questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters were sufficient to give it standing as a "representative of the public." This theory reflects a misunderstanding of our cases involving so-called "public actions" in the area of administrative law.

[***]

The trend of cases arising under the APA and other statutes authorizing judicial review of federal agency action has been toward recognizing that injuries other than

economic harm are sufficient to bring a person within the meaning of the statutory language, and toward discarding the notion that an injury that is widely shared is ipso facto not an injury sufficient to provide the basis for judicial review. . . . But broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.

. . . It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. . . . **[5]** But a mere "interest in a problem," no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA. The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a 'special interest' in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization however small or short-lived. And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process.[15] It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process. The principle that the Sierra Club would have us establish in this case would do just that.

As we conclude that the Court of Appeals was correct in its holding that the Sierra Club lacked standing to maintain this action, we do not reach any other questions presented in the petition, and we intimate no view on the merits of the complaint. The judgment is AFFIRMED.

Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

Mr. Justice DOUGLAS, dissenting

I share the views of my Brother BLACKMUN and would reverse the judgment below.

[1] The critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological

[15] . . . **[8]** The test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief. . . .

equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. *See* Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). This suit would therefore be more properly labeled as Mineral King v. Morton.

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole—a creature of ecclesiastical law—is an acceptable adversary and large fortunes ride on its cases. The ordinary corporation is a 'person' for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.

So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, proves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.

I do not know Mineral King. I have never seen it nor traveled it, though I have seen articles describing its proposed "development". . . .

Mineral King is doubtless like other wonders of the Sierra Nevada such as Tuolumne Meadows and the John Muir Trail. Those who hike it, fish it, hunt it, camp in it, frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be few or many. **[2]** Those who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.

[3] [The] problem is to make certain that the inanimate objects, which are the very core of America's beauty, have spokesmen before they are destroyed. It is, of course, true that most of them are under the control of a federal or state agency. The standards given those agencies are usually expressed in terms of the "public interest." Yet "public interest" has so many differing shades of meaning as to be quite meaningless on the environmental front. Congress accordingly has adopted ecological standards in the National Environmental Policy Act of 1969, Pub.L. 91—90, 83 Stat. 852, 42 U.S.C. § 4321 *et seq.*, and guidelines for agency action have been provided by the Council on Environmental Quality. . . .

Yet the pressures on agencies for favorable action one way or the other are enormous. The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.

[***]

The Forest Service—one of the federal agencies behind the scheme to despoil Mineral King—has been notorious for its alignment with lumber companies, although its mandate from Congress directs it to consider the various aspects of multiple use in its supervision of the national forests.

The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.

Perhaps they will not win. Perhaps the bulldozers of "progress" will plow under all the aesthetic wonders of this beautiful land. That is not the present question. The sole question is: who has standing to be heard?

Those who hike the Appalachian Trail into Sunfish Pond, New Jersey, and camp or sleep there, or run the Allagash in Maine, or climb the Guadalupes in West Texas, or who canoe and portage the Quetico Superior in Minnesota, certainly should have standing to defend those natural wonders before courts or agencies, though they live 3,000 miles away. Those who merely are caught up in environmental news or propaganda and flock to defend these waters or areas may be treated differently. That is why these environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life which it represents will stand before the court—the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams. Those inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community.

[***]

That, as I see it, is the issue of "standing" in the present case and controversy.

Mr. Justice BRENNAN, dissenting

[1] I agree that the Sierra Club has standing for the reasons stated by my Brother Blackmun in Alternative No. 2 of his dissent. I therefore would reach the merits. Since the Court does not do so, however, I simply note agreement with my Brother Blackmun that the merits are substantial.

Mr. Justice BLACKMUN, dissenting

The Court's opinion is a practical one espousing and adhering to traditional notions of standing. . . . If this were an ordinary case, I would join the opinion and the Court's judgment and be quite content.

[1] But this is not ordinary, run-of-the-mill litigation. The case poses—if only we choose to acknowledge and reach them—significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?

[2] The ultimate result of the Court's decision today, I fear, and sadly so, is that the 35.3-million-dollar complex, over 10 times greater than the Forest Service's suggested minimum, will now hastily proceed to completion; that serious opposition to it will recede in discouragement; and that Mineral King . . . will become defaced, at least in part. . . .

I believe this will come about because: (1) The District Court, although it accepted standing for the Sierra Club and granted preliminary injunctive relief, was reversed by the Court of Appeals, and this Court now upholds that reversal. (2) With the reversal, interim relief by the District Court is now out of the question and a permanent injunction becomes most unlikely. (3) The Sierra Club may not choose to amend its complaint or, if it does desire to do so, may not, at this late date, be granted permission. (4) The ever-present pressure to get the project under way will mount. (5) Once under way, any prospect of bringing it to a halt will grow dim. Reasons, most of them economic, for not stopping the project will have a tendency to multiply. And the irreparable harm will be largely inflicted in the earlier stages of construction and development.

[3] Rather than pursue the course the Court has chosen to take by its affirmance of the judgment of the Court of Appeals, I would adopt one of two alternatives:

1. I would reverse that judgment and, instead, approve the judgment of the District Court which recognized standing in the Sierra Club and granted preliminary relief. I would be willing to do this on condition that the Sierra Club forthwith amend its complaint to meet the specifications the Court prescribes for standing. If Sierra Club fails or refuses to take that step, so be it; the case will then collapse. But if it does amend, the merits will be before the trial court once again. As the Court . . . so clearly reveals, the issues on the merits are substantial and deserve resolution. They assay new ground. They are crucial to the future of Mineral King. They raise important ramifications for the quality of the country's public land management. . . . In fact, they concern the propriety of the 80-acre permit itself and the consistency of the entire, enormous development with the statutory purposes of the Sequoia Game Refuge, of which the Valley is a part. In the context of this particular development, substantial questions are raised about the use of a national park area for Disney purposes for a new high speed road and a 66,000-volt power line to serve the complex. Lack of compliance with existing administrative regulations is also charged. These issues are not shallow or perfunctory.

2. Alternatively, I would permit an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues. This incursion upon tradition need not be very extensive. Certainly, it should be no cause for alarm. . . . It need only recognize the interest of one who has a provable, sincere, dedicated, and established status. We need not fear that Pandora's box will be opened or that there will be no limit to the number of those who desire to participate in environmental litigation. The courts will exercise appropriate restraints just as they have exercised them in the past. . . . And Mr. Justice Douglas, in his eloquent opinion, has imaginatively suggested another means and one, in its own way, with obvious, appropriate, and self-imposed limitations as to standing. As I read what he has written, he makes only one addition to the customary criteria (the existence of a genuine dispute; the assurance

of adversariness; and a conviction that the party whose standing is challenged will adequately represent the interests he asserts), that is, that the litigant be one who speaks knowingly for the environmental values he asserts.

I make two passing references:

1. The first relates to the Disney figures presented to us. The complex, the Court notes, will accommodate 14,000 visitors a day (3,100 overnight; some 800 employees; 10 restaurants; 20 ski lifts). The State of California has proposed to build a new road from Hammond to Mineral King. That road, to the extent of 9.2 miles, is to traverse Sequoia National Park. It will have only two lanes, with occasional passing areas, but it will be capable, it is said, of accommodating 700—800 vehicles per hour and a peak of 1,200 per hour. We are told that the State has agreed not to seek any further improvement in road access through the park.

If we assume that the 14,000 daily visitors come by automobile (rather than by helicopter or bus or other known or unknown means) and that each visiting automobile carries four passengers (an assumption, I am sure, that is far too optimistic), those 14,000 visitors will move in 3,500 vehicles. If we confine their movement (as I think we properly may for this mountain area) to 12 hours out of the daily 24, the 3,500 automobiles will pass any given point on the two-lane road at the rate of about 300 per hour. This amounts to five vehicles per minute, or an average of one every 12 seconds. This frequency is further increased to one every six seconds when the necessary return traffic along that same two-lane road is considered. And this does not include service vehicles and employees' cars. Is this the way we perpetuate the wilderness and its beauty, solitude, and quiet?

2. The second relates to the fairly obvious fact that any resident of the Mineral King area—the real "user"—is an unlikely adversary for this Disney-governmental project. He naturally will be inclined to regard the situation as one that should benefit him economically. His fishing or camping or guiding or handyman or general outdoor prowess perhaps will find an early and ready market among the visitors. But that glow of anticipation will be short-lived at best. If he is a true lover of the wilderness—as is likely, or he would not be near Mineral King in the first place—it will not be long before he yearns for the good old days when masses of people—that 14,000 influx per day—and their thus far uncontrollable waste were unknown to Mineral King.

Do we need any further indication and proof that all this means that the area will no longer be one "of great natural beauty" and one "uncluttered by the products of civilization?" Are we to be rendered helpless to consider and evaluate allegations and challenges of this kind because of procedural limitations rooted in traditional concepts of standing? I suspect that this may be the result of today's holding. . . .

Subsequent Development

The District Court for the Northern District of California "subsequently allowed plaintiffs to amend their complaint to make further allegations concerning standing; and, to add certain additional parties. . . ." Sierra Club v. Morton, 348 F. Supp. 219, 220 (1972). Thereafter the tribunal denied "defendants' motion to dismiss the amended complaint." *Id.* While the case was pending, Congress passed the National Parks and Recreation Act of 1978 to "assure the preservation for this and future generations of the outstanding natural and scenic features of the area commonly known

as the Mineral King Valley." 16 U.S.C. § 45f, 95 P.L. 625; 92 Stat. 3467 (1978). The statute provided for the administration of the area under the National Park System and explicitly prohibited "the development of permanent facilities." *Id.*, (d) & (h).

Manuel LUJÁN, Jr., Secretary of the Interior, v. DEFENDERS OF WILDLIFE *et al.*

504 U.S. 555 (1992)
Supreme Court of the United States
June 12, 1992

Scalia, J., announced the judgment of the Court and delivered, [with respect to Parts I, II, III-A, and IV], the [Court's] opinion, in which Rehnquist, C. J., and White, Kennedy, Souter, and Thomas, JJ., joined, and, [with respect to Part III-B], an opinion, in which Rehnquist, C. J., and White and Thomas, JJ., joined. [Concurring in part and concurring in the judgment,] Kennedy, J., filed an opinion . . . , in which Souter, J., joined. . . . Stevens, J., filed an opinion concurring in the judgment. . . . Blackmun, J., filed a dissenting opinion, in which O'Connor, J., joined. . . .

Justice SCALIA delivered the opinion of the Court with respect to Parts I, II, III-A, and IV, and an opinion with respect to Part III-B, in which the Chief Justice [REHNQUIST], Justice WHITE, and Justice THOMAS join.

[I] This case involves a challenge to a rule promulgated by the Secretary of the Interior interpreting §7 of the Endangered Species Act of 1973 (ESA), 87 Stat. 884, 892, as amended, 16 U.S.C. § 1536, in such fashion as to render it applicable only to actions within the United States or on the high seas. The preliminary issue, and the only one we reach, is whether respondents here, plaintiffs below, have standing to seek judicial review of the rule.

I

[F] The ESA, 87 Stat. 884, as amended, 16 U.S.C. § 1531 *et seq.*, seeks to protect species of animals against threats to their continuing existence caused by man. . . . The ESA instructs the Secretary of the Interior to promulgate by regulation a list of those species which are either endangered or threatened under enumerated criteria, and to define the critical habitat of these species. 16 U.S.C. § 1533, 1536. Section 7(a)(2) of the Act then provides, in pertinent part:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical. 16 U.S.C. § 1536(a)(2).

In 1978, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), on behalf of the Secretary of the Interior and the Secretary of Commerce, respectively, promulgated a joint regulation stating that the obligations imposed by § 7(a)(2) extend to actions taken in foreign nations. 43 Fed.Reg. 874 (1978). The next year, however, the Interior Department began to reexamine its position. . . .

A revised joint regulation, reinterpreting § 7(a)(2) to require consultation only for actions taken in the United States or on the high seas, was proposed in 1983, 48 Fed.Reg. 29990, and promulgated in 1986, 51 Fed.Reg. 19926; 50 CFR 402.01 (1991).

[P] Shortly thereafter, respondents, organizations dedicated to wildlife conservation and other environmental causes, filed this action against the Secretary of the Interior, seeking a declaratory judgment that the new regulation is in error as to the geographic scope of § 7(a)(2) and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation. The District Court granted the Secretary's motion to dismiss for lack of standing. Defenders of Wildlife v. Hodel, 658 F.Supp. 43, 47-48 (Minn. 1987). The Court of Appeals for the Eighth Circuit reversed by a divided vote. Defenders of Wildlife v. Hodel, 851 F.2d 1035 (1988). On remand, the Secretary moved for summary judgment on the standing issue, and respondents moved for summary judgment on the merits. The District Court denied the Secretary's motion, on the ground that the Eighth Circuit had already determined the standing question in this case; it granted respondents' merits motion, and ordered the Secretary to publish a revised regulation. Defenders of Wildlife v. Hodel, 707 F.Supp. 1082 (Minn. 1989). The Eighth Circuit affirmed. 911 F.2d 117 (1990). We granted certiorari, 500 U.S. 915 (1991).

II

[R] While the Constitution of the United States divides all power conferred upon the Federal Government into "legislative Powers," Art. I, 1, "[t]he executive Power," Art. II, 1, and "[t]he judicial Power," Art. III, 1, it does not attempt to define those terms. To be sure, it limits the jurisdiction of federal courts to "Cases" and "Controversies," but an executive inquiry can bear the name "case" (the Hoffa case) and a legislative dispute can bear the name "controversy" (the Smoot-Hawley controversy). Obviously, then, the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. . . . One of [the judiciary's] landmarks . . . is the doctrine of standing. **[1]** Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. . . .

[2] Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. 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,'" Whitmore [v. Arkansas], 495 U.S. 149, 155 (1990)] (quoting Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)). 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 . . . th[e] result [of] the independent action of some third party not before the court." Simon v. Eastern K. Welfare Rights Organization, 426 U.S. 26, 41-42 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.*, at 38, 43.

[3] The party invoking federal jurisdiction bears the burden of establishing these elements. . . . Since they are not mere pleading requirements, but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as

any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. . . . At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss. . . . In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." [Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 115, n. 31 (1979).]

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depend considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. **[4]** When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. [It] becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish. Allen [v. Wright, 468 U.S. 737, 758 (1984)]

III

We think the Court of Appeals failed to apply the foregoing principles in denying the Secretary's motion for summary judgment. Respondents had not made the requisite demonstration of (at least) injury and redressability.

A

. . . Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing. *See, e.g.*, Sierra Club v. Morton, [405 U.S. 727, 734 (1972)]. But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured. *Id.*, at 734-735. To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents' members would thereby be "directly" affected apart from their "'special interest' in th[e] subject." *Id.*, at 735, 739. . . .

[5] With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two Defenders' members—Joyce Kelly and Amy Skilbred. Ms. Kelly stated that she traveled to Egypt in 1986 and observed the traditional habitat of the endangered Nile crocodile there and intend[s] to do so again, and hope[s] to observe

the crocodile directly, and that she will suffer harm in fact as the result of [the] American . . . role . . . in overseeing the rehabilitation of the Aswan High Dam on the Nile . . . and [in] develop[ing] . . . Egypt's . . . Master Water Plan. App. 101. Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and "observed th[e] habitat" of "endangered species such as the Asian elephant and the leopard" at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she "was unable to see any of the endangered species"; "this development project," she continued, will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited, [which] may severely shorten the future of these species"; that threat, she concluded, harmed her because she "intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard." *Id.*, at 145-146. When Ms. Skilbred was asked at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that "I intend to go back to Sri Lanka," but confessed that she had no current plans: "I don't know [when]. There is a civil war going on right now. I don't know. Not next year, I will say. In the future." *Id.*, at 318.

We shall assume for the sake of argument that these affidavits contain facts showing that certain agency-funded projects threaten listed species—though that is questionable. They plainly contain no facts, however, showing how damage to the species will produce "imminent" injury to Ms. Kelly and Skilbred. That the women "had visited" the areas of the projects before the projects commenced proves nothing. . . . And the affiants' profession of an "inten[t]" to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the "actual or imminent" injury that our cases require. . . .

[6] Besides relying upon the Kelly and Skilbred affidavits, respondents propose a series of novel standing theories. The first, inelegantly styled "ecosystem nexus," proposes that any person who uses any part of a "contiguous ecosystem" adversely affected by a funded activity has standing even if the activity is located a great distance away. This approach, as the Court of Appeals correctly observed, is inconsistent with our opinion in *National Wildlife Federation*, which held that a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity, and not an area roughly "in the vicinity" of it. [Lujan v. National Wildlife Federation, 497 U.S. 871, 887-889 [1990]. It makes no difference that the general-purpose section of the ESA states that the Act was intended, in part, "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," 16 U.S.C. § 1531(b). To say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.

Respondents' other theories are called, alas, the "animal nexus" approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the "vocational nexus" approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a

keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of Agency for International Development did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason. Standing . . . requires, at the summary judgment stage, a factual showing of perceptible harm. It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible—though it goes to the outermost limit of plausibility—to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist. . . . It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.

B

[7] Besides failing to show injury, respondents failed to demonstrate redressability. Instead of attacking the separate decisions to fund particular projects allegedly causing them harm, respondents chose to challenge a more generalized level of Government action (rules regarding consultation), the invalidation of which would affect all overseas projects. This programmatic approach has obvious practical advantages, but also obvious difficulties insofar as proof of causation or redressability is concerned. . . .

The most obvious problem in the present case is redressability. Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: he could be ordered to revise his regulation to require consultation for foreign projects. But this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question. . . .

[***]

A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. AID, for example, has provided less than 10% of the funding for the Mahaweli project. . . . There is no standing.

IV

The Court of Appeals found that respondents had standing for an additional reason: because they had suffered a "procedural injury." The so-called "citizen suit" provision of the ESA provides, in pertinent part, that any "person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter." 16 U.S.C. § 1540(g). [This] is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.*, the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them). Nor is it simply a case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations. Nor, finally, is it the unusual case in which

Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff. Rather, the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental "right" to have the Executive observe the procedures required by law. We reject this view.

[8] We have consistently held that a plaintiff 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.

[***]

To be sure, our generalized-grievance cases have typically involved Government violation of procedures assertedly ordained by the Constitution, rather than the Congress. But there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts, rather than of the political branches. . . . Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. **[9]** The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation of powers significance we have always said, the answer must be obvious: to permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, 3. . . .

[***]

We hold that respondents lack standing to bring this action, and that the Court of Appeals erred in denying the summary judgment motion filed by the United States. The opinion of the Court of Appeals is hereby reversed, and the cause is remanded for proceedings consistent with this opinion.
It is so ordered.

Justice KENNEDY, with whom Justice SOUTER joins, concurring in part and concurring in the judgment

Although I agree with the essential parts of the Court's analysis, I write separately to make several observations.

[1] I agree with the Court's conclusion in Part III-A that, on the record before us, respondents have failed to demonstrate that they themselves are "among the injured." Sierra Club v. Morton, 405 U.S. 727, 735 (1972). . . .

[2] In light of the conclusion that respondents have not demonstrated a concrete injury here sufficient to support standing under our precedents, I would not reach the issue of redressability that is discussed by the plurality in Part III-B.

I also join Part IV of the Court's opinion with the following observations. As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common law tradition. . . . **[3]** In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. . . . In exercising this power, however, Congress must, at the very least, identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. The citizen-suit provision of the Endangered Species Act does not meet these minimal requirements, because, while the statute purports to confer a right on any person . . . to enjoin . . . the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter, it does not, of its own force, establish that there is an injury in "any person" by virtue of any "violation." 16 U.S.C. § 1540(g)(1)(A).

The Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III. I agree that it would exceed those limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. . . . In addition, the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government.

An independent judiciary is held to account through its open proceedings and its reasoned judgments. In this process, it is essential for the public to know what persons or groups are invoking the judicial power, the reasons that they have brought suit, and whether their claims are vindicated or denied. The concrete injury requirement helps assure that there can be an answer to these questions; and, as the Court's opinion is careful to show, that is part of the constitutional design.

With these observations, I concur in Parts I, II, III-A, and IV of the Court's opinion, and in the judgment of the Court.

Justice STEVENS, concurring in the judgment

Because I am not persuaded that Congress intended the consultation requirement in § 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536(a)(2), to apply to activities in foreign countries, I concur in the judgment of reversal. I do not, however, agree with the Court's conclusion that respondents lack standing because the threatened injury to their interest in protecting the environment and studying endangered species is not "imminent." Nor do I agree with the plurality's additional conclusion that respondents' injury is not "redressable" in this litigation.

I

[1] In my opinion, a person who has visited the critical habitat of an endangered species has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction. Congress has found that a wide variety of endangered species of fish, wildlife, and plants are of "aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). Given that finding, we have no license to demean the importance of the interest that particular individuals may have in observing any species or its habitat, whether those individuals are motivated by esthetic enjoyment, an interest in professional research, or an economic interest in preservation of the species. Indeed, this Court has often held that injuries to such interests are sufficient to confer standing and the Court reiterates that holding today. . . .

[***]

In this case . . . the likelihood that respondents will be injured by the destruction of the endangered species is not speculative. If respondents are genuinely interested in the preservation of the endangered species and intend to study or observe these animals in the future, their injury will occur as soon as the animals are destroyed. Thus, the only potential source of "speculation" in this case is whether respondents' intent to study or observe the animals is genuine. In my view, Joyce Kelly and Amy Skilbred have introduced sufficient evidence to negate petitioner's contention that their claims of injury are "speculative" or "conjectural."

[***]

[2] We must presume that, if this Court holds that § 7(a)(2) requires consultation, all affected agencies would abide by that interpretation and engage in the requisite consultations. Certainly the Executive Branch cannot be heard to argue that an authoritative construction of the governing statute by this Court may simply be ignored by any agency head. Moreover, if Congress has required consultation between agencies, we must presume that such consultation will have a serious purpose that is likely to produce tangible results. . . .

II

[3] Although I believe that respondents have standing, I nevertheless concur in the judgment of reversal because I am persuaded that the Government is correct in its submission that § 7(a)(2) does not apply to activities in foreign countries. . . .

[***]

Accordingly, notwithstanding my disagreement with the Court's disposition of the standing question, I concur in its judgment.

Justice BLACKMUN, with whom Justice O'CONNOR joins, dissenting

I part company with the Court in this case in two respects. **[1]** First, I believe that respondents have raised genuine issues of fact—sufficient to survive summary judgment—both as to injury and as to redressability. **[2]** Second, I question the Court's breadth of language in rejecting standing for "procedural" injuries. I fear the Court seeks to impose fresh limitations on the constitutional authority of Congress to allow citizen suits in the federal courts for injuries deemed "procedural" in nature. I dissent.

I

[***]

A

To survive petitioner's motion for summary judgment on standing, respondents need not prove that they are actually or imminently harmed. They need show only a "genuine issue" of material fact as to standing. Fed. Rule Civ. Proc. 56(c). This is not a heavy burden. A "genuine issue" exists so long as "the evidence is such that a reasonable jury could return a verdict for the nonmoving party [respondents]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). This Court's function is not [it]self to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Id.*, at 249.

[***]

1

Were the Court to apply the proper standard for summary judgment, I believe it would conclude that the sworn affidavits and deposition testimony of Joyce Kelly and Amy Skilbred advance sufficient facts to create a genuine issue for trial concerning whether one or both would be imminently harmed by the Aswan and Mahaweli projects. . . . The only remaining issue, then, is whether Kelly and Skilbred have shown that they personally would suffer imminent harm.

I think a reasonable finder of fact could conclude from the information in the affidavits and deposition testimony that either Kelly or Skilbred will soon return to the project sites, thereby satisfying the "actual or imminent" injury standard. . . . A reasonable finder of fact could conclude, based not only upon their statements of intent to return, but upon their past visits to the project sites, as well as their professional backgrounds, that it was likely that Kelly and Skilbred would make a return trip to the project areas.

[***]

I fear the Court's demand for detailed descriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not. More likely, it will resurrect a code pleading formalism in federal court summary judgment practice, as federal courts, newly doubting their jurisdiction, will demand more and more particularized showings of future harm. . . .

2

The Court also concludes that injury is lacking, because respondents' allegations of "ecosystem nexus" failed to demonstrate sufficient proximity to the site of the environmental harm. . . . Many environmental injuries, however, cause harm distant from the area immediately affected by the challenged action. Environmental destruction may affect animals traveling over vast geographical ranges... It cannot seriously be contended that a litigant's failure to use the precise or exact site where animals are slaughtered or where toxic waste is dumped into a river means he or she cannot show injury.

. . . I have difficulty imagining this Court applying its rigid principles of geographic formalism anywhere outside the context of environmental claims. As I understand it, environmental plaintiffs are under no special constitutional standing disabilities. Like other plaintiffs, they need show only that the action they challenge has injured them, without necessarily showing they happened to be physically near the location of the alleged wrong. The Court's decision today should not be interpreted to foreclose the possibility . . . that, in different circumstances, a nexus theory similar to those proffered here might support a claim to standing. . . .

B

A plurality of the Court suggests that respondents have not demonstrated redressability: a likelihood that a court ruling in their favor would remedy their injury.

[***]

I find myself unable to agree with the plurality's analysis of redressability, based as it is on its invitation of executive lawlessness, ignorance of principles of collateral estoppel, unfounded assumptions about causation, and erroneous conclusions about what the record does not say. In my view, respondents have satisfactorily shown a genuine issue of fact as to whether their injury would likely be redressed by a decision in their favor.

II

The Court concludes that any "procedural injury" suffered by respondents is insufficient to confer standing. It . . . cannot be saying, [however,] that "procedural injuries" as a class are necessarily insufficient for purposes of Article III standing.

Most governmental conduct can be classified as "procedural." Many injuries caused by governmental conduct, therefore, are categorizable at some level of generality as "procedural" injuries. Yet, these injuries are not categorically beyond the pale of redress by the federal courts. When the Government, for example, "procedurally" issues a pollution permit, those affected by the permittee's pollutants are not without standing to sue.

[***]

Congress legislates in procedural shades of gray not to aggrandize its own power but to allow maximum Executive discretion in the attainment of Congress' legislative goals. Congress could simply impose a substantive prohibition on Executive conduct; it could say that no agency action shall result in the loss of more than 5% of any listed species. Instead, Congress sets forth substantive guidelines and allows the Executive, within certain procedural constraints, to decide how best to effectuate the ultimate

goal. . . . The Court never has questioned Congress' authority to impose such procedural constraints on Executive power. Just as Congress does not violate separation of powers by structuring the procedural manner in which the Executive shall carry out the laws, surely the federal courts do not violate separation of powers when, at the very instruction and command of Congress, they enforce these procedures.

[***]

III

In conclusion, I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing. . . .

I dissent.

JÜRGEN HABERMAS, '*A Reconstructive Approach to Law I: The System of Rights*' (Ch. 3) (Intro.; 3.1 Private and Public Autonomy, Human Rights and Popular Sovereignty), *in* BETWEEN FACTS AND NORMS 83-131 (William Rehg trans., 1996)

The foregoing reflections served the propaedeutic purpose of introducing the category of law, modern law in particular, from the vantage point of the theory of communicative action. A social theory claiming to be "critical" cannot restrict itself to describing the relation between norm and reality from the perspective of an observer. Before returning in chapter 7 to this external tension between the normative claims of constitutional democracies and the facticity of their actual functioning, in this and the following chapters I want to rationally reconstruct the *self-understanding* of these modern legal orders. I take as my starting point the rights citizens must accord one another if they want to legitimately regulate their common life by means of positive law. This formulation already indicates that the system of rights as a whole is shot through with that internal tension between facticity and validity manifest in the ambivalent mode of legal validity.

As we have seen in the first chapter, the concept of individual rights plays a central role in the modern understanding of law. It corresponds to the concept of liberty or individual freedom of action: rights ("subjective rights" in German) fix the limits within which a subject is entitled to freely exercise her will. More specifically, they define the same liberties for all individuals or legal persons understood as bearers of rights. In Article 4 of the 1789 Declaration of Rights of Man and of the Citizen we read, "Political liberty consists in the power of doing whatever does not injure another. The exercise of the natural rights of every man has no [***83**] other limits than those which are necessary to secure to every other man the free exercise of the same rights; and these limits are determinable only by the law."[41] Kant picks up on this proposition when he formulates his universal principle of law (or principle of right, *Rechtsprinzip*). This principle considers an act to be right or lawful as long as its guiding maxim permits one person's freedom of choice to be conjoined with everyone's freedom in accordance with a universal law. Rawls follows the same principle in formulating his first principle of justice: "each person is to have an equal right to the most extensive basic

[41] [The translation is that of Thomas Paine, in his *Rights of Man*. Trans.]

liberty compatible with a similar liberty for others."[42] The concept of a law or legal statute makes explicit the idea of equal treatment already found in the concept of right: in the form of universal and abstract laws all subjects receive the same rights.

These basic concepts and definitions explain why modern law is especially suited for the social integration of economic societies, which rely on the decentralized decisions of self-interested individuals in morally neutralized spheres of action. But law must do more than simply meet the functional requirements of a complex society; it must also satisfy the precarious conditions of a social integration that ultimately takes place through the achievements of mutual understanding on the part of communicatively acting subjects, that is, through the acceptability of validity claims. Modern law displaces normative expectations from morally unburdened individuals onto the laws that secure the compatibility of liberties.[43] These laws draw their legitimacy from a legislative procedure based for its part on the principle of popular sovereignty. The paradoxical emergence of legitimacy out of legality must be explained by means of the rights that secure for citizens the exercise of their political autonomy.

Why paradoxical? As "subjective rights," these rights enjoyed by citizens display on the one hand the same structure as all rights that grant spheres of free choice to the individual. If we disregard the different modalities in the use of these rights, then we must be able to interpret political rights, too, as subjective liberties that merely make lawful behavior a duty, and hence *leave open* the motives for conforming to norms. On the other hand, the procedure of democratic legislation must confront participants with the normative [***84**] expectation of an orientation to the common good, because this procedure can draw its legitimating force only from a process in which citizens reach an understanding about the rules for their living together. In modern societies as well, the law can fulfill the function of stabilizing behavioral expectations only if it preserves an internal connection with the socially integrating force of communicative action.

I want to elucidate this puzzling connection between private liberties and civic autonomy with the help of the discourse concept of law. This connection involves a stubborn problem, which I will first discuss in two different contexts. Thus far no one has succeeded in satisfactorily reconciling private and public autonomy at a fundamental conceptual level, as is evident from the unclarified relation between individual rights and public law in the field of jurisprudence, as well as from the unresolved competition between human rights and popular sovereignty in social-contract theory (section 3.1). In both cases the difficulties stem not only from certain premises rooted in the philosophy of consciousness but also from a metaphysical legacy inherited from natural law, namely, the subordination of positive law to natural or moral law. In fact, however, positive law and postconventional morality emerge co-originally from the crumbling edifice of substantial ethical life. Kant's analysis of the form of law provides

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[42] J. Rawls, *A Theory of Justice* (Cambridge, Mass., 1971), p. 60. In response to a criticism of H.L.A. Hart, "Rawls on Liberty and Its Priority," in N. Daniels, ed., *Reading Rawls* (Oxford, 1975), pp. 230-52, Rawls replaced this formulation with another one that, at least to me, does not seem to be an improvement: "Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all." J. Rawls, "The Basic Liberties and Their Priority," in S. McMurrin, ed., *The Tanner Lectures on Human Values*, vol. 3 (Salt Lake City, 1982), p. 5.

[43] E.-W. Böckenförde, "Das Bild vom Menschen in der Perspektive der heutigen Rechtsordnung," in Böckenförde, *Recht, Staat, Freiheit* (Frankfurt am Main, 1991), pp. 58-66.

an occasion to discuss the relation between law and morality, in order to show that the principle of democracy must not be subordinated to the moral principle, as it is in Kantian legal theory (section 3.2). Only after this preliminary spadework can I ground the system of rights with the help of the discourse principle, so that it becomes clear why private and public autonomy, human rights and popular sovereignty, mutually presuppose one another (section 3.3).

3.1 Private and Public Autonomy, Human Rights and Popular Sovereignty

3.1.1

In German civil-law jurisprudence, which in Germany has been decisive for the understanding of law in general, the theory of [***85**] "subjective right," as it was called, was initially influenced by the idealist philosophy of right. According to Friedrich Carl von Savigny, a legal relation secures "the power justly pertaining to the individual person: an area in which his will rules, and rules with our consent."[44] This still emphasizes the connection of individual liberties with an intersubjective recognition by legal consociates. As his analysis proceeds, however, an intrinsic value accrues to private law, independent of its authorization by a democratic legislature. Right "in the subjective sense" is legitimate per se because, starting with the inviolability of the person, it is supposed to guarantee "an area of independent rule" (*Herrschaft*) for the free exercise of the individual will.[45] For Georg Friedrich Puchta, too, law was essentially subjective right, that is, private law: "Law is the recognition of the freedom belonging equally to all human beings as subjects with the power of will."[46] According to this view, rights are negative rights that protect spheres of action by grounding actionable claims that others refrain from unpermitted interventions in the freedom, life, and property of the individual. Private autonomy is secured in these legally protected spheres primarily through contract and property rights.

In the later nineteenth century, though, awareness grew that private law could be legitimated from its own resources only as long as it could be assumed that the legal subject's private autonomy had a foundation in the moral autonomy of the person. Once law in general lost its idealist grounding—in particular, the support it had from Kant's moral theory—-the husk of the "individual power to rule" was robbed of the normative core of a freedom of will that is both legitimate and worthy of protection from the start. The only bond that possessed legitimating force was the one that Kant, with the help of his "principle of right" (*Rechtsprinzips*), had tied between freedom of choice and the person's autonomous will. After this bond was severed, law, according to the positivist view, could only assert itself as a particular form that furnished specific decisions and powers with the force of de facto bindingness. After Bernhard Windscheid, individual rights were considered reflexes of an established legal order that transferred to individuals the power of will objectively incorporated in law: "Right is a power or rule of will conferred by the legal order."[47]

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[44] F.C. con Savigny, *System des heutigen Römischen Rechts*, vol. 1 (Berlin, 1840), sec. 4. [For an English translation of this book, see Savigny, *System of the Modern Roman Law*, vol. 1, trans. W. Holloway (Madras, 1867). Trans.]

[45] Savigny, *System*, sec. 53.

[46] G.F. Puchta, *Cursus der Institutionen* (Leipzig, 1865), sec. 4.

[47] B. Windscheid, *Lehrbuch des Pandektenrechts* (Frankfurt am Main, 1906), vol. 2, sec. 37. Here one might also note the affirmative reference to Ferdinand Regelsberger's definition: "We have to do with a

[***86**] Rudolf von Ihering's utilitarian interpretation, according to which utility and not will makes up the substance of right,"[48] was later included in this definition: "From a conceptual standpoint, individual rights are powers of law conferred on the individual by the legal order; from the standpoint of its purpose, they are means for the satisfaction of human interests."[49] The reference to gratification and interest allowed private rights to be extended beyond the class of negative liberties. In certain instances an individual right yields not only a right on the part of person A to something protected from the interference of third parties, but also a right, be it absolute or relative, to a share in organized services. Finally, Hans Kelsen characterized individual rights in general as interests objectively protected by law and as freedoms of choice (or "*Wollendürfen*" in Windscheid's sense) objectively guaranteed by law. At the same time, he divested the legal order of the connotations of John Austin's command theory, which had been influential up to that point in the German version of August Thon. According to Kelsen, individual entitlements are not just authorized by the will of someone with the power to command, but possess normative validity: legal norms establish prescriptions and permissions having the character of an "ought." This illocutionary "ought," however, is understood not in a deontological but in an empirical sense, as the actual validity that political lawgivers confer on their decisions by coupling enacted law with penal norms. The coercive power of state sanctions qualifies the lawgivers' will to become the "will of the state."

In Kelsen's analysis the moral content of individual rights expressly lost its reference, namely, the free will (or "power to rule") of a person who, from the moral point of view, deserves to be protected in her private autonomy. To this extent, his view marks the counterpart of that private-law jurisprudence stemming from Savigny. Kelsen detached the legal concept of a person not only from the moral person but even from the natural person, because a fully self-referential legal system must get by with its self-produced fictions. As Luhmann will put it after taking a further naturalistic turn, it pushes natural persons out into its environment. With individual rights, the legal order itself creates the logical space for [***87**] to keep the judgment that 'a legal subject or person "has" subjective rights' from becoming the empty tautology 'there are subjective rights.' . . . For to entitle or to obligate the person would then be to entitle rights, to obligate duties, in short, to 'norm' norms."[50] Once the moral and natural person has been uncoupled from the legal system, there is nothing to stop jurisprudence from conceiving rights along purely functionalist lines. The doctrine of rights hands on the baton to a systems theory that rids itself by methodological fiats of all normative considerations."[51]

The transformation of private law under National Socialism[52] certainly provoked moral reactions in postwar Germany, which decried the so—called "legal dethronement" (*objektiv-rechtliche Entthronung*) and concomitant hollowing out of the moral substance of rights. But the natural-law-based restoration of the connection between

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subjective right if the legal order cedes the realization of a recognized purpose, i.e., the satisfaction of a recognized interest, to the participant and grants him legal power for this end."

[48] R. von Ihering, *Geist des römischen Rechts* (Leipzig, 1888), pt. 3, p. 338.

[49] L. Enneccerus, *Allgemeiner Reil des bürgerlichen Rechts*, 15th ed. (Tübingen, 1959), sec. 72.

[50] H. Kelsen, *Allgemeine Staatslehre* (Bad Homburg, 1968), p. 64.

[51] J. Schmidt, "Zur Funktion der subjektiven Rechte," *Archiv für Rechts- und Sozialphilosophie* 57 (1971): 383-96.

[52] B. Rüthers, *Die unbegrenzte Auslegung* (Frankfurt am Main, 1973).

private and moral autonomy soon lost its power to convince. "*Ordo*"-liberalism[53] only rehabilitated the individualistically truncated understanding of rights-—-the very conception that invited a functionalist interpretation of private law as the framework for capitalist economic relations:

> The idea of "subjective right" carries on the view that private law and the legal protection grounded in it ultimately serve to maintain the individual 's freedom in society, [in other words, the view] that individual freedom is one of the foundational ideas for the sake of which private law exists. For the idea of "subjective right" expresses the fact that private law is the law of mutually independent legal consociates who act according to their own separate decisions.[54]

In opposition to the threat posed by a functionalist reinterpretation of this conception, Ludwig Raiser has drawn on social law in an attempt to correct the individualistic approach and thus restore to private law its moral content. Rather than going back to Savigny's conceptual framework, Raiser is led by the welfare-state materialization of private law to restrict a concept of "subjective right," which he preserves without alteration, to the classical liberties. In continuity with previous views, these rights are meant to secure "the self-preservation and individual responsibility of each person within society." But they must be supplemented with social rights: "From an ethical and political standpoint, more is required than a recognition of this [private] legal standing. Rather, it is just as important the legal subject as bearer of these rights: "If the legal subject . . . is allowed to remain as a point of reference, then this occurs in order [***88**] that one also integrate the individual by law into the ordered network of relationships that surround him and bind him with others. In other words, one must develop and protect the legal institutions in which the individual assumes the *status of member*."[55] "Primary" rights are too weak to guarantee protection to persons in those areas where they "are integrated into larger, transindividual orders."[56] However, Raiser's rescue attempt does not start at a sufficiently abstract level. It is true that private law has undergone a reinterpretation through the paradigm shift from bourgeois formal law to the materialized law of the welfare state.[57] But this reinterpretation must not be confused with a revision of the basic concepts and principles themselves, which have remained the same and have merely been *interpreted* differently in shifting paradigms.

Raiser does remind us of the intersubjective character of rights, though, something the individualistic reading had rendered unrecognizable. After all, such rights are based on the reciprocal recognition of cooperating legal persons. Taken by themselves, rights do not necessarily imply the atomism——the isolation of legal subjects from one another——that Raiser wants to correct. The citizens who mutually grant one another equal rights are one and the same individuals as the private persons who

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[53] [Associated with the so-called "Ordo Circle," this German version of liberal economic and legal thought got started before World War II and considerably influenced postwar policies in Germany. Trans.]

[54] H. Coing, "Zur Geschichte des Begriffs 'subjektives Recht'," in Coing et al., *Das subjektive Recht und der Rechtsschutz der Persönlichkeit* (Frankfurt am Main, 1959), pp. 7-23, here pp. 22-23.

[55] L. Raiser, "Der Stand der Lehre vom subjektiven Recht im Deutschen Zivilrecht (1961)," in Raiser, *Die Aufgabe des Privatrechts* (Frankfurt am Main, 1977), pp. 98ff., here p. 115.

[56] Raiser, "Stand der Lehre," p. 113.

[57] See chapter 9 in this volume, sec. 9.1.2.

use rights strategically and encounter one another as potential opponents, but the two roles are not identical:

> A right, after all, is neither a gun nor a one-man show. It is a relationship and a social practice, and in both those essential aspects it is seemingly an expression of connectedness. Rights are public propositions, involving obligations to others as well as entitlements against them. In appearance, at least, they are a form of social cooperation—not spontaneous but highly organized cooperation, no doubt, but still, in the final analysis, cooperation.[58]

At a conceptual level, rights do not immediately refer to atomistic and estranged individuals who are possessively set against one another. On the contrary, as elements of the legal order they presuppose collaboration among subjects who recognize one another, in their reciprocally related rights and duties, as free and equal citizens. This mutual recognition is constitutive for a legal order from which actionable rights are derived. In this sense "subjective" rights [***89**] emerge co-originally with "objective" law, to use the terminology of German jurisprudence. However, a statist understanding of objective law is misleading, for the latter first issues from the rights that subjects mutually acknowledge. In order to make clear the intersubjective structure of relations of recognition that underlies the legal order as such, it is not enough to append social rights additively. Both the idealist beginnings and the positivist offshoots of German civil-law jurisprudence from Savigny to Kelsen misjudge this structure.

As we have seen, private-law theory (as the doctrine of "subjective right") got started with the idea of morally laden individual rights, which claim normative independence from, and a higher legitimacy than, the political process of legislation. The freedom-securing character of rights was supposed to invest private law with a moral authority both independent of democratic lawmaking and not in need of justification within legal theory itself. This sparked a development that ended in the abstract subordination of "subjective" rights to "objective" law, where the latter's legitimacy finally exhausted itself in the legalism of a political domination construed in positivist terms. The course of this discussion, however, concealed the real problem connected with the key position of private rights: the source from whence enacted law may draw its legitimacy is not successfully explained. To be sure, the source of all legitimacy lies in the democratic lawmaking process, and this in turn calls on the principle of popular sovereignty. But the legal positivism, or *Gesetzespositivismus*, propounded in the Weimar period by professors of public law does not introduce this principle in such a way that the intrinsic moral content of the classical liberties – the protection of individual freedom emphasized by Helmut Coing – could be preserved. In one way or another, the intersubjective meaning of legally defined liberties is overlooked, and with it the relation between private and civic autonomy in which both moments receive their full due.

3.1.2

Trusting in an idealist concept of autonomy, Savigny could still assume that private law, as a system of negative and procedural rights that secure freedom, is legitimated on the basis of reason, [***90**] that is, of itself. But Kant did not give an entirely unequivocal answer to the question of the legitimation of general laws that could sup-

[58] F. Michelman, "Justification (and Justifiability) of Law in a Contradictory World," in J.R. Pennock and J.W. Chapman, eds., *Justification*, Nomos vol. 18 (New York, 1986), pp. 71-99, here p. 91.

posedly ground a system of well-ordered egoism. Even in his *Rechtslehre* (*Metaphysical Elements of Justice*), Kant ultimately fails to clarify the relations among the principles of morality, law (or right), and democracy (if we can call what Kant sees as constituting the republican mode of government a principle of democracy). All three principles express, each in its own way. the same *idea of self-legislation*. This concept of autonomy was Kant's response to Hobbes's unsuccessful attempt to justify a system of rights on the basis of the participants' enlightened self-interest alone, without the aid of moral reasons.

If one looks back at Hobbes from a Kantian perspective, one can hardly avoid reading him more as a theoretician of a bourgeois rule of law without democracy than as the apologist of unlimited absolutism; according to Hobbes, the sovereign can impart his commands only in the language of modern law. The sovereign guarantees an order in internal affairs that assures private persons of equal liberties according to general laws: "For supreme commanders can confer no more to their civil happiness, than that being preserved from foreign and civil wars, they may quietly enjoy that wealth which they have purchased by their own industry."[59]

For Hobbes, who clearly outfits the status of subjects with private rights, the problem of legitimation naturally cannot be managed *within* an already established legal order, and hence through political rights and democratic legislation. This problem must be solved immediately with the constitution of state authority, in a single blow, as it were; that is, it must be conjured out of existence for the future. Certainly Hobbes wants to explain why absolutist society is justified as an instrumental order from the perspective of all participants, if only they keep to a strictly purposive-rational calculation of their own interests. This was supposed to make it unnecessary to design a rule of law, that is, to elaborate regulations for a legitimate *exercise* of political authority. The tension between facticity and validity built into law itself dissolves if legal authority per se can be portrayed as maintaining an ordered system of egoism that is favored by all the participants anyhow: what appears as morally right and legitimate then issues spontaneously from the [***91**] self-interested decisions of rational egoists or, as Kant will put it, a "race of devils." The utilitarian grounding of the bourgeois order of private law—that this type of market society makes as many people as possible well off for as long as possible[60]—bestows material justice on the sovereignty of a ruler who by definition can do nothing unlawful.

However, to carry out his intended demonstration, Hobbes must do more than simply show why such an order equally satisfies the interests of all participants ex post facto, that is, from the standpoint of readers who already find themselves in a civil society. He must in addition show why such a system could be *preferred* in the same way by each isolated, purposive-rational actor while still in the state of nature. Because Hobbes ascribes the same success-oriented attitude to the parties in the state of nature as private law ascribes to its addressees, it seems reasonable to construe the original act of association along the lines of an instrument available in private law, the contract—specifically, to construe this act as a civil contract in which all the parties jointly agree to install (but not to bind) a sovereign. There is one circumstance

[59] T. Hobbes, *De Cive*, chap. 13, par. 6 (trans. Attributed to Hobbes, in *Man and Citizen*, ed. E. Gert [Indianapolis, 1991]); cf. J. Habermas, "The Classical Doctrine of Politics in Relation to Social Philosophy," in Habermas, *Theory and Practice*, trans. J. Viertel (Boston, 1973), pp. 41-81.
[60] Hobbes, *De Cive*, chap. 13, par. 3.

Hobbes does not consider here. Within the horizon of their individual preferences, the subjects make their decisions from the perspective of the first-person singular. But this is not the perspective from which parties in a state of nature are led, on reflection, to trade their natural, that is, mutually conflicting but unlimited, liberties for precisely those civil liberties that general laws at once limit and render compatible. Only under two conditions would one expect subjects in the state of nature to make a rationally motivated transition from their state of permanent conflict to a cooperation under coercive law that demands a partial renunciation of freedom on the part of everyone.

On the one hand, the parties would have to be capable of understanding what a social relationship based on the principle of reciprocity even means. The subjects of private law, who are at first only virtually present in the state of nature, have, *prior to all* association, not yet learned to "take the perspective of the other" and self-reflexively perceive themselves from the perspective of a second person. Only then could their own freedom appear to them not simply as a natural freedom that occasionally encounters [***92**] factual resistance but as a freedom constituted through mutual recognition. In order to understand what a contract is and knowhow to use it, they must already have at their disposal the sociocognitive framework of perspective taking between counter-parts, a framework they can acquire only in a social condition not yet available in the state of nature. *On the other hand*, the parties who agree on the terms of the contract they are about to conclude must be capable of distancing themselves in yet another way from their natural freedoms. They must be capable of assuming the social perspective of the first-person plural, a perspective always already tacitly assumed by Hobbes and his readers but withheld from subjects in the state of nature. On Hobbesian premises, these subjects may not assume the very standpoint from which each of them could first judge whether the reciprocity of coercion, which limits the scope of each's free choice according to general laws, lies in the equal interest of all and hence can be willed by all the participants. In fact, we find that Hobbes does acknowledge in passing the kinds of moral grounds that thereby come into play; he does this in those places where he recurs to the Golden Rule— *Quod tibi fieri non vis, alteri ne feceris*—as a natural law.[61] But morally impregnating the state of nature in this way contradicts the naturalism presupposed by the intended goal of Hobbes's demonstration, namely, to ground the construction of a system of well-ordered egoism on the sole basis of the enlightened self-interest of any individual.[62]

The empiricist question—how a system of rights can be explained by the interlocking of interest positions and utility calculations of accidentally related rational

[61] "Whatsoever you require that others should do to you, that do ye to them." Hobbes, *Leviathan*, ed. R. Tuck (Cambridge, 1991), p. 92; cf. also pp. 117, 188.

[62] Otfried Höffe likewise pursues mutatis mutandis this Hobbesian goal of demonstration. For him justice consists in limitations of freedom that are universally distributed and hence equally advantageous for all sides: "Because it is advantageous for all, natural justice has no need of moral conscience, nor of personal justice, for its implementation. It can be satisfied with self-interest as a motivating principle." O. Höffe, *Politische Gerechtigkeit* (Frankfurt am Main, 1987), p. 407. This approach is even more clearly elaborated in Höffe's *Kategorische Rechtsprinzipien* (Frankfurt am Main, 1990); Höffe, *Gerechtigkeit als Tausch?* (Baden-Baden, 1991). For a critique, see K. Günther, "Kann ein Volk von Teufeln Recht und Staat moralisch legitimieren?" *Rechtshistorisches Journal* 10 (1991): 233-67.

actors—has never failed to hold the attention of astute philosophers and social scientists. But even the modern tools of game theory have yet to provide a satisfactory solution. If for no other reason, Kant's reaction to the *failure* of this attempt continues to deserve consideration.

Kant saw that rights cannot for their part be grounded by recourse to a model taken from private law. He raised the convincing objection that Hobbes failed to notice the structural difference between the social contract, which serves as a model for legitimation, and the private contract, which basically regulates exchange relationships. In fact, one must expect something other than a [***93**] merely egocentric attitude from the parties concluding a social contract in the state of nature: "the contract establishing a civil constitution . . . is of so unique a kind that . . . it is in principle essentially different from all others in what it founds."[63] Whereas parties usually conclude a contract "to some determinate end," the social contract is "an end in itself." It grounds "the right of men [to live] under public coercive law, through which each can receive his due and can be made secure from the interference of others."[64] In Kant's view the parties do not agree to appoint a sovereign to whom they cede the power to make laws. Rather, the social contract is unique in not having any specific content at all; it provides instead the model for a kind of sociation ruled by the principle of law. It lays down the performative conditions under which rights acquire legitimate validity, for "right is the limitation of each person's freedom so that it is compatible with the freedom of everyone, insofar as this is possible in accord with a general law."[65]

Under this aspect, the social contract serves to *institutionalize* the single "innate" right to equal liberties. Kant sees this primordial human right as grounded in the autonomous will of individuals who, as moral persons, have at their prior disposal the social perspective of a practical reason that tests laws. On the basis of this reason, they have *moral*—and not just prudential—-grounds for their move out of the condition of unprotected freedom. At the same time, Kant sees that the "single human right" must differentiate itself into a *system of rights* through which both "the freedom of every member of society as a human being" as well as "the equality of each member with every other as a subject" assume a positive shape.[66] This happens in the form of "public laws," which can claim legitimacy only as acts of the public will of autonomous and united citizens: establishing public law "is possible through no other will than that belonging to the people collectively (because all decide for all, hence each for himself); for only to oneself can one never do injustice."[67] Because the question concerning the legitimacy of freedom-securing laws must find an answer *within* positive law, the social contract establishes the principle of law by binding the legislator's political will-formation to conditions of a *democratic procedure*, under these conditions the results arrived at in conformity with this procedure express per se the concurring will or [***94**] rational consensus of all participants. In this way, the morally grounded primordial human right to equal liberties is intertwined in the social contract with the principle of popular sovereignty.

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[63] I. Kant, "On the Proverb: That May Be True in Theory, But Is of No Practical Use," in Kant, *Perpetual Peace and Other Essays*, trans. T. Humphrey (Indianapolis, 1983), p. 71.
[64] Kant, "On the Proverb," p. 72 [translation slightly altered. Trans.]
[65] Kant, "On the Proverb," p. 72.
[66] Kant, "On the Proverb," p. 72.
[67] Kant, "On the Proverb," pp. 75-76 [trans. slightly altered. Trans.]

The human rights grounded in the moral autonomy of individuals acquire a positive shape solely through the citizens' political autonomy. The principle of law seems to mediate between the principle of morality and that of democracy. But it is not entirely clear how the latter two principles are related. Kant certainly introduces the concept of autonomy, which supports the whole construction, from the prepolitical viewpoint of the morally judging individual, but he explicates this concept along the lines of the universal-law version of the Categorical Imperative, drawing in turn on the model of a public and democratic self-legislation borrowed from Rousseau. From a conceptual standpoint, the moral principle and the democratic principle reciprocally explain each other, but the architectonic of Kant's legal theory conceals this point. If one accepts this reading, then the principle of law cannot be understood as the middle term between the principles of morality and democracy, but simply as the reverse side of the democratic principle itself: because the democratic principle can-not be implemented except in the form of law, both principles must be realized *uno actu*. How these three principles are related certainly remains unclear, which stems from the fact that in Kant, as in Rousseau, there still is an unacknowledged *competition* between morally grounded *human rights* and the *principle of popular sovereignty*.

But what significance can such a discussion of the history of political ideas have for a systematic treatment of private and public autonomy? Before going any further, I insert an excursus intended to clarify the impact of modern political theory.

3.1.3 Excursus

The two ideas of human rights and popular sovereignty have determined the normative self-understanding of constitutional democracies up to the present day. We must not look on the idealism anchored in our constitutional principles simply as a closed chapter in the history of political ideas. On the contrary, this [***95**] history of political theory is a necessary element and reflection of the tension between facticity and validity built into law itself, between the positivity of law and the legitimacy claimed by it. This tension can be neither trivialized nor simply ignored, because the rationalization of the lifeworld makes it increasingly difficult to rely only on tradition and settled ethical conventions to meet the need for legitimating enacted law—a law that rests on the changeable decisions of a political legislator. Here let me briefly recall the rationality potential, at work in both cultural and socialization processes, that has increasingly made itself felt in the law since the first great codifications of private and public law at the end of the eighteenth century.

The classical, primarily Aristotelian, doctrine of natural law, whose influence extended well into the nineteenth century, as well as Thomas Aquinas's remodeled Christian version, still reflected an encompassing societal ethos that extended through all social classes of the population and clamped the different social orders together. In the vertical dimension of the components of the lifeworld, this ethos ensured that cultural value patterns and institutions sufficiently overlapped with the action orientations and motives fixed in personality structures. At the horizontal level of legitimate orders, it allowed the normative elements of ethical life, politics, and law to intermesh. In the train of developments I interpret as the rationalization of the lifeworld, this clamp sprang open. As the first step, cultural traditions and processes of socialization came under the pressure of reflection, so that actors themselves gradually made them into topics of discussion. To the extent that this occurred, received

practices and interpretations of ethical life were reduced to mere conventions and differentiated from conscientious decisions that passed through the filter of reflection and independent judgment. In the process, the use of practical reason reached that point of specialization with which I am concerned in the present context. The modern ideas of *self-realization* and *self-determination* signaled not only different issues but two different kinds of discourse tailored to the logics of *ethical* and *moral* questions. The respective logics peculiar to these two types of questions were in turn manifested in philosophical developments that began in the late eighteenth century.

[***96**] What was considered "ethics" since the time of Aristotle now assumed a new, subjectivistic sense. This was true of both individual life histories and of intersubjectively shared traditions and forms of life. In connection with, and in reaction to, a growing autobiographical literature of confessions and self-examinations—running from Rousseau through Kierkegaard to Sartre—a kind of reflection developed that altered attitudes toward one's own life. To put it briefly, in place of exemplary instructions in the virtuous life and recommended models of the good life, one finds an increasingly pronounced, abstract demand for a conscious, self-critical appropriation, the demand that one responsibly take possession of one's own individual, irreplaceable, and contingent life history. Radicalized interiority is burdened with the task of achieving a self-understanding in which self-knowledge and existential decision interpenetrate. Heidegger used the formulation "thrown project" to express the expectation of this probing selection of factually given possibilities that mold one's identity.[68] The intrusion of reflection into the life-historical process generates a new kind of tension between the consciousness of contingency, self-reflection, and liability for one's own existence. To the extent that this constellation has an [ever-broader] impact on society through prevailing patterns of socialization, ethical-existential or clinical discourses become not only possible but in a certain sense unavoidable: the conflicts springing from such a constellation, if they are not resolved consciously and deliberately, make themselves felt inobtrusive symptoms.

Not only the conduct of personal life but also the transmission of culture is increasingly affected by the type of discourse aimed at self-understanding. In connection with, and in reaction to, the rise of the hermeneutical and historical sciences, the appropriation of our own intersubjectively shared traditions became problematic starting with Schleiermacher and continuing through Droysen and Dilthey up to Gadamer. In place of religious or metaphysical self-interpretations, history and its interpretation have now become the medium in which cultures and peoples find their self-reassurance. Although philosophical hermeneutics got its start in the method-ology of the humanities, it responds more broadly to an insecurity provoked by historicism—to a reflexive refraction affecting the [***97**] public appropriation of tradition in the first-person plural.[69] During the nineteenth century, a posttraditional identity first took on a definite shape under a close affiliation between historicism and nationalism. But this was still fueled by a dogmatism of national histories that has since been in the

[68] Ernst Tugendhat has reconstructed this, using linguistic analysis; see his *Self-Consciousness and Self-Determination*, trans. P. Stern (Cambridge, Mass., 1986).

[69] J. Habermas, "Historical Consciousness and Post-Traditional Identity: The Federal Republic's Orientation to the West," in Habermas, *The New Conservatism*, ed. And trans. S.W. Nicholsen (Cambridge, Mass., 1989), pp. 249-67.

process of disintegration. A pluralism in the ways of reading fundamentally ambivalent traditions has sparked a growing number of debates over the collective identities of nations, states, cultures, and other groups. Such discussions make it clear that the disputing parties are expected to consciously choose the continuities they want to live out of, which traditions they want to break off or continue. To the extent that collective identities can develop only in the fragile, dynamic, and fuzzy shape of a decentered, even fragmented public consciousness, *ethical-political discourses* that reach into the depths have become both possible and unavoidable.

The intrusion of reflection into life histories and cultural traditions has fostered individualism in personal life projects and a pluralism of collective forms of life. Simultaneously, however, norms of interaction have also become reflexive; in this way universalist value orientations gain ascendancy. Once again, an altered normative consciousness is reflected in the relevant philosophical theories since the end of the eighteenth century. One no longer legitimates maxims, practices, and rules of action simply by calling attention to the contexts in which they were handed down. The distinction between autonomous and heteronomous actions has in fact revolutionized our normative consciousness. At the same time, there has been a growing need for justification, which, under the conditions of postmetaphysical thinking, can be met only by *moral discourses*. The latter aim at the impartial evaluation of action conflicts. In contrast to ethical deliberations, which are oriented to the telos of my/our own good (or not misspent) life, moral deliberations require a perspective freed of all egocentrism or ethnocentrism. Under the moral viewpoint of equal respect foreach person and equal consideration for the interests of all, the henceforth sharply focused normative claims of legitimately regulated interpersonal relationships are sucked into a whirlpool of problematization. At the posttraditional level of justification, individuals develop a principled moral consciousness and orient their [***98**] action by the idea of self-determination. What self-legislation or moral autonomy signifies in the sphere of personal life corresponds to the rational natural-law interpretations of political freedom, that is, interpretations of democratic self-legislation in the constitution of a just society.

To the extent that the transmission of culture and processes of socialization become reflexive, there is a growing awareness of the logic of ethical and moral questions. Without the backing of religious or metaphysical worldviews that are immune to criticism, practical orientations can in the final analysis be gained only from rational discourse, that is, from the reflexive forms of communicative action itself. The rationalization of a lifeworld is measured by the extent to which the rationality potentials built into communicative action and released in discourse penetrate lifeworld structures and set them a flow. Processes of individual formation and cultural knowledge-systems offer less resistance to this whirlpool of problematization than does the institutional framework. It is here, at the level of personality and knowledge, that the logic of ethical and moral questions first asserted itself, such that alternatives to the normative ideas dominating modernity could no longer be justified in the long run. The conscious life conduct of the individual person finds its standards in the expressivist ideal of self-realization, the deontological idea of freedom, and the utilitarian maxim of expanding one's life opportunities. The ethical substance of collective forms of life takes is standards, on the one hand, from utopias of nonalienated, solidary social life within the horizon of traditions that have been self-consciously appropriated and critically passed on. On the other hand, it looks to models of a just society

whose institutions are so constituted as to regulate expectations and conflicts in the equal interest of all; the social-welfare ideas of the progressive increase and just distribution of social wealth are just further variants of this.

One consequence of the foregoing considerations is of particular interest in the present context: to the extent that "culture" and "personality structures" are charged with ideals of the above sort, a law robbed of its sacred foundation also comes under duress; as we have seen, the third component of the lifeworld, "society" as the totality of legitimate orders, is more intensely concentrated in the legal system the more the latter must bear the burden of fulfilling [***99**] integrative functions for society as a whole. The changes just sketched in the two other components can explain why modern legal orders must find their legitimation, to an increasing degree, only in sources that do not bring the law into conflict with those posttraditional ideals of life and ideas of justice that first made their impact on persons and culture. Reasons that are convenient for the legitimation of law must, on pain of cognitive dissonances, harmonize with the moral principles of universal justice and solidarity. They must also harmonize with the ethical principles of a consciously "projected" life conduct for which the subjects themselves, at both the individual and collective levels, take responsibility. However, these ideas of self-determination and self-realization cannot be put together without tension. Not surprisingly, social-contract theories have responded to the modern ideals of justice and the good life with answers that bear different accents.

3.1.4

The aim of the excursus was to explain why human rights and the principle of popular sovereignty still constitute the sole ideas that can justify modern law. These two ideas represent the precipitate left behind, so to speak, once the normative substance of an ethos embedded in religious and metaphysical traditions has been forced through the filter of posttraditional justification. To the extent that moral and ethical questions have been differentiated from one another, the discursively filtered substance of norms finds expression in the two dimensions of self-determination and self-realization. Certainly one cannot simply align these two dimensions indirect correspondence with human rights and popular sovereignty. Still, there exist affinities between these two pairs of concepts, affinities that can be emphasized to a greater or lesser degree. If I may borrow a terminological shorthand from contemporary discussions in the United States, "liberal" traditions conceive human rights as the expression of moral self-determination, whereas "civic republicanism" tends to interpret popular sovereignty as the expression of ethical self-realization. From both perspectives, human rights and popular sovereignty do not so much mutually complement as compete with each other. [***100**]

Frank Michelman, for example, sees in the American constitutional tradition a tension between the impersonal rule of law founded on innate human rights and the spontaneous self-organization of a community that makes its law through the sovereign will of the people.[70] This tension, however, can be resolved from one side or the

[70] F. Michelman, "Law's Republic," *Yale Law Journal* 97 (1988): 1499f.: "I take American constitutionalism – as manifest in academic constitutional theory, in the professional practice of lawyers and judges, and in the ordinary political self-understanding of Americans at large – to rest on two premises regarding political freedom: first, that the American people are politically free insomuch as they are governed by themselves collectively, and, second, that the American people are politically free insomuch as they are

other. Liberals invoke the danger of a "tyranny of the majority and postulate the priority of human rights that guarantee the prepolitical liberties of the individual and set limits on the sovereign will of the political legislator. The proponents of a civic republicanism, on the contrary, emphasize the intrinsic, noninstrumentalizable value of civic self-organization, so that human rights have a binding character for a political community only as elements of their own consciously appropriated tradition. Whereas on the liberal view human rights all but impose them-elves on our moral insight as something given, anchored in a fictive state of nature, according to republicans the ethical-political will of a self-actualizing collectivity is forbidden to recognize anything that does not correspond to its own authentic life project. In the one case, the moral-cognitive moment predominates, in the other, the ethical-volitional. By way of contrast, Rousseau and Kant pursued the goal of conceiving the notion of autonomy as unifying practical reason and sovereign will in such a way that the idea of human rights and the principle of popular sovereignty would mutually interpret one another. Nevertheless, these two authors also did not succeed in integrating the two concepts in an evenly balanced manner. On the whole, Kant suggests more of a liberal reading of political autonomy, Rousseau a republican reading.

Kant obtains the "universal principle of law" by applying the moral principle to external relations. He begins his *Elements of Justice* with the one right owed to each human being "by virtue of his humanity," that is, the right to equal individual liberties backed by authorized coercion. This primordial right regulates internal property"; applying this to "external property" yields the private rights of the individual (which then become the starting point for Savigny and the German civil-law jurisprudence subsequent to Kant),[71] This system of natural rights, which "one cannot give up even if one wanted to,"[72] belongs "inalienably" to each human being. It is legitimated, prior to its differentiation in the shape of [***101**] positive law, on the basis of moral principles, and hence independently of that political autonomy of citizens first constituted only with the social contract. To this extent the principles of private law enjoy the validity of moral rights already in the state of nature; hence "natural rights," which protect the human being's private autonomy, precede the will of the sovereign lawgiver. At least in this regard, the sovereignty of the "concurring and united will" of the citizens is constrained by morally grounded human rights. To be sure, Kant did not interpret the binding of popular sovereignty by human rights as a constraint, because he assumed that no one exercising her autonomy as a citizen *could* agree to laws infringing on her private autonomy as warranted by natural law. But this means that political autonomy must be explained on the basis of an *internal* connection between popular sovereignty and human rights. The construct of the social contract is meant to accomplish just this. However, in following a path of justification that *progresses* from morality to law, the construction of Kant's *Rechtslehre* denies to the social contract the central position it actually assumes in Rousseau.

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governed by laws and not by men. I take it that no earnest, non-disruptive participant in American constitutional debate is quite free to reject either of those two professions of belief. I take them to be premises whose problematic relation to each other, and therefore whose meanings, are subject to an endless contestation."

[71] See I. Kant, *The Metaphysical Elements of Justice*, trans. J. Ladd (New York, 1965), pp. 35, 44-45.

[72] Kant, "On the Proverb," p. 82 [translation slightly altered. Trans.].

Rousseau starts with the constitution of civic autonomy and produces a fortiori an internal relation between popular sovereignty and human rights. Because the sovereign will of the people can express itself only in the language of general and abstract laws, it has directly *inscribed* in it the right of each person to equal liberties, which Kant took as a morally grounded human right and thus *put ahead* of political will—formation. In Rousseau, then, the exercise of political autonomy no longer stands under the proviso of innate rights. Rather, the normative content of human rights enters into the very mode of carrying out popular sovereignty. The united will of the citizens is bound, through the medium of general and abstract laws, to a legislative procedure that excludes per se all nongeneralizable interests and only admits regulations that guarantee equal liberties for all. According to this idea, the procedurally correct exercise of popular sovereignty simultaneously secures the substance of Kant's original human right.

However, Rousseau does not consistently carry through with this plausible idea, because he owes a greater debt to the republican tradition than does Kant. He gives the idea of self-legislation more of an ethical than a moral interpretation, conceiving autonomy as [***102**] the realization of the consciously apprehended form of life of a particular people. As is well known, Rousseau imagines the constitution of popular sovereignty through the social contract as a kind of existential act of sociation through which isolated and success-oriented individuals *transform* themselves into citizens oriented to the common good of an ethical community. As members of a collective body, they fuse together into the macrosubject of a legislative practice that has broken with the particular interests of private persons subjected to laws. Rousseau takes the excessive ethical demands on the citizen, which are built into the republican concept of community in any case, to an extreme. He counts on political virtues that are anchored in the ethos of a small and perspicuous, more or less homogenous community integrated through shared cultural traditions. The single alternative would be state coercion: "Now the less the individual wills relate to the general will, that is to say customary conduct to the laws, the more repressive force has to be increased. The Government, then, in order to be good, should be relatively stronger as the people becomes more numerous."[73]

However, if the practice of self-legislation must feed off the ethical substance of a people who already *agree in advance* on their value orientations, then Rousseau cannot explain how the postulated orientation of the citizens toward the common good can be mediated with the differentiated interest positions of private persons. He thus cannot explain how the normatively construed common will can, without repression, be mediated with the free choice of individuals. This would require a genuinely moral standpoint that would allow individuals to look beyond what is good *for them* and examine what lies equally in the interest of each. In the final analysis, the ethical version of the concept of popular sovereignty must lose sight of the universalistic meaning of Kant's principle of law.

Apparently the normative content of the original human right cannot be fully captured by the grammar of general and abstract laws alone, as Rousseau assumed. The

[73] J.-J. Rousseau, *Of the Social Contract or Principles of Political Right*, trans. C.M. Sherover (New York, 1984), p. 55 (bk. 3, pt. 1, par. 159).

substantive legal equality[74] that Rousseau took as central to the legitimacy claim of modern law cannot be satisfactorily explained by the *semantic* properties of general laws. The form of universal normative propositions says [***103**] nothing about their validity. Rather, the claim that a norm lies equally in the interest of everyone has the sense of rational accept-ability: all those possibly affected should be able to accept the norm on the basis of good reasons. But this can become clear only under the *pragmatic* conditions of rational discourses in which the only thing that counts is the compelling force of the better argument based on the relevant information. Rousseau thinks that the normative content of the principle of law lies simply in the semantic properties of *what* is willed; but this content could be found only in those pragmatic conditions that establish *how* the political will is formed. So the sought-for internal connection between popular sovereignty and human rights lies in the normative content of the very *mode of exercising political autonomy*, a mode that is not secure simply through the grammatical form of general laws but only through the communicative form of discursive processes of opinion- and will-formation.

This connection remains hidden from Kant and Rousseau alike. Although the premises of the philosophy of the subject allow one to bring reason and will together in a concept of autonomy, one can do so only by ascribing this capacity for self-determination to a subject, be it the transcendental ego of the *Critique of Practical Reason* or the people of the *Social Contract*. If the rational will can take shape only in the individual subject, then the individual's moral autonomy must reach through the political autonomy of the united will of all in order to secure the private autonomy of each in advance via natural law. If the rational will can take shape only in the macrosubject of a people or nation, then political autonomy must be understood as the self-conscious realization of the ethical substance of a concrete community; and private autonomy is protected from the overpowering force of political autonomy by the nondiscriminatory form of general laws. Both conceptions miss the legitimating force of a discursive process of opinion- and will-formation, in which the illocutionary binding forces of a use of language oriented to mutual understanding serve to bring reason and will together—and lead to convincing positions to which all individuals can agree without coercion.

However, if discourses (and, as we will see, bargaining processes as well, whose procedures are discursively grounded) are the site [***104**] where a rational will can take shape, then the legitimacy of law ultimately depends on a communicative arrangement: as participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected. Consequently, the sought-for internal relation between popular sovereignty and human rights consists in the fact that the system of rights states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalized. The system of rights can be reduced neither to a moral reading of human rights nor to an ethical reading of popular sovereignty, because the private autonomy of citizens must neither be set above, nor made subordinate to, their political autonomy. The normative intuitions we associate conjointly with human rights and popular sovereignty achieve their full

[74] [According to Habermas, "substantive legal equality," or *Rechtsinhaltsgleichheit*, has two components: (a) legal statutes are applied so as to treat like cases alike and different cases differently; and (b) legal statutes regulate matters in a way that is in the equal interest of each person. Trans.]

effect in the system of rights only if we assume that the universal right to equal liberties may neither be imposed as a moral right that merely sets an external constraint on the sovereign legislator, nor be instrumentalized as a functional prerequisite for the legislator's aims. The co-originality of private and public autonomy first reveals itself when we decipher, in discourse-theoretic terms, the motif of self-legislation according to which the addressees of law are simultaneously the authors of their rights. The substance of human rights then resides in the formal conditions for the legal institutionalization of those discursive processes of opinion- and will-formation in which the sovereignty of the people assumes a binding character.

Ronald Dworkin, Constitutionalism and Democracy, 3 EUR. J. PHIL. 1 (1995)[1]

1. Introduction

Professor Habermas was kind enough to send me an advance copy of his paper.[2] I thought it might be best, in the interests of a concentrated discussion, to address some of the same themes as he does, though, as you will see, my perspective is a different one. So I shall discuss connections between law and jurisprudence, on the one hand, and moral and political theory on the other.

By 'constitutionalism' I mean a system that establishes individual legal rights that the dominant legislature does not have the power to override or compromise. Constitutionalism, so understood, is an increasingly popular political phenomenon. It has become increasingly common to suppose that a respectable legal system must include constitutional protection of individual rights. That is the assumption not only of the European Convention of Human Rights, but of almost all the Member States of that convention, in their domestic law. (Even in Britain, which is an exception, the pressure for an embedded constitution is growing.) Perhaps the most remarkable example, however, is South Africa. Even when the ANC legal committee was in exile, drafting a constitution against the day in which a black majority would be permitted to govern, it was never doubted that a South African Constitution should protect minorities against majority power.

But nevertheless a strong objection has been pressed against constitutionalism: that it subverts or compromises democracy, because if a constitution forbids the legislation to pass a law limiting freedom of speech, for example, that diminishes the democratic right of the majority to have the law it wants. If we respect constitutionalism, but also democracy, what should we do? What is the proper accommodation between the two ideals?

I believe that the conflict just described is illusory, because it is based on an inaccurate understanding of what democracy is. We should begin by noticing a distinction between democracy and majority rule. Democracy means *legitimate* majority rule, which means that mere majoritarianism does not constitute democracy unless further conditions are met. It is controversial just what these conditions are. But *some* kind

[1] I prepared this paper not to read at the symposium held at the Zentrum für interdisziplinäre Forschung, Bielefeld, but to give Professor Habermas an advance idea of what I would discuss there. I agreed to its publication here, but did not have an opportunity to revise it for that purpose.

[2] Jürgen Habermas, *On the Internal Relation Between the Role of Law and Democracy*, 3 EUR. J. PHIL. 12 (1995).

of constitutional structure that a majority cannot change is certainly a prerequisite to democracy. There must be embedded constitutional rules stipulating that a majority cannot abolish future elections, for example, or disenfranchise a minority.

Let us distinguish, then, between *enabling* constitutional rules, which construct majority government by stipulating who may vote, when elections are **[3]** to be held, how representative officials are assigned to electoral districts, what powers each group of representative officials has, and so forth, and *disabling* constitutional rules, which restrict the powers of the representative officials that the enabling rules have defined. We cannot say that only enabling rules are prerequisites of democracy, because some constitutional rules that might seem, on the surface, to be disabling rules are plainly essential to democracy. A majority would destroy democracy just as effectively by forbidding a minority the right to free expression as it would by denying that minority the vote, for example.

It is nevertheless controversial which disabling rules are essential to constructing democracy and so cannot be regarded as compromising or subverting it. Is it essential to democracy that minorities are guaranteed freedom from private discrimination in schools and employment, for example? Is it essential that women are guaranteed the right to an abortion if they wish, or that homosexuals are guaranteed sexual freedom? Is it essential that people are guaranteed a decent level of health care or housing or nutrition or education? These various rights are not so evidently connected to fair political procedures as is the right to free speech, and it may therefore seem plausible that embedding any of these rights in a constitution that cannot be amended by the majority is a compromise of democracy, a constraint on a majority's legitimate right to govern. That issue is, however, more complex than it might first appear, and we must look again.

2. Two Concepts of Collective Action

Democracy, like almost any other form of government, involves collective action. We say that in a democracy government is by the *people*: we mean that the people collectively do things—elect leaders, for example—that no individual does or can do alone. There are two kinds of collective action, however— statistical and communal—and our conception of the essential pre-conditions of democracy will turn on which kind of collective action we take democratic government to require. Collective action is statistical when what the group does is only a matter of some function, rough or specific, of what the individual members of the group do on their own, that is, with no sense of doing something *as* a group. We might say: the German people want a more aggressive foreign policy. We describe a kind of collective action: no one German can act in such a way that he has made it true that the German people think anything in particular. But the reference to the German *people* is nevertheless only and simply a figure of speech. Our remark only makes a rough statistical judgment of some sort about what (say) most Germans who think about the subject think, or something of that sort. Or we might say that yesterday the foreign exchange market drove up the price of the Mark. Once again, we are describing collective action: only a large group of bankers and dealers can affect the foreign currency **[4]** market in any substantial way. But once again our reference to a collective entity, the currency market, does not point to any actual entity. We could, without changing our meaning, make an overtly statistical claim instead: that the combined effects of individual currency transactions were responsible for the higher price of the Mark at the latest trade.

Collective action is communal, on the other hand, when it cannot be reduced just to some statistical function of individual action, because it is collective in the deeper sense that requires individuals to assume the existence of the group as a separate entity or phenomenon. The familiar but very powerful example of collective guilt provides a good example. Many Germans (including those born after 1945) feel responsible for what *Germany* did, not just for what other Germans did; their sense of responsibility assumes that they are themselves connected to the Nazi terror in some way, that they belong to the *nation* that committed those crimes. Here is a less unpleasant example. An orchestra can play a symphony, though no single musician can, but this is not a case of statistical collective action because it is essential to an orchestral performance not just that a specified function of musicians each plays some appropriate score, but that the musicians play *as* an orchestra, each intending to make a contribution to the performance of the group, and not just as isolated individual recitations.

The distinction between statistical and communal action allows us two conceptions of democracy as collective action. The first is a statistical conception: that in a democracy political decisions are made in accordance with some function—a majority or plurality—of the votes or decisions or wishes of individual citizens. The second is a communal conception: that in a democracy political decisions are taken by a distinct entity—the *people* as such—rather than any set of individuals one by one. Rousseau's idea of government by general will is an example of a communal rather than a statistical conception of democracy.

Our sense of which constitutional rights are essential preconditions of democracy will depend on which of these conceptions of democracy—these two conceptions of collective action—we accept. I suspect that most of you are drawn to a statistical conception, which is certainly more familiar in our political theory, if not our political rhetoric, than a communal conception. You may think the communal conception metaphysical and mysterious. You may also think it dangerously totalitarian, and my reference to Rousseau would not have allayed that suspicion. So I will proceed, first, on that assumption, though we shall later find reason to consider how the matter would look if we adopted a communal conception (which I myself prefer).

If we adopt a statistical conception of democracy, then we must think about the pre-conditions of democracy in the following way. The bare fact that a majority or plurality of people favour one decision rather than another does not, just in itself, provide more legitimacy—it does not provide an appealing moral case justifying the coercion of the minority, who may have been seriously disadvantaged by the decision. We must consider what further facts would confer moral legitimacy on such a decision. We have already noticed some of **[5]** these: a constitutional structure must be in place protecting the right of every adult to vote and to participate in political decisions. What other rights or conditions must be guaranteed? This is a question of political morality that different people would answer differently. But two further conditions might seem necessary. A majority vote does not achieve the needed legitimacy unless, first, all citizens have the moral independence necessary to participate in the political decision as free moral agents, and unless, second, the political process is such as to treat all citizens with equal concern. If that is right, then the preconditions of democracy include some rights—which ones is a matter for debate—tending to secure these conditions. It must include freedom of conscience and religion as well as freedom of

political speech, and it must guarantee that political decisions do not reflect prejudice against any group, or disdain for or indifference towards its needs.

3. Does Constitutionalism Undermine Equality?

So the case seems compelling, on the statistical conception of collective action, that constitutional rights do not subvert democracy but, on the contrary, are an essential precondition of it. But now we must take account of arguments to the contrary. I assumed, just now, that the bare fact of a statistical majority or plurality does not provide moral legitimacy. But some of you might object to that quick conclusion. You might think that, even if a majoritarian vote does not provide full legitimacy, it has some moral consequence, just in itself, so that curtailing majoritarianism by accepting constitutionalism, even if overall justified, does involve a moral cost. If that were true, then it would give sense to the popular idea that constitutionalism involves *some* compromise in democracy. So I must now consider arguments to that effect.

It might be said that constitutionalism compromises political equality because it gives enormous power to a group of judges who are not elected or politically responsible. That might sound right, at first blush, but it is actually hard to defend in any troubling form. In the first place, as I have tried to explain at length elsewhere, we cannot define political equality as a function of political *power*. If we define power as impact, the goal of equal power is unattainable in a representative democracy; if we define it as influence, the goal is undesirable as well as unattainable. Political equality must be defined as a matter of *status* not power, and many constitutional rights, like the right of free speech, therefore contribute to rather than derogate from political equality. Second, many other officials who are appointed rather than elected—cabinet officers, for example— wield even greater power than judges. An American secretary of state may bring the country into war. In any case, however, we should distinguish between two forms of power: legislative power and adjudicative or interpretive power. The argument that constitutionalism subverts political equality generally assumes that constitutional interpretation is actually legislation. That is an important fact **[6]** for us to notice, because it shows the impact of both legal theory and moral philosophy on this political issue.

The important constitutional disabling provisions are usually drafted in very abstract language. The American constitution, for example, requires 'due process of law' and 'equal protection of the laws', and forbids punishments that are 'cruel'. Judges must decide how to apply these to concrete cases and, of course, judges disagree. They disagree, moreover, in ways that suggest the impact of any judge's convictions about political morality—about the relative moral importance of particular freedoms, for example—on that judge's opinion about what the constitution really means. There are two connected doctrines that argue, from these facts, that judges are not interpreting the law, but inventing new law. According to these doctrines, judges' interpretations are actually pieces of fundamental legislation that, once enacted by a judicial decision at the highest level, cannot be changed by a majoritarian parliament.

The two connected doctrines are a legal theory—legal positivism—and a philosophical thesis—Archimedean moral scepticism. Legal positivism (in its strictest form) holds that law consists in the decisions of officials or other people who have been given law-creating powers by the social conventions of the community in question. If positivism is sound, as a general theory of law, then constitutional adjudication must

be constitutional legislation in disguise, because no official or anyone else with conventional law-creating powers has ever decided whether, for example, the equal protection clause forbids paying women lower wages for the same work or the due process clause forbids making abortion a crime. But legal positivism is an inadequate interpretation of legal practice, not just in constitutional cases, but generally. It ignores the fact that we treat as law, not only what the proper officials have declared, but the principles underlying what they have declared, whether they recognized those principles or intended to enact them or not. Law is a matter of integrity not just fiat. So legal positivism cannot support the claim that constitutionalism is undemocratic, because legal positivism is a bad theory of law.

4. Moral Scepticism

Archimedean scepticism, which argues, on philosophical grounds, that there cannot be a single right answer to a controversial moral question, poses a greater challenge, if only because of the great popularity of such scepticism in our cultures now. The question whether outlawing abortion offends the due process clause plainly involves issues of political morality: it requires judges to decide, as one justice put it, which freedoms are basic to the very idea of 'ordered liberty'. If moral convictions are only expressions or projections of emotions or sentiments, as Archimedean sceptics insist, then it cannot be accurate to say that judges interpret the constitution hoping to discover its right or true meaning. We must say that they project their own emotions onto the constitution, which means that they are legislating a new one. **[7]**

I called this form of scepticism 'Archimedean' to distinguish it from ordinary, or internal, scepticism, of the kind that you and I ourselves share, I assume, about some parts of conventional morality. Internal scepticism rejects morality on internal, moral grounds. If we are sceptical about conventional sexual morality, it is because we think that morality is a matter of people's interests, and we don't think that voluntary sexual choices, however unusual, are harmful. If we think that moral duty can be generated only by the command of a supernatural being, and we think there is no God, we will be sceptical for that reason. This form of scepticism, however global, is rooted in a moral sense, in a set of deep beliefs that, when made explicit, count as a positive moral assertion, a claim about what the only true ground of morality could be. That is why, as J. Stern put it, the three most important moral sceptics of the 19th century, Freud, Marx and Nietzsche, were all profound moralists.

Archimedean (or external) scepticism, on the contrary, is supposedly independent of and neutral among all value claims: it is a philosophical position, based on epistemological or ontological or semantic considerations, not a moral one. The difference is very important in the present context. Since internal scepticism is itself grounded in a moral sense, it can be global but not universal: it cannot be scepticism all the way down. It cannot claim that there is not truth in the *neighborhood* of the moral. External scepticism, on the contrary, is Archimedean because it is supposedly rooted not in some deep moral sense but in a realm outside morality altogether: a special philosophical platform from which a philosopher might look down on morality and pass judgment about it on the whole. An internal sceptic about sexual morality answers the charge that homosexuality is wrong with an opposite moral claim: that it is not wrong. An Archimedean critic answers that it is neither true nor false that homosexuality is wrong, or that its wrongness or rightness is not out there in reality but in here, in our breasts.

Archimedean sceptics are sceptical (we might say) not about the content but about the status of moral claims. They oppose not particular opinions about how we should behave, what we should value, and so on, but what we might call the 'face value' view of these opinions. That is the view you and I have about many of our moral opinions. We think that genocide in Bosnia is wrong, immoral, wicked, odious. We think that these opinions are true -we might be sufficiently confident, in this case at least, to say that we know that genocide is wrong - and the people who do not agree with us in these opinions are making a bad mistake. That is the view of morality, indeed of value in general, that the Archimedean sceptics wish to oppose or defeat. According to them, the face value view is not itself a moral view. It is a second-order view about moral views, and, in their opinion, a mistaken one.

But this distinction between the first-order moral convictions which Archimedean scepticism accepts and the second-order face-value view which it rejects is itself a mistake. For the face-value view of morality is itself a piece of morality: it cannot be understood any other way. To say that it is true that abortion is wicked is, for our purposes, just to say that abortion is wicked. To say **[8]** it is objectively wicked is just to say that it is wicked everywhere and at all times. To say that the wickedness of morality is 'out there' or 'part of the furniture of the universe', if this means anything at all, is just to say that abortion would still be wicked even if no-one thought it was, which is a further moral claim. We cannot assign any sense to these various redundant or metaphorical or odd beliefs that the Archimedeans think the rest of us have, about the 'status' of our moral convictions, that does not make these into redundant or further moral convictions. (If we try, we turn them into preposterous convictions that no-one actually holds, like the view that the wrongness of abortion is a weird physical fact or that the wrongness of abortion enters into the causal explanation of why people think it is wrong.) But if so, then Archimedean or external scepticism is based on a plainly mistaken idea: that an ordinary, internal moral conviction can somehow be undermined by a morally neutral, external claim. In fact, the only thing that can undermine a moral position either is or presupposes a moral or evaluative commitment of some kind.

You will be amazed that I propose so quickly to dispose of a philosophical tradition that has exercised such great influence since Hume. But I do think that that is all there is to it. Any genuine form of scepticism about morality (or art or law or ethics) must be internal to those domains. We can (and I hope we will) pursue the point in discussion. But if it is correct, then we must understand what might be regarded as meta-ethical theories of different sorts as substantive ethical theories instead. Consider the dialogic theory that Professor Habermas has defended so powerfully: the only form of truth in morals, he suggests, is a kind of convergence under ideal conditions. This is unpersuasive, for the reasons I suggested, when viewed as an external, philosophical analysis of truth. But it is more attractive as a substantive account of morality—as a substantive moral claim that hypothetical convergence is a substantively appropriate test of a moral or a political view. One way (there are others) to put the claim would then be this: we must reject any moral position, at least as a basis for government, unless it is likely (or plausible, or possible) that it would be the object of convergence under circumstances we would think suitable. (Compare Thomas Scanlon's 'contractarian' view that no principle is morally sound if it could be reasonably rejected by anyone, under appropriate circumstances.) I should say that I am, so far, not fully persuaded by Habermas' view even in this substantive form. I have more

confidence that racial prejudice is wrong than I do that people would converge on that view under any circumstances. In fact, I doubt that we will find a satisfying overall, general substantive account of moral truth.

In any case, I reject the idea that any form of Archimedean scepticism shows us, in advance, that constitutional interpretation must be constitutional legislation. Even though judges disagree about the best interpretation of abstract constitutional clauses, like the due process clause, it does not follow that they are legislating new constitutional law rather than doing their best to discover what the existing constitutional law really is. It remains possible to argue, on *internal* grounds, that there is no right answer to some legal question, like the **[9]** question, for example, whether the due process clause forbids states to make abortion a crime. But of course the possibility that some such argument might succeed as to some issues gives us no reason to claim, as a general matter, that there is never a right answer to a controversial constitutional issue.

5. Does Constitutionalism Deny Freedom?

It is sometimes said that though constitutionalism may protect negative liberty, or the liberty of the moderns, it does so at the cost of positive liberty, or the liberty of the ancients, or the Kantian power of people to legislate their own laws. The distinction I made earlier, between a statistical and a communal concept of collective action, is important in trying to understand this charge. If we conceive of democracy as statistical, then the charge seems simply a flat mistake. Democracy does not protect any *individual's* power to control his own destiny: in a large state, of many million people, no-one's positive freedom is greater, in any but the thinnest, most academic sense, if he has a vote than if he does not. In order to reveal the force of the claim about positive liberty, we must take up the *communal* conception of democracy. Then it might seem a powerful point that constitutionalism limits the power of 'the people', now conceived as an entity rather than only statistically, to govern its own affairs.

But if we adopt a communal conception of democracy, then we must answer a question parallel to the question I asked with respect to the statistical conception earlier. What are the pre-conditions for a collection of people counting as a genuine community, such that it is then morally significant what the community does? I will suggest that three conditions are necessary in order that a political community count as a moral community. The structure of the political community must be such that individual citizens have a *part* in the collective, a *stake* in it, and *independence* from it.

First, in a democracy understood as communal government by equals, each person must be offered the chance to play a role that could make a difference to the character of political decisions, and the force of her role—the magnitude of the difference she can make—must not be structurally fixed or limited by assumptions about her worth or talent or ability, or the soundness of her convictions or tastes. Second, collective decisions must reflect equal concern for the interests of all members. Membership in a collective unit of responsibility involves reciprocity: a person is not a member of a collective unit sharing success and failure unless he is treated as a member by others, and treating him as a member means accepting that the impact of collective action on his life and interests is as important to the overall success of the action as the impact on the life and interests of any other member. Though even Germans who actively opposed Hitler feel a measure of collective responsibility for his crimes, it

would be absurd, even perverse, for German Jews to feel any such sense. So the communal conception of democracy explains an intuition many of us share: that **[10]** a society in which the majority deliberately distributes resources unfairly is undemocratic as well as unjust. Third, if a community is to have moral significance, so that its decisions give legitimacy to coercion of dissenters, then it must be a community of moral agents. Citizens must be encouraged to see moral and ethical judgment as their own responsibility rather than the responsibility of the collective unit; otherwise they will form not a democracy but a monolithic tyranny. A communal democratic government must not dictate what its citizens think about matters of political or moral or ethical judgment, but must, on the contrary, provide circumstances that encourage citizens to arrive at beliefs on these matters through their own reflective and finally individual conviction.

6. Democracy and Mistakes

So constitutionalism does not threaten positive liberty, because constitutionalism is essential to creating a democratic community—to constituting 'the people'— and there can *be* no communal, collective freedom without it. I mean, of course, that constitutionalism does not compromise positive liberty *in* p*rinciple*. It may do so if the constitution contains the *wrong* principles, or if judges make the wrong decisions interpreting it. But that is hardly surprising. Democracy can go wrong in many ways, and this is only one of them. But the point does remind us of an important further question. Suppose we accept that constitutionalism, as I defined it, is a necessary precondition of democracy. How should a society decide what its constitution should be, and—what may come to the same thing in practice—how should it apply its constitution to particular controversial issues?

There seems only one way in which a society that aspires to be a democracy should decide what abstract principles or rights to declare in its constitution. It should do so by popular referendum. But how should the constitution be interpreted? I favour (perhaps unsurprisingly) the American method: we assign adjudicative responsibility to judges, whose decision is final, barring a constitutional amendment, until it is changed by a later judicial decision. Of course that does give great power to a few men and women. Even if we agree that interpretation is not invention, and that judges can sensibly take themselves to be attempting to find the best interpretation of the constitution they have rather than to write a new one, the fact that their views will be final gives them exceptional power. That power is limited in various ways—there are typically several judges in a constitutional court, and new appointments, reflecting popular judgments, are fairly frequent. And judges can be impeached if they behave outrageously. But it is still exceptional power, and the arrangement needs a justification.

I would offer a negative and a positive argument on its behalf. First, democracy requires that the power of elected officials be checked by individual rights, as we have seen, and the responsibility to decide when those rights have **[11]** been infringed is not one that can sensibly be assigned to the officials whose power is supposed to be limited. Second, asking judges to interpret and enforce those rights provides the best available forum for viewing the question of their interpretation as a moral rather than a political one. The public participates in the discussion—as it has in the United States, for example, about abortion, school prayer and many other issues—but it does

so not in the ordinary way, by pressuring officials who need their votes or their campaign contributions, but by expressing convictions about matters of principle. In that sense, even the terrible debate in the United States about the Supreme Court's abortion decision, *Roe* v. *Wade*, has been beneficial.

There is, of course, a good deal of idealization in my description. Judges are not trained as political philosophers, and are not necessarily impressive at it - though the decisions of the Supreme Court do contain some marvellously lucid and effective arguments of principle. The constitutional debate in the newspapers, on television, and in political campaigns rarely reaches the sophistication of a seminar. But I believe that adding to a political system a process that is institutionally structured as a debate over principle rather than a contest over power is nevertheless desirable, and that counts as a strong reason for allowing judicial interpretation of a fundamental constitution.

Ruth Barcan Marcus, *More about Moral Dilemmas*, *in* MORAL DILEMMAS AND MORAL THEORY 23 (Homer E. Mason ed., 1996)

In "Moral Dilemmas and Consistency,"[1] I argued that moral dilemmas need not signify an inconsistency in the set of principles under which we define our obligations. I also argue that consistency of principles does not entail that dilemmas are resolvable in both a weak and a strong sense. The weak sense is that even where principles, including priority principles, favor one alternative in a dilemma, the original obligation with respect to the other is not erased. The strong sense is that there is no reason to suppose that any set of moral principles will be sufficient to provide grounds for making a choice in every case of conflict. In so claiming, I am not also claiming that there *is* a right choice to be arrived at, by intuition independent of principle or the like. I am claiming that there may be cases of dilemma for which there is no morally justified resolution at all. As explained below, there may be non-moral grounds for choosing. I do not count tossing a coin or using a lottery as clearly *morally* justified grounds for choice.

The existence of dilemmas in the strong and weak sense suggests a second order principle: that as rational agents we ought to arrange our lives and institutions with a view to reducing such conflicts.

I want in this paper to clarify some of the original arguments, to modify some of my earlier claims, and to elaborate on some of the consequences[2]2 But, first, a review of the arguments.

I

It is assumed that a moral principle is one that applies to all moral agents in a moral community. A moral code is a set of moral principles. To count as a principle, a precept must be of a certain generality, and not tied to specific individuals, times, or places, except that on any occasion of use it takes the time of that occasion as a zero

[1] [Ruth Barcan Marcus], *Moral Dilemmas and Consistency*, 77 J. Phil. 121 (1980). Many passages in the present paper are repetitions of passages in the original paper. Versions of the present paper have been circulating (and sometimes referred to) since October 1980.

[2] Some of the modifications and elaborations are a result of comments of Joel Feinberg, Paul Benacerraf, Walter Sinnott-Armstrong, and a study of Thomas Nagel's MORTAL QUESTIONS (1979), as well as close reading of Bernard Williams's *Ethical Consistency*, 39 PROC. ARISTOTELIAN SOC'Y 103 (1965).

coordinate and projects into the future. It proscribes or prescribes action. For the discussion here, no distinction need be drawn between categorical and conditional principles. We may think of categorical moral principles as imposing obligations on an agent by virtue of his being a person and a member of a moral community. In the conduct of our lives, circumstances arise or are brought about in which our code mandates a course of action. Sometimes, as in dilemma, incompatible actions x and y are **[24]** mandated, where doing x precludes doing y. Indeed, y may consist of refraining from doing x.

Dilemmas are usually presented as a predicament for an individual, such as Plato's case, in which the return of weapons has been promised to one who, intent on mayhem, comes to claim them. But they need not be so confined. In the case of Antigone and Creon, Antigone's sororal obligations conflict with Creon's obligation to keep his word and preserve peace. Creon's meeting his obligations precludes Antigone's meeting hers and the converse, under shared principles. Of course, if one of their shared principles is the principle of respect for the obligations of others, then the dilemma could be viewed as an individual predicament for each of them.

We will say that denial of the reality of moral dilemmas consists in claiming that, in every situation where the moral code applies, there is only one right choice in accordance with the code, and on making that choice there is no residue. Doing the right thing cancels other apparent conflicting obligations.

Kant[3] denied the reality of moral dilemmas. He says, categorically, "Because however duty and obligation are in general concepts that express the objective practical necessity of certain actions . . . , it follows that a conflict of duties is inconceivable *(obligationes non colliduntur).*" His account of what for him would be apparent dilemmas is notoriously deficient.

W. D. Ross also denied the reality of moral dilemmas but takes pains to give us an account of them. He proposed that principles that in *particular cases* generate conflicting obligations are insufficient. In cases of conflict, they do not yield a *final* basis for decision. Ross, like Kant, argues that there is always one morally right choice, but, unlike Kant, he claims that right choices in cases of conflict need not be wholly mandated by our prima facie principles. Although Ross recognizes that estimates of the stringency of different prima facie principles will permit some ordering of priorities in situations of conflict, the ultimate determination is a matter of intuition, albeit some kind of rational intuition. For Ross, the locus of the apparent dilemma is in the agent's uneasiness. For, he says, "Where a possible act is seen to have two characteristics in virtue of one of which it is prima facie right and in virtue of the other prima facie wrong, we are well aware that we are not *certain* whether we ought or ought not to do it. Whether we do it or not, we are taking a moral risk."[4] Dilemmas are seen to generate uncertainty. They are not evidence of inconsistency.

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[3] Immanuel Kant, THE METAPHYSICAL ELEMENTS OF JUSTICE, Part 1 of THE METAPHYSICS OF MORALS 24 (John Ladd trans., Bobbs-Merrill 1965).

[4] WILLIAM DAVID (W.D.) ROSS, THE RIGHT AND THE GOOD 30 (1930).

There are those who do view dilemmas as evidence for inconsistency. John Lemmon,[5] citing instances of dilemma, says, "This moral situation merely reflects an implicit inconsistency in our existing moral code; we are forced if we are to remain both moral and logical, by the situation, to restore consistency to our code by adding exception clauses to our present principles or by giving priority to one principle over another, or by some such device. The situation is as it is in mathematics; there if an inconsistency is revealed by derivation, we are compelled to modify our axioms; here if an inconsistency is revealed in application, we are forced to revise our principles."

For philosophers like those to whom Lemmon refers, such as Hare, and to some extent Rawls, dilemmas aren't, or at least may not be, quite "real." Hare supposes that amplifying a code with exception clauses, priority rules, and the **[25]** like will dispel dilemmas and yield a resolution in all possible cases. Rawls early on supposed that there would always be a "lexical ordering." I will not review the many arguments against such implausible proposals since my claim is that dilemmas are not evidence for inconsistency of a code.

Donald Davidson[6] is another who views dilemmas as evidence for inconsistency. He says, "Unless we take the line that moral principles *cannot* conflict in application to a case, we must give up the concept of the nature of practical reason we have so far been assuming. For how can premises all of which are true (or acceptable) entail a contradiction? It is astonishing that in contemporary moral philosophy this problem has received little attention and no satisfying treatment."

Until the recent revival of interest, philosophers who addressed the question of moral dilemmas seemed to agree, to the extent that I can determine, that dilemmas, whether real or apparent, have their initial source in the plurality of principles. They believed that if there were a single rule or maxim, conflicts would not arise. It is perhaps such a belief that accounts for Kant's inattention to the problem. It is surprising that philosophers concerned with practical reasoning persisted in that view despite its obvious falsehood. (I'm thinking here, for example, of remarks of Thomas Nagel[7] and Charles Fried.[8]) Promise-keeping defines a non-controversial moral principle, yet I might make two promises in all good faith and reason that they will not conflict, but then find that they do as a result of circumstances that are unpredictable and beyond my control. If all other considerations balance out, we have a dilemma in the strongest sense. There may be no *moral* reasons in favor of keeping one promise over the other. The examples can be multiplied.

It is true that unqualified act utilitarianism with a procedural tie-breaker is a plausible candidate for a moral system free of dilemma, but not only because it is a single principle. It. is rather that for the utilitarian only consequences of an action count. It is not particular features of the agent and the act per se that determine its rightness or wrongness. For the utilitarian, the valuation is computational, and where conflicting courses of action have the same utility it is open to him to adopt a computational procedure for deciding, such as tossing a coin. Computation is what yields

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[5] John Lemmon, *Deontic Logic and the Logic of Imperatives*, 8 LOGIQUE ET ANALYSE 39-61 (1965).

[6] Donald Davidson, *How Is Weakness of Will Possible?*, *in* MORAL CONCEPTS 105 (Joel Feinberg ed. 1970).

[7] THOMAS NAGEL, MORTAL QUESTIONS 74 n.12, 114 n. 6 (1979).

[8] CHARLES FRIED, RIGHT AND WRONG 16 (1978).

reasons for the utilitarian. It is clear that for dilemmas to arise some deontological principle is required—a principle that proscribes or commends certain clearly specified intentional actions toward others, without regard to wider consequences. Intentional actions such as violating another's rights, lying, or killing an innocent person are familiar proscriptions. Keeping promises and respecting the rights of others are familiar prescriptions, along with those that come with certain roles, such as that of parent, public official, and the like. These are actions in which the moral features, including intentions, circumstances, and immediate outcomes, are incorporated in the description of the action. In that respect the attributive content of that description is like an essential property—a property that the action has in all possible circumstances, or, if you like, in all possible worlds. Lying is an action in which an individual tells what she believes to be a falsehood with intention to deceive another, and it is wrong in accordance with a principle independent of any further consequence. It is this sense in which the prohibition against lying is absolute.

[26] There has been a tendency to confute two quite different senses of absolute—one in which it means essential and the other in which it means has priority under all circumstances. If an agent has among his principles a deontic principle about lying as well as a utilitarian principle, even though lying is essentially bad, it need not be the case that it overrides *all* utilitarian considerations. There may be some priority principle that specifies conditions under which utilitarian considerations override deontic considerations.

Dilemmas therefore would seem to require that a code have at least one deontic principle. If one also has a utilitarian principle in one's code, one might resolve all dilemmas by adopting an ordering that says that all deontic principles override the utilitarian principle and that only in cases of strong dilemma is the utilitarian principle to be applied. But that would be false to the moral facts for those who are not absolute deontologists. Our usual principles are such that the most familiar dilemmas are often generated by a conflict *between* deontic and utilitarian principles. For most of us with mixed principles, which include a principle of utility, there may be bad consequences of sufficient magnitude to justify a killing or telling a lie.

Of contemporary moral philosophers, Bernard Williams[9] is the one who has noted the contingent origin of dilemmas and seen most clearly that there should be a way of squaring dilemmas with consistency of moral codes. He sought to do that by seeing whether there were principles of deontic logic which, if rejected, would secure consistency despite dilemmas. Familiar systems of deontic logic are not only obscure in many respects, they apply to worlds that are doubly perfect; to worlds where not only is it *possible* always to act in accordance with duty, but where everyone always acts in accordance with duty. Indeed, *all* of the early standard postulates of deontic logic are met in such doubly perfect worlds. What one wants is a definition of consistency independent of controversial systems of deontic logic. Such a definition might, of course, have consequences for deontic logic.

II

Consistency, as generally defined, is a property of a set of propositions such that it is possible for all the members of the set to be true, in the sense that a contradiction

[9] Bernard Williams, *Ethical Consistency*, 39 PROC. ARISTOTELIAN SOC'Y 103 (1965).

would not be a logical consequence of supposing each member of the set true. *Grass is white* and *snow is green* is a consistent set of propositions. Analogously, we define a set *of rules* as consistent if there is some possible world, some alternative set of circumstances, in which they are all *obeyable*. In such a world persons bent on mayhem have not been promised or do not simultaneously seek the return of a cache of arms. Sororal obligations do not conflict with obligations to keep one's word or preserve the peace. Agents may still fail, through an imperfect will, to fulfill their obligations.

Consider, for example, a silly two-person card game.[10] The deck is shuffled and divided equally, face down between two players. Players turn up top cards on each play until the cards are played out. Two rules are in force: black cards trump red cards, and high cards (ace high) trump lower-valued cards without **[27]** attention to color. Where no rule applies, e.g., two red deuces, there is indifference and the players proceed. We could define the winner as the player with the largest number of tricks when the cards are played out. There is an inclination to call such a set of rules inconsistent. For suppose the pair turned up is a red ace and a black deuce; who trumps? This is not a case of rule indifference, as in a pair of red deuces. Rather, two rules apply, and both cannot be satisfied. But, on the definition here proposed, the rules are consistent in that there are possible circumstances where, in the course of playing the game, the dilemma would not arise and the game would proceed to a conclusion. It is possible that the cards be so distributed that, when a black card is paired with a red card, the black card happens to be of equal or higher value. Of course, with shuffling, the likelihood of dilemma-free circumstances is very small indeed. But we could have invented a similar game where the likelihood of proceeding to a conclusion without dilemma is greater. Indeed, a game might be so complex that its being dilemmatic under any circumstances is very small and may not even be known to the players. On the proposed definition, rules are consistent if there are possible circumstances in which no conflict will emerge. By extension, a set of rules is *inconsistent* if there are *no* circumstances, no possible world, in which all the rules are satisfiable.

A pair of offending rules that generates inconsistency provides *no* guide to action under any circumstance. Choices are thwarted whatever the contingencies. Well, a critic might say, you have made a trivial logical point. What pragmatic difference is there between the inconsistent set of rules and a set, like those of the game described above, where there is a likelihood of irresolvable dilemma? A code is, after all, supposed to guide action. If it allows for conflicts without resolution, if it tells us in some circumstances that we ought to do x and we ought to do y even though x and y are incompatible in those circumstances, that is tantamount to telling us that we ought to do x and we ought to refrain from doing x and similarly for y. The code has failed us as a guide. If it is not inconsistent, then it is surely deficient, and, like the dilemma-provoking game, in need of repair.

But the logical point is not trivial, for there are crucial *disanalogies* between games and the conduct of our lives. It is part of the canon of the family of games of chance, such as the game described, that the cards must be shuffled. The distribution of the cards must be "left to chance." To stack the deck, like loading the dice, is to cheat. But, presumably, the moral principles we subscribe to are, whatever their justification, not justified merely in terms of some canon for games. Granted, they must

[10] One could devise an equally silly one-person game of solitaire.

be guides to action and hence not totally defeasible. But consistency in our sense is surely only a necessary but not a sufficient condition for a set of moral rules. Presumably, moral principles have some ground; we adopt principles when we have reasons to believe that they serve to guide us in right action. Our interest is not merely in having a playable game, whatever the accidental circumstances, but in doing the right thing to the extent that it is possible. We may want to ensure that we can act in accordance with each of our rules. To that end, our alternative as moral agents, individually and collectively, as contrasted with the card game players, is to try to stack the deck so that dilemmas do not arise or that their likelihood is reduced. **[28]**

Given the complexity of our lives and the imperfection of our knowledge, the occasions of dilemma cannot always be foreseen or predicted. In playing games, when we are faced with a conflict of rules, we abandon the game or invent new playable rules; in the conduct of our lives, in contrast, we do not abandon action, and there may be no justification for making new rules to fit. We proceed with choices as best we can. Priority rules and the like assist us in those choices and in making the best of predicaments.

The foregoing analysis of consistency reveals the sources of confusion in Lemmon's and Davidson's claim about dilemma's being evidence for inconsistency. They fail to attend to the obvious [asymmetries] between deductive reasoning in the sciences and "deductive" reasoning, in which principles mandate future courses of action. In a dilemma, in the absence of a lexical ordering, we may choose each of the two courses of action. But we cannot meet both conflicting obligations. We cannot simultaneously return and fail to return a cache of arms to a person at a given place and time. Even if one wanted to keep the deontic principle of factoring—that if x ought to do A and x ought to do B, then x ought to do A and B—no *contradiction* is generated. There is no *contradiction* in recommending that someone do the impossible, although it might create considerable anxiety in the agent (the double bind). A contradiction, if we include factoring, does arise if we accept the principle that ought implies can.

Whether one adopts one or the other claim or neither requires independent justification. Considerations of consistency alone will not settle the matter. The simple response to Davidson's question is that where our principles have the consequence that they mandate conflicting courses of action in a particular case, we need not, as in the sciences, alter our principles; we may seek to change the world so that such conflicts do not arise. To allow that it is likely that we cannot wholly succeed is to acknowledge the reality of evil.

Our analysis of consistency as it applies to moral principles sheds light on the Kantian precept "Act so that thou canst will thy maxim to become a universal law of nature." As Kant understood laws of nature, they are universally and jointly applicable in *all* particular circumstances. It is that analogy with universal laws of *nature*, laws about what is rather than what we ought to do, that is the source of Davidson's and Lemmon's remarks about consistency. But, counter to Kant's ostrich-like stance, however perfect our will, circumstances may defeat such universal applicability. However, Kant's principle may be viewed as a second-order principle, and in fact a peculiar *consequentialist* rather than deontic principle. To will maxims to become universal laws of nature one must will the means. Those means are not confined to specific acts toward other persons, but they include arranging our lives and institutions, bringing

about certain consequences that will help to ensure that moral principles are universally applicable.

Of course there is no reason to suppose that we can always succeed in such an effort. The world may defeat us. Still, in troublesome dilemmas we often wish we could have avoided the emergence of such a predicament, and we often do take steps, to the extent that it is possible, to avoid them in the future. But as a general principle of action, that second-order principle is, like unmitigated utilitarianism, burdensome and seemingly supererogatory. Furthermore, it generates another deep dilemma: not a moral dilemma but one that creates a **[29]** tension between our pursuit of what we may regard as a good and rich or fulfilling life and our pursuit of a life without moral conflicts.[11] The principle may also, as it often does, deter morally conscientious persons from assuming roles in which their participation would be for the greater good, such as politics. In political life, dilemmas may be virtually certain to occur and dirty hands may be an inevitability. Of course, that tension is partly a function of what we count as moral principles. Those extreme libertarians who urge that moral principles be confined to *minimal negative* deontic obligations, such as not interfering with the rights of others and the like, have much greater latitude in pursuing life goals without encountering dilemmas as compared with those whose range of principles includes positive deontic, egalitarian, and consequentialist principles. Stoicism, asceticism, and the like can also be seen as at least in part a response to this tension.

Ill

I should like to talk about the consequences of our analysis for deontic logic. One may think of the deontic operator 'O' as applying to descriptions of particular actions where those actions fall under a moral rule. So, if there is a general rule about promise keeping, then O (Sally keeps her promise to Bill). The systems of deontic logic like that proposed by Chellas[12] are inadequate. Indeed, the basis for such familiar systems of deontic logic may be reduced to one axiom and a rule. The rule says that from the material conditional

$$A_1 \,\&\, A_2 \ldots A_n \rightarrow B$$

it follows that

$$OA_1 \,\&\, OA_2 \ldots OA_n \rightarrow OB$$

The axiom says

1. $$-(OA \,\&\, -OA)$$

The axiom makes invalid the situation of moral dilemma and hence must be rejected.

The rule, a rule of closure for the ought operator, is also implausible. Suppose as a matter of fact that, in this world, whenever someone keeps a promise, he raises his

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[11] A point made by Paul Benacerraf. Still, such a second-order principle was regarded by Rousseau as "the only one perhaps which is of practical use: to avoid situations which place duties in opposition to our interests." JEAN-JACQUES ROUSSEAU, THE CONFESSIONS 62-63. (John Michael (J. M.) Cohen trans., Penguin Books 1958). Peter Railton pointed out this quotation to me.

[12] *See* BRIAN CHELLAS, MODAL LOGIC (1980).

eyebrows. Then from that rule it follows from the obligation to keep promises that we have an obligation to raise our eyebrows.

Nor does strengthening the conditional to a causal conditional improve matters. Here we would have a rule of closure over the causal conditional. But (utilitarianism aside) obligatoriness characterizes an action that falls under a kind (see above). It is not the actions that are its causal consequences that are being prescribed and proscribed. One imagines that, in worlds with different physical laws, actions that are essentially right and wrong under a system of **[30]** moral rules would remain so, although actions that are causal consequences of those actions may shift. Suppose that under some set of psychological laws and conditions of upbringing, when Sally does the right thing, it always causes Sally to applaud. Applauding is an action that does not fall under a moral principle.

Nor does the rule hold where the conditional is strengthened to entailment. Recall that, for deontologists, ought is supposed to operate on action descriptions in which the action is, according to the normative principle, essentially right. But action descriptions that mention all relevant factors *entail* action descriptions that do not mention all relevant factors. Keeping a promise entails doing something or other. So keeping a promise to return a cache of arms to Sam entails giving something to Sam. But giving something to Sam has none of the features of an action description that falls under a normative principle. And what of the entailment from the troublesome law of addition? Returning a cache of arms to Sam entails returning a cache of arms to Sam or killing Sam. Ought, like some other intensional operators, is not closed under logical consequence. "Believes" and "desires" are among such operators.

There are, of course, no grounds for demanding that standard deontic systems fit the moral facts, devised as they were for a kingdom of ends. In deontically perfect worlds, there is no need for principles such as ought implies can, since there are two senses in which everything that ought to be done can be done. Contingent circumstances do not present us with symmetric moral choices in which choosing one alternative precludes choosing the other, nor do agents ever suffer failures of will. The minimal system[13] of deontic logic also retains closure under logical consequence but has only the axiom

2. $$-O(A \& -A)$$

In such a system, dilemmas are not ruled out as they are by 1. Nor is the factoring principle for ought derivable as a theorem, as it is in standard deontic logic. One cannot, as in Plato's case, go from

$$OA \& O-A$$

To

$$O(A \& -A\_$$

—which contradicts the axiom of this minimal system. Indeed, the axiom of this minimal system may be seen as a very *weakened* ought implies can. Such 'acts', if we may by extension call them that, which are the doing and refraining from doing A, fall under no normative principle.

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[13] *See* BRIAN CHELLAS, MODAL LOGIC (1980).

But the minimal system still has as its only rule closure under implication, and we have seen that even closure under *known* entailment will fail. Questions of closure reflect deep difficulties we encounter with the semantics of so-called opaque contexts.

[31] I do not wish here to elaborate on further modifications to arrive at an appropriate system, if that is possible. But a satisfactory system will be very complicated indeed. It will require some very non-standard assumptions to cope with the difficulties of closure. An adequate semantical base for a theory of obligation will require a semantical theory in which sentences designate possible states of affairs. It will also need to include modal operators (logical and metaphysical), temporal operators, and operators for physical modalities, for the latter is required for a proper treatment of the more general ought implies can.

In my previous paper I defended the principle of ought implies can, but I would like to qualify that defense.[14] In the principle ought implies can, 'can' is not used merely in the purely logical sense. It is supposed to include physical possibility. Obligations often require plans and arrangements if one is to discharge them. Something goes wrong when, for example, I promise to meet someone for lunch, deliberately go on a trip at a great distance, and plead that I could not return in time. One needs a condition that says at least that if an agent ought to do x and if he does nothing to thwart the doing of x, then he can do x. But even here the question remains. Even in the case in which an agent didn't thwart the doing of x, in which his car broke down, for example, the agent is *not* exactly in the same position as someone who said he *might* be at lunch and failed to appear. The agent who promised will still make explanations and excuses, and may even resolve to have his car checked more regularly to avoid such predicaments in the future. In other words, he behaves in *some* respects like someone who had failed to meet an obligation simpliciter— who simply failed to act responsibly. Indeed, that view of the matter is more in keeping with my more general reflections on the reality of dilemmas. Such a case is not exactly like a case of dilemma in which one in fact *could* have met either of the competing obligations, taken separately, although one could not meet them both. Intuitively, in the case of dilemma, remorse seems more appropriate when what is done and what fails to be done are, before the actual choice, among the irreconcilable alternatives *each* of which is within the agent's range of choices. Regret seems appropriate when, owing to circumstances beyond control and despite all reasonable precaution and planning, an agent cannot meet an obligation—when what thwarts it is not a conflicting obligation but a straightforward physical impossibility. In both cases, explanations are required. The agent who incurred *no* obligation need not explain.

Given the character of deontic principles that define rightness in terms of the essential character of the act, it is perhaps more appropriate to adopt the principle that what is deontically prescribed is never annulled, but that when, through no deliberate scheme of his own, an agent cannot meet his obligation, he cannot be *blamed*. Here, as elsewhere, deontic principles diverge from consequentialist ones. For if what makes an action right is only its consequences, then if through no contrivance of the agent it cannot be done, it cannot be viewed as an obligation. What cannot be done

[14] I am indebted to Walter Sinnott-Armstrong for pointing out these difficulties with the principle ought implies can, and for suggesting alternatives.

has no consequences and there *are* no other features of the act that make it right or wrong. **[32]**

IV

In his analysis of moral sentiments, Rawls[15] says that it is an essential characteristic of such a feeling that an agent "invokes a moral concept and its associated principle. His (the agent's) account of his feeling makes reference to an acknowledged right or wrong." "When plagued by feelings of guilt ... a person wishes to act properly in the future and strives to modify his conduct accordingly. He is inclined to admit what he has done, to acknowledge and accept reproofs and penalties." In the case, for example, of a person of stern religious upbringing to whom theater-going had been forbidden, and who claims to feel guilty when attending the theater although he no longer believes it wrong, Rawls wants to say that he is mistaken in so claiming. The agent may have sensations of uneasiness that are like those one has when he feels guilty. But according to Rawls, *moral* sentiments such as feelings of guilt are not merely sensations, not *merely* psychological, but, like other attitudes toward states of affairs, a complex involving—along with diffuse feelings—beliefs, acknowledgments, and states of affairs. In the case of the uneasy theater-goer, the essential feature is absent: no moral concept or associated moral principle is invoked. The agent consequently is not apologetic, does not resolve to absent himself from the theater, does not regard himself as blameworthy or deserving of reproof. His sensations resemble feelings of guilt. It is the non-moral ground of his feelings that needs to be explained or excused, not his action.

Rawls's account suggests a finer-grained analysis of moral sentiments such as guilt, in which an agent acknowledges a moral principle in accordance with which he has failed to act. When, out of a failure of will, an agent fails to discharge a moral obligation that he acknowledges under a principle and that he could have discharged, all of the features *appropriate* to guilt feelings may be present. Nor does he absolve himself when, through cunning, he arranges his life so as to make it impossible to discharge his obligation. In both cases, he is appropriately distressed by guilt feelings. When he has such feelings, the moral agent wishes to act properly in the future, acknowledging his *own* failure and blameworthiness.

Where an agent fails to discharge an obligation when through no failure of his own he can't discharge it, such as the doctor who is prevented by a hurricane from seeing a critically ill patient, he acknowledges his obligation, but he has acted properly, and no future modification of his action is required. In the strong sense, he could not have done otherwise; his feeling is closer to that of regret. He does not acknowledge that reproofs and penalties are deserved. Explanations and excuses are appropriate.

In the case of dilemma in both the weak and the strong sense, the agent *could* have done otherwise with respect to each of the obligations. Through no fault of his own, he could not fulfill *both* of them. In such cases, particularly the strong cases of dilemma in which the choices are absolutely symmetrical, although he may have acted as properly as he could under the circumstances, excuses and explanations such as those appropriate to the doctor impeded by a hurricane are seen as insufficient. In

[15] JOHN RAWLS, A THEORY OF JUSTICE 481-83 (1971).

cases of dilemma, the agent may be profoundly apologetic; he may impose on himself reproofs and penalties. He may even be **[33]** inclined to accept some reproofs and penalties. Regret, here, as above noted, is too weak a description of the accompanying moral sentiment. Something closer to remorse is more appropriate. In Sartre's[16] case in which an agent struggles with a choice between joining the Free French and caring for an aged mother, it is more than regret he feels for the unmet obligation. Of course, our analysis suggests that Sartre was wrong in concluding that therefore "No rule of general morality can show you what you ought to do." Rules of general morality have shown the agent in question what to do in *each* case. In the absence of a conflict, he would have been obliged to do one or the other or both under those rules. We see here the source and dynamic force of the second-order principle. There *is* a sense in which someone who has failed to discharge the obligation that was one horn of a dilemma may wish to act properly in the future and modify his actions accordingly. Here it is not a case of striving to meet those obligations that through a failure of will were not met on a given occasion. Rather, the agent may strive to arrange his own life and encourage institutional arrangements that would prevent, to the extent possible, future conflicts. To deny that the feelings that follow upon choice in a dilemma are inappropriately described as guilt feelings is to weaken the impulse to make such arrangements. Such considerations are particularly appropriate to the question of the inevitability of dirty hands in public life. We want in public life those who are moved by such feelings and who would therefore try to avoid such conflicts, yet who are willing to take the moral risk of entering into public life. It is in such cases that we see the tension between life choices and moral risk.

V

I have argued that there is no reason to suppose on considerations of consistency that there *must* be principles that, on moral grounds, will provide a sufficient ordering for deciding all cases of dilemma. But, it may be argued, when confronted with what are *apparently* symmetrical choices undecidable on moral grounds (dilemma in the strong sense), agents do, finally, choose. That is sometimes understood as a way in which, given good will, an agent makes explicit the rules under which he acts. It is the way an agent discovers a priority principle under which he orders his actions. That may sometimes correctly describe the case. But I should like to question the generality of such a claim. A frequently quoted remark of E. M. Forster's is "If I had to choose between betraying my country and betraying my friend, I hope I should have the courage to betray my country."[17] One could, of course, read that as if Forster had made manifest some priority rule: that certain obligations to friends override obligations to nation. But consider a remark by A. B. Worster: "If I had to choose between betraying my country and betraying my friend, I hope I should have the courage to betray my friend." Both recognize a dilemma, and one can read Worster as subscribing to a different priority rule and, to that extent, a different set of rules from Forster's. But is that the only alternative? Suppose Forster had said that, morally, Worster's position is as valid as his own—that **[34]** there was no moral reason for generalizing his own

[16] Jean Paul Sartre, *Existentialism is a Humanism*, *in* EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE 295 (Walter Arnold Kaufmann ed., Philip Mairet trans., Meridian Books 1956).

[17] EDWARD MORGAN (E.M.) FORSTER, TWO CHEERS FOR DEMOCRACY (1939).

choice to all, and that there was disagreement between them not about moral principles but rather about the kind of persons they wished to be and the kind of lives they wished to lead. Forster may not want Worster for a friend; a certain possibility of intimacy may be closed to them that Forster perhaps requires in a friend. Worster may see in Forster a sensibility that he does not admire. But there is no reason to suppose that such appraisals are or must be moral appraisals. Not all questions of value are moral questions, and moral dilemmas in the strong sense may be "resolved" by principles for which no *moral* justification can be given. The latter conclusion is one I believe of important consequence for moral philosophy. One of the most difficult questions in ethics is what falls within the sphere of *moral*. If we insist that, whenever we make a choice in a moral dilemma, we always invoke a further *moral* principle, then, as in Forster's case, Forster would be said to have adopted a general principle that makes loyalty to friends a moral principle that overrides, for all, loyalty to nation. That, it seems to me, is a wrong and dangerous conclusion. For one can see how that might bring virtually all action into the moral sphere. As Thomas Nagel[18] points out, there are, independent of pure self-interest, other values that guide action, such as commitments to personal goals (in which those goals may even be seen as contrary to self-interest) and commitments to advancing ends that are thought of as good in themselves, such as the advancement of knowledge, art, and the like.

Nagel classifies five fundamental types of value distinct from self-interest, which he calls obligations, rights, utility, perfectionist ends, and private commitments. Rights may be seen as generating 'categorical obligations'—obligations one has, as *a person*, to act or refrain from acting in certain ways toward others. The other obligations are proscriptions and prescriptions on action toward others one incurs or assumes by virtue of a more special role. For the strict deontologist, such obligations make up the only sphere of the *moral*. It is what lies behind libertarian ethics.

For moral philosophers like Rawls, when egalitarianism is more than everyone having certain rights, and when consequentialist considerations about improving the material lot of others enter into a determination of right action, then the sphere of the moral has been enlarged—perhaps constrained by the difference principle, but nevertheless enlarged. When, however, as in versions of virtue ethics or many religious moralities, some view of what counts as a good, or valuable, or desirable life is generalized to all, then all determinations of value are open to *moral* scrutiny. That is a conclusion I, for one, would not want to accept.

VI

This paper is not about conflicts between moral and non-moral values, but conflicts within the moral sphere. It also supposes that not all questions of value are moral questions and that the choices one makes may reflect other values. That: conclusion poses some interesting questions about legal decision making. **[34]**

Ronald Dworkin[19] has argued that there is *always* a right answer in a legal disagreement; that, implicitly, the law is *complete*, and that judges are not creating but discovering law. Here the arguments against that likelihood are like those I have offered against the necessity of *moral principles* settling all moral disputes. But it is a

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[18] THOMAS NAGEL, MORTAL QUESTIONS 74 n.12, 114 n. 6 (1979).

[19] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 194 (1978).

peculiar feature of our legal system that with some singular exceptions judges must rule in favor of one of the litigants' claims. Among singular exceptions are, for example, a judge's being exempt from ruling which of two creditors ought to be paid when a debtor has legal obligations to both. A bankruptcy law permits a distribution to all creditors. But those are the exceptional cases. In being *forced to rule*, a judge, given the role of precedent in our legal system is, contra Dworkin, creating law. Furthermore, in those areas of the law that are supposed to reflect moral commitments, a judge, being *forced* to a decision in hard cases, may be making legal, or illegal, actions for which no analogous *moral* resolution *would* have been available. In that way, the judge or legislator may be constraining our choice of action in non-moral spheres. He may be legislating about lifestyles; about what are, to use Nagel's terminology, considered perfectionist ends and private commitments.

Juridical Condition and Rights of the Undocumented Migrants

Advisory Opinion OC-18/03 (ser. A) No. 18
Requested by the United Mexican States
Inter-American Court of Human Rights
September 17, 2003

I. Presentation of the Request

1. [**P**] On May 10, 2002, the State of the United Mexican States (hereinafter "Mexico" or "the requesting State"), based on Article 64(1) of the American Convention on Human Rights (hereinafter "the American Convention," "the Convention" or "the Pact of San José"), submitted to the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") a request for an advisory opinion (hereinafter also "the request") on the ". . . deprivation of the enjoyment and exercise of certain labor rights [of migrant workers,] and its compatibility with the obligation of the American States to ensure the principles of legal equality, non-discrimination and the equal and effective protection of the law embodied in international instruments for the protection of human rights; and also with . . . obligations imposed by international human rights law, including those of an *erga omnes* nature.

[***]

II. Proceeding Before the Court

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16. On January 13, 2003, the Inter-American Commission on Human Rights presented its written comments.

17. On January 13, 2003, the United States of America presented a note in which it informed the Court that it would not present comments on the request for an advisory opinion.

[***]

32. On February 24, 2003, a public hearing was held at the seat of the Court, in which the oral arguments of the participating States and the Inter-American Commission on Human Rights were heard.

[***]

35. On March 28, 2003, Mexico presented a brief in which it remitted the answers to the questions formulated by Judge Cançado Trindade and Judge García Ramírez during the public hearing (*supra* para. 32).

36. On April 7, 2003, the President issued an Order in which he convened "a public hearing on the request for Advisory Opinion OC-18, at 10 a.m. on June 4, 2003," so that the persons and organizations that had forwarded *amici curiae* briefs could present their respective oral arguments. The Order also indicated that if any person or organization that had not presented an *amicus curiae* brief wished to take part in the public hearing, they could do so, after they had been accredited to the Court.

III. [Jurisdiction]

48. **[R]** This request for an advisory opinion was submitted to the Court by Mexico, in exercise of the faculty granted to it by article 64(1) of the Convention . . . .

[***]

55. Therefore, the Court considers that it [has jurisdiction] to rule on the questions posed by Mexico, which also requests the interpretation of the American Declaration, the American Convention, the Universal Declaration and the International Covenant on Civil and Political Rights, all of them instruments that protect human rights and that are applicable to the American States.

[***]

57. **[1]** This . . . Court has [jurisdiction] to render advisory opinions on the interpretation of the OAS Charter, taking into consideration the relationship of the Charter to the Inter-American system for the protection of human rights, specifically within the framework of the American Declaration, the American Convention, or other treaties on the protection of human rights in the American States.

58. Nevertheless, should the Court restrict its ruling to those States that have ratified the American Convention, it would be difficult to separate this Advisory Opinion from a specific ruling on the legislation and practices of States that have not ratified the Convention with regard to the questions posed . . . .

59. Likewise, if the opinion only encompassed those OAS Member States that are parties to the American Convention, the Court would be providing its advisory services to a limited number of American States, which would not be in the general interest of the request.

60. Consequently, the Court decides that everything indicated in this Advisory Opinion applies to the OAS Member States that have signed either the OAS Charter, the American Declaration, or the Universal Declaration, or have ratified the International Covenant on Civil and Political Rights, regardless of whether or not they have ratified the American Convention or any of its optional protocols.

[***]

63. In the exercise of its advisory function, the Court is not called on to resolve questions of fact, but to determine the meaning, purpose and reason of international human rights norms. In this context, the Court fulfills an advisory function. . . . The fact that the Court's advisory jurisdiction may be invoked by all the Member States of the

OAS and its main organs defines the distinction between its advisory and contentious jurisdictions. . . .

64. When affirming its [jurisdiction] in this matter, the Court recalls the broad scope of its advisory function, unique in contemporary international law. [It thus assists] states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process.

65. The Court observes that the use of examples serves the purpose of referring to a specific context and illustrates the different interpretations that could be given to the legal issue raised in the advisory opinion in question, without implying that the Court is rendering a legal ruling on the situation described in such examples. Likewise, the latter allow the Court to show that its advisory opinion is not mere academic speculation and is justified by its potential benefit for the international protection of human rights and for strengthening the universal juridical conscience. When tackling the respective issue, the Court acts as a human rights tribunal, guided by the international instruments that regulate its advisory [jurisdiction] and makes a strictly juridical analysis of the questions submitted to it.

66. In view of the foregoing, the Court considers that it should examine the matters set out in the request and issue the corresponding opinion.

[***]

VI. Obligation to Respect and Guarantee Human Rights and the Fundamental Nature of the Principle of Equality and Non-discrimination

[***]

Obligation to Respect and Guarantee Human Rights

72. The Court now considers it pertinent to refer to the general State obligation to respect and guarantee human rights, which is of the highest importance, and will then examine the principle of equality and non-discrimination.

73. Human rights must be respected and guaranteed by all States. All persons have attributes inherent to their human dignity that may not be harmed; these attributes make them possessors of fundamental rights that may not be disregarded and [that] are, consequently, superior to the power of the State, whatever its political structure.

74. The general obligation to respect and ensure human rights is enshrined in various international instruments.

75. The supervisory bodies of the American Convention and the International Covenant on Civil and Political Rights, the instruments indicated by Mexico in the questions of the request for an advisory opinion examined in this chapter, have ruled on the said obligation.

[***]

81. [Both] the international instruments and the respective international case law establish clearly that States have the general obligation to respect and ensure the fundamental rights. To this end, they should take affirmative action, avoid taking measures that restrict or infringe a fundamental right, and eliminate measures and practices that restrict or violate a fundamental right.

The Principle of Equality and Non-Discrimination

82. Having established the State obligation to respect and guarantee human rights, the Court will now refer to the elements of the principle of equality and non-discrimination.

83. Non-discrimination, together with equality before the law and equal protection of the law, are elements of a general basic principle related to the protection of human rights. The element of equality is difficult to separate from non-discrimination. Indeed, when referring to equality before the law, . . . this principle must be guaranteed with no discrimination . . . .

84. **[2]** This Advisory Opinion will differentiate by using the terms distinction and discrimination. The term distinction will be used to indicate what is admissible, because it is reasonable, proportionate and objective. Discrimination will be used to refer to what is inadmissible, because it violates human rights. Therefore, the term "discrimination" will be used to refer to any exclusion, restriction or privilege that is not objective and reasonable and [that] adversely affects human rights.

85. There is an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination. States are obliged to respect and guarantee the full and free exercise of rights and freedoms without any discrimination. Non-compliance by the State with the general obligation to respect and guarantee human rights, owing to any discriminatory treatment, gives rise to its international responsibility.

86. The principle of the equal and effective protection of the law and of non-discrimination is embodied in many international instruments. The fact that the principle of equality and non-discrimination is regulated in so many international instruments is evidence that there is a universal obligation to respect and guarantee the human rights arising from that general basic principle.

[***]

88. The principle of equality and non-discrimination is fundamental for the safeguard of human rights in both international and domestic law. Consequently, States have the obligation to combat discriminatory practices and not to introduce discriminatory regulations into their laws.

89. . . . Distinctions based on *de facto* inequalities may be established; such distinctions constitute an instrument for the protection of those who should be protected, considering their situation of greater or lesser weakness or helplessness. For example, the fact that minors who are detained in a prison may not be imprisoned together with adults who are also detained is an inequality permitted by law. Another example of these inequalities is the limitation to the exercise of specific political rights owing to nationality or citizenship.

[***]

96. In accordance with the foregoing, States must respect and ensure human rights in light of the general basic principle of equality and non-discrimination. Any discriminatory treatment with regard to the protection and exercise of human rights entails the international responsibility of the State.

The Fundamental Nature of the Principle of Equality and Non-Discrimination

97. The Court now proceeds to consider whether this is a *jus cogens* principle.

98. Originally, the concept of *jus cogens* was linked specifically to the law of treaties . . . .

99. In its development and by its definition, *jus cogens* is not limited to treaty law. The sphere of *jus cogens* has expanded to encompass general international law, including all legal acts. *Jus cogens* has also emerged in the law of the international responsibility of States and, finally, has had an influence on the basic principles of the international legal order.

100. In particular, when referring to the obligation to respect and ensure human rights, regardless of which of those rights are recognized by each State in domestic or international norms, the Court considers it clear that all States, as members of the international community, must comply with these obligations without any discrimination; this is intrinsically related to the right to equal protection before the law . . . . The principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights. Indeed, this principle may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals. This implies that the State, both internationally and in its domestic legal system, and by means of the acts of any of its powers or of third parties who act under its tolerance, acquiescence or negligence, cannot behave in a way that is contrary to the principle of equality and non-discrimination, to the detriment of a determined group of persons.

101. **[3]** Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.

Effects of the Principle of Equality and Non-Discrimination

102. This general obligation to respect and guarantee human rights, without any discrimination and on an equal footing, has various consequences and effects that are defined in specific obligations. The Court will now refer to the effects derived from this obligation.

103. **[4]** In compliance with this obligation, States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination. This translates, for example, into the prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of

the law that discriminate against a specific group of persons because of their race, gender, color or other reasons.

104. In addition, States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.

105. Because of the effects derived from this general obligation, States may only establish objective and reasonable distinctions when these are made with due respect for human rights and in accordance with the principle of applying the norm that grants protection to the individual.

106. Non-compliance with these obligations gives rise to the international responsibility of the State, and this is exacerbated insofar as non-compliance violates peremptory norms of international human rights law. Hence, the general obligation to respect and ensure human rights binds States, regardless of any circumstance or consideration, including a person's migratory status.

107. One of the results of the foregoing is that, in their domestic laws, States must ensure that all persons have access, without any restriction, to a simple and effective recourse that protects them in determining their rights, irrespective of their migratory status.

[***]

109. This general obligation to respect and ensure the exercise of rights has an *erga omnes* character. The obligation is imposed on States to benefit the persons under their respective jurisdictions, irrespective of the migratory status of the protected persons. This obligation encompasses all the rights included in the American Convention and the International Covenant on Civil and Political Rights, including the right to judicial guarantees. In this way, the right of access to justice for all persons is preserved, understood as the right to effective jurisdictional protection.

110. Finally . . . , the contents of the preceding paragraphs are applicable to all the OAS Member States. The effects of the fundamental principle of equality and non-discrimination encompass all States, precisely because this principle, which belongs to the realm of *jus cogens* and is of a peremptory character, entails obligations *erga omnes* of protection that bind all States and give rise to effects with regard to third parties, including individuals.

VII. Application of the Principle of Equality and Non-Discrimination to Migrants

111. Now that the *jus cogens* character of the principle of equality and non-discrimination and the effects that derive from the obligation of States to respect and guarantee this principle have been established, the Court will refer to migration in general and to the application of this principle to undocumented migrants.

112. Migrants are generally in a vulnerable situation as subjects of human rights; they are in an individual situation of absence or difference of power with regard to non-migrants (nationals or residents). This situation of vulnerability has an ideological dimension and occurs in a historical context that is distinct for each State and is maintained by *de jure* (inequalities between nationals and aliens in the laws) and *de*

facto (structural inequalities) situations. This leads to the establishment of differences in their access to the public resources administered by the State.

113. Cultural prejudices about migrants also exist that lead to reproduction of the situation of vulnerability; these include ethnic prejudices, xenophobia and racism, which make it difficult for migrants to integrate into society and lead to their human rights being violated with impunity.

[***]

117. In accordance with the foregoing, the international community has recognized the need to adopt special measures to ensure the protection of the human rights of migrants.

118. We should mention that the regular situation of a person in a State is not a prerequisite for that State to respect and ensure the principle of equality and non-discrimination, because, as mentioned above, this principle is of a fundamental nature and all States must guarantee it to their citizens and to all aliens who are in their territory. This does not mean that they cannot take any action against migrants who do not comply with national laws. However, it is important that, when taking the corresponding measures, States should respect human rights and ensure their exercise and enjoyment to all persons who are in their territory, without any discrimination owing to their regular or irregular residence, or their nationality, race, gender or any other reason.

119. Consequently, States may not discriminate or tolerate discriminatory situations that prejudice migrants. However, the State may grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective, proportionate and does not harm human rights. For example, distinctions may be made between migrants and nationals regarding ownership of some political rights. States may also establish mechanisms to control the entry into and departure from their territory of undocumented migrants, which must always be applied with strict regard for the guarantees of due process and respect for human dignity. . . .

[***]

122. The Court considers that the right to due process of law should be recognized within the framework of the minimum guarantees that should be provided to all migrants, irrespective of their migratory status. The broad scope of the preservation of due process applies not only *ratione materiae* but also *ratione personae,* without any discrimination.

[***]

126. The right to judicial protection and judicial guarantees is violated for several reasons: owing to the risk a person runs, when he resorts to the administrative or judicial instances, of being deported, expelled or deprived of his freedom, and by the negative to provide him with a free public legal aid service, which prevents him from asserting the rights in question. In this respect, the State must guarantee that access to justice is genuine and not merely formal. The rights derived from the employment relation subsist, despite the measures adopted.

127. Now that the Court has established what is applicable for all migrants, it will examine the rights of migrant workers, in particular those who are undocumented.

VIII. Rights of Undocumented Migrant Workers

[***]

131. The vulnerability of migrant workers as compared to national workers must be underscored. . . .

[***]

133. Labor rights necessarily arise from the circumstance of being a worker, understood in the broadest sense. A person who is to be engaged, is engaged or has been engaged in a remunerated activity, immediately becomes a worker and, consequently, acquires the rights inherent in that condition. The right to work, whether regulated at the national or international level, is a protective system for workers; that is, it regulates the rights and obligations of the employee and the employer, regardless of any other consideration of an economic and social nature. A person who enters a State and assumes an employment relationship, acquires his labor human rights in the State of employment, irrespective of his migratory status, because respect and guarantee of the enjoyment and exercise of those rights must be made without any discrimination.

134. In this way, the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment. On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment. These rights are a consequence of the employment relationship.

135. **[6]** It is important to clarify that the State and the individuals in a State are not obliged to offer employment to undocumented migrants. The States and individuals, such as employers, can abstain from establishing an employment relationship with migrants in an irregular situation.

136. However, if undocumented migrants are engaged, they immediately become possessors of the labor rights corresponding to workers and may not be discriminated against because of their irregular situation. This is very important, because one of the principal problems that occurs in the context of immigration is that migrant workers who lack permission to work are engaged in unfavorable conditions compared to other workers.

137. It is not enough merely to refer to the obligations to respect and ensure the labor human rights of all migrant workers, but it should be noted that these obligations have different scopes and effects for States and third parties.

138. Employment relationships are established under both public law and private law and, in both spheres, the State plays an important part.

139. In the context of an employment relationship in which the State is the employer, the [state] must evidently guarantee and respect the labor human rights of all its [employees], whether nationals or migrants, documented or undocumented, because non-observance of this obligation gives rise to State responsibility at the national and the international level.

140. In an employment relationship regulated by private law, the obligation to respect human rights between individuals should be taken into consideration. That is, the positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (*erga omnes)*. This obligation has been developed in legal writings, and particularly by the *Drittwirkung* theory, according to which fundamental rights must be respected by both the public authorities and by individuals with regard to other individuals.

[***]

146. In this way, the obligation to respect and ensure human rights, which normally has effects on the relations between the State and the individuals subject to its jurisdiction, also has effects on relations between individuals. As regards this Advisory Opinion, the said effects of the obligation to respect human rights in relations between individuals is defined in the context of the private employment relationship, under which the employer must respect the human rights of his workers.

147. The obligation to respect and guarantee the human rights of third parties is also based on the fact that it is the State that determines the laws that regulate the relations between individuals and, thus, private law; hence, it must also ensure that human rights are respected in these private relationships between third parties; to the contrary, the State may be responsible for the violation of those rights.

148. **[7]** The State is obliged to respect and ensure the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that prejudice the latter in the employment relationships established between individuals (employer-worker). The State should not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.

149. This State obligation arises from legislation that protects workers—legislation based on the unequal relationship between both parties—which therefore protects the workers as the more vulnerable party. In this way, States must ensure strict compliance with the labor legislation that provides the best protection for workers, irrespective of their nationality, social, ethnic or racial origin, and their migratory status; therefore they have the obligation to take any necessary administrative, legislative or judicial measures to correct *de jure* discriminatory situations and to eradicate discriminatory practices against migrant workers by a specific employer or group of employers at the local, regional, national or international level.

150. On many occasions migrant workers must resort to State mechanisms for the protection of their rights. Thus, for example, workers in private companies have recourse to the Judiciary to claim the payment of wages, compensation, *etc*. Also, these workers often use State health services or contribute to the State pension system. In all these cases, the State is involved in the relationship between individuals as a guarantor of fundamental rights, because it is required to provide a specific service.

151. In labor relations, employers must protect and respect the rights of workers, whether these relations occur in the public or private sector. The obligation to respect the human rights of migrant workers has a direct effect on any type of employment relationship, when the State is the employer, when the employer is a third party, and when the employer is a natural or legal person.

152. The State is thus responsible for itself, when it acts as an employer, and for the acts of third parties who act with its tolerance, acquiescence or negligence, or with the support of some State policy or directive that encourages the creation or maintenance of situations of discrimination.

153. In summary, employment relationships between migrant workers and third party employers may give rise to the international responsibility of the State in different ways. First, States are obliged to ensure that, within their territory, all the labor rights stipulated in its laws—rights deriving from international instruments or domestic legislation—are recognized and applied. Likewise, States are internationally responsible when they tolerate actions and practices of third parties that prejudice migrant workers, either because they do not recognize the same rights to them as to national workers or because they recognize the same rights to them but with some type of discrimination.

154. Furthermore, there are cases in which it is the State that violates the human rights of the workers directly. For example, when it denies the right to a pension to a migrant worker who has made the necessary contributions and fulfilled all the conditions that were legally required of workers, or when a worker resorts to the corresponding judicial body to claim his rights and this body does not provide him with due judicial protection or guarantees.

155. The Court observes that labor rights are the rights recognized to workers by national and international legislation. In other words, the State of employment must respect and guarantee to every worker the rights embodied in the Constitution, labor legislation, collective agreements, agreements established by law (*convenios-ley*), decrees and even specific and local practices, at the national level; and, at the international level, in any international treaty to which the State is a party.

156. This Court notes that, since there are many legal instruments that regulate labor rights at the domestic and the international level, these regulations must be interpreted according to the principle of the application of the norm that best protects the individual, in this case, the worker. This is of great importance, because there is not always agreement either between the different norms or between the norms and their application, and this could prejudice the worker. Thus, if a domestic practice or norm is more favorable to the worker than an international norm, domestic law should be applied. To the contrary, if an international instrument benefits the worker, granting him rights that are not guaranteed or recognized by the State, such rights should be respected and guaranteed to him.

157. In the case of migrant workers, there are certain rights that assume a fundamental importance and yet are frequently violated, such as: the prohibition of obligatory or forced labor; the prohibition and abolition of child labor; special care for women workers, and the rights corresponding to: freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security, judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation. The safeguard of these rights for migrants has great importance based on the principle of the inalienable nature of such rights, which all workers possess, irrespective of their migratory status, and also the fundamental principle of human dignity embodied in Article 1 of the Universal Declaration . . . .

158. This Court considers that the exercise of these fundamental labor rights guarantees the enjoyment of a dignified life to the worker and to the members of his family. Workers have the right to engage in a work activity under decent, fair conditions and to receive a remuneration that allows them and the members of their family to enjoy a decent standard of living in return for their labor. Likewise, work should be a means of realization and an opportunity for the worker to develop his aptitudes, capacities and potential, and to realize his ambitions, in order to develop fully as a human being.

159. On many occasions, undocumented migrant workers are not recognized the said labor rights. For example, many employers engage them to provide a specific service for less than the regular remuneration, dismiss them because they join unions, and threaten to deport them. Likewise, at times, undocumented migrant workers cannot even resort to the courts of justice to claim their rights owing to their irregular situation. This should not occur; because, even though an undocumented migrant worker could face deportation, he should always have the right to be represented before a competent body so that he is recognized all the labor rights he has acquired as a worker.

160. The Court considers that undocumented migrant workers, who are in a situation of vulnerability and discrimination with regard to national workers, possess the same labor rights as those that correspond to other workers of the State of employment, and the latter must take all necessary measures to ensure that such rights are recognized and guaranteed in practice. Workers, as possessors of labor rights, must have the appropriate means of exercising them.

IX. State Obligations When Determining Migratory Policies in Light of the International Instruments for the Protection of Human Rights

161. The Court will now refer to State obligations when determining migratory policies solely in light of international instruments for the protection of human rights.

162. In this section of the Advisory Opinion, the Court will consider whether the fact that the American States subordinate and condition the observance of human rights to their migratory policies is compatible with international human rights law; it will do so in light of the international obligations arising from the International Covenant on Civil and Political Rights and other obligations of an *erga omnes* nature.

163. The migratory policy of a State includes any institutional act, measure or omission (laws, decrees, resolutions, directives, administrative acts, *etc.*) that refers to the entry, departure or residence of national or foreign persons in its territory.

[***]

169. **[8]** Considering that this Opinion applies to questions related to the legal aspects of migration, the Court deems it appropriate to indicate that, in the exercise of their power to establish migratory policies, it is licit for States to establish measures relating to the entry, residence or departure of migrants who will be engaged as workers in a specific productive sector of the State, provided this is in accordance with measures to protect the human rights of all persons and, in particular, the human rights of the workers. In order to comply with this requirement, States may take different measures, such as granting or denying general work permits or permits for certain specific work, but they must establish mechanisms to ensure that this is done

without any discrimination, taking into account only the characteristics of the productive activity and the individual capability of the workers. In this way, the migrant worker is guaranteed a decent life, he is protected from the situation of vulnerability and uncertainty in which he usually finds himself, and the local or national productive process is organized efficiently and adequately.

170. Therefore, it is not admissible for a State . . . to protect its national production, in one or several sectors by encouraging or tolerating the employment of undocumented migrant workers in order to exploit them, taking advantage of their condition of vulnerability in relation to the employer in the State or considering them an offer of cheaper labor, either by paying them lower wages, denying or limiting their enjoyment or exercise of one or more of their labor rights, or denying them the possibility of filing a complaint about the violation of their rights before the competent authority.

171. [I]t is important to note that this Court considers that not only should all domestic legislation be adapted to the respective treaty, but also State practice regarding its application should be adapted to international law. In other words, it is not enough that domestic laws are adapted to international law, but the organs or officials of all State powers, whether the Executive, the Legislature or the Judiciary, must exercise their functions and issue or implement acts, resolutions and judgments in a way that is genuinely in accordance with the applicable international law.

172. The Court considers that the State may not subordinate or condition the observance of the principle of equality before the law and non-discrimination to achieving the goals of its public policies, whatever these may be, including those of a migratory nature. This general principle must be respected and guaranteed always. Any act or omission to the contrary is inconsistent with the international human rights instruments.

X. Opinion

173. For the foregoing reasons,

THE COURT DECIDES, unanimously, that it [has jurisdiction] to issue this Advisory Opinion. AND IS OF THE OPINION [above also] unanimously . . . .

[***]

Judges Cançado Trindade, García Ramírez, Salgado Pesantes and Abreu Burelli informed the Court of their Concurring Opinions, which accompany this Advisory Opinion.

Done at San José, Costa Rica, on September 17, 2003, in the Spanish and the English language, the Spanish text being authentic.

Concurring Opinion of Judge A. A. CANÇADO TRINDADE

1. [T]he present Advisory Opinion of the Inter-American Court of Human Rights . . . constitutes a significant contribution to the evolution of the International Law of Human Rights. . . .

2. Even more significant is the fact that the matter dealt with in the present Advisory Opinion, requested by Mexico and adopted by the Court by unanimity, is of direct interest of wide segments of the population in distinct latitudes, —in reality, of millions of

human beings—and constitutes in our days a legitimate preoccupation of the whole international community, and—I would not hesitate to add, —of the humanity as a whole. . . .

[***]

IV. The Position and Role of the General Principles of Law.

44. Every legal system has fundamental principles, which inspire, inform and conform their norms. It is the principles (derived [etymologically] from the Latin *principium*) that, evoking the first causes, sources or origins of the norms and rules, confer cohesion, coherence and legitimacy upon the legal norms and the legal system as a whole. It is the general principles of law (*prima principia*) [that] confer to the legal order (both national and international) its ineluctable axiological dimension; it is they that reveal the values [that] inspire the whole legal order and [that], ultimately, provide its foundations themselves. This is how I conceive the presence and the position of the principles in any legal order, and their role in the conceptual universe of Law.

[***]

50. To the extent that a new *corpus juris* is formed, one ought to fulfill the pressing need of identification of its principles. Once identified, these principles ought to be observed, as otherwise the application of the norms would be replaced by a simple rhetoric of "justification" of the "reality" of the facts; if there is truly a legal system, it ought to operate on the basis of its fundamental principles, as otherwise we would be before a legal vacuum, before the simple absence of a legal system.

51. The general principles of law have contributed to the formation of normative systems of protection of the human being. The recourse to such principles has taken place, at the substantive level, as a response to the new necessities of protection of the human being.

[***]

VI. The Principle of Equality and Non-Discrimination
in the International Law of Human Rights

59. **[1]** In the ambit of the International Law of Human Rights, another one of the fundamental principles, [which the scholarly commentary has] not sufficiently developed . . . to date, but which permeates its whole *corpus juris*, is precisely the principle of equality and non-discrimination. Such principle . . . assumes special importance in relation with the protection of the rights of the migrants in general, and of the undocumented migrant workers in particular. Besides the constitutive element of equality, —essential to the rule of law (*Estado de Derecho*) itself, —the other constitutive element, that of non-discrimination, set forth in so many international instruments, assumes capital importance in the exercise of the protected rights. The discrimination is defined, in the sectorial Conventions aiming at its elimination, essentially as any distinction, exclusion, restriction or limitation, or privilege, to the detriment of the human rights enshrined therein. The prohibition of discrimination comprises both the totality of those rights, at [substantive] level, as well as the conditions of their exercise, at procedural level.

[***]

VII. Emergence, Content and Scope of the *Jus Cogens*

[***]

66. The emergence and assertion of *jus cogens* in contemporary International Law fulfill the necessity of a minimum of verticalization in the international legal order, erected upon pillars in which the juridical and the ethical are merged.

[***]

68. On my part, I have always sustained that it is an ineluctable consequence of the affirmation and the very existence of *peremptory* norms of International Law their not being limited to the conventional norms, to the law of treaties, and their being extended to every and any juridical act. Recent developments point out in the same sense, that is, that the domain of the *jus cogens*, beyond the law of treaties, encompasses likewise general international law. Moreover, the *jus cogens*, in my understanding, is an open category, which expands itself to the extent that the universal juridical conscience (material source of all Law) awakens for the necessity to protect the rights inherent to each human being in every and any situation.

[***]

VIII. Emergence and Scope of the Obligations *Erga Omnes* of Protection: Their Horizontal and Vertical Dimensions

74. . . . It is widely recognized, in our days, that the peremptory norms of *jus cogens* effectively bring about obligations *erga omnes*.

[***]

77. **[2]** In my view, we can consider such obligations *erga omnes* from *two dimensions, one horizontal and the other vertical*, which complement each other. Thus, the obligations *erga omnes* of protection, in a horizontal dimension, are obligations pertaining to the protection of the human beings due to the international community as a whole. In the framework of conventional international law, they bind all the States Parties to human rights treaties (obligations *erga omnes partes*), and, in the ambit of general international law, they bind all the States [that] compose the organized international community, whether or not they are Parties to those treaties (obligations *erga omnes lato sensu*). In a vertical dimension, the obligations *erga omnes* of protection bind both the organs and agents of (State) public power, and the individuals themselves (in the inter-individual relations).

[***]

85. The State is bound by the *corpus juris* of the international protection of human rights, which protects every human person *erga omnes*, independently of her statute of citizenship, or of migration, or any other condition or circumstance. The fundamental rights of the migrant workers, including the undocumented ones, are opposable to the public power and likewise to the private persons or individuals (*e.g.*, employers), in the inter-individual relations. The State cannot [avail] itself of the fact of not being a Party to a given treaty of human rights to evade the obligation to respect the fundamental principle of equality and non-discrimination, for being this latter a principle of general international law, and of *jus cogens*, which thus transcends the domain of the law of treaties.

IX. Epilogue

86. The . . . significant evolution of the recognition and assertion of norms of *jus cogens* and *erga omnes* obligations of protection ought to be fostered, seeking to secure its full practical application, to the benefit of all human beings. Only thus shall we rescue the

universalist vision of the founding fathers of the *droit des gens*, and shall we move closer to the plenitude of the international protection of the rights inherent to the human person. These new conceptions impose themselves in our days, and, of their faithful observance, in my view, will depend in great part the future evolution of the present domain of protection of the human person, as well as, ultimately, of the International Law itself as a whole.

[***]

Reasoned Concurring Opinion of Judge Sergio GARCÍA RAMÍREZ

1. The . . . rendered Advisory Opinion . . . covers a wide spectrum of situations regarding undocumented migrants in general; that is, those persons who leave a State to migrate to another State and stay there, but who do not have authorization to do so from the State in which the seek to reside. . . . Many individuals are in this situation, regardless of the motive for their move, their particular conditions, and the activity they perform or wish to perform.

2. **[1]** One specific category within this spectrum corresponds to undocumented migrant *workers*; that is, persons who are not authorized to enter the State of employment and engage in a remunerated activity there, according to the laws of the State and the international agreements to which that State is a party, but who, nevertheless, engage in that activity . . . . It is with regard to [these employees], working in urban and rural areas, that the request submitted by the United Mexican States to the Inter-American Court of Human Rights refers principally—although not exclusively. It is necessary to examine the rights of millions of human beings, women and men, who have migrated or who migrate in all parts of the world—and especially in the countries of the Americas—moved by different factors, but all driven by the same expectation: to earn their living outside the country in which they were born.

[***]

4. **[2]** The issue to which this Advisory Opinion refers is of fundamental importance today. The increasing interrelation between nations, the process of globalization that has an impact in diverse areas, and the different conditions of the national, regional and global economies have been determining factors in the appearance and growth of migratory flows that have particular characteristics and require coherent solutions . . . .

[***]

6. The new migratory flows . . . reflect the situation of the economy in the countries of origin and destination of migrants. In the latter there is a factor of attraction that requires the contribution of the labor of those workers, who play a role in wealth creation and—as those who study these processes have acknowledged—make a very significant contribution to the welfare and development of the receiving countries. . . .

7. These processes cannot—or rather, should not—be exempt from scrupulous respect for the human rights of migrants. This . . . central thesis [finds supporte in] the guiding principle of contemporary national and international law, [in] legal writings and [the] practice of the rule of law in a democratic society, and [in] the principles that govern international human rights law and the implementation of its norms by the

States that compose the legal community and the corresponding international jurisdictions.

8. Evidently, it is not possible to reduce a phenomenon of this nature to a question of border policy, or approach it from the simple perspective of the legal or illegal, regular or irregular status of the residence of aliens in a specific territory. . . .

9. **[3]** Those who form part of these migratory flows are very often almost totally helpless, owing to their lack of social, economic and cultural knowledge of the country in which they work, and to the lack of instruments to protect their rights. In these circumstances, they constitute an extremely vulnerable sector that has suffered the consequences of this vulnerability by the implementation of laws, the adoption and execution of policies, and the proliferation of discriminatory and abusive practices in their labor relations with the employers who use their services and the authorities of the country where they reside. This vulnerability is structural in character. . . .

10. It is well known that there have been many cases of aggression against undocumented migrants by public authorities, who fail to comply with or distort the exercise of their attributes, and by individuals who take advantage of the vulnerable situation of undocumented migrants and subject them to ill-treatment or convert them into victims of crimes. . . .

11. The vulnerability of migrant workers increases, reaching dramatic extremes that move the universal moral conscience, when they lack official authorization to enter and remain in a country and, consequently, form part of the category of those persons who are instantly identified as "undocumented," "irregular" or, worse still "illegal," workers.

[***]

16. Equality before the law and rejection of all forms of discrimination is at the forefront of texts that stipulate, regulate and guarantee human rights. They could be said to represent reference points, constructive elements, interpretation criteria, and options for the protection of all rights. Because of the degree of acceptance they have achieved, they are clear expressions of *jus cogens*, with the peremptory nature that this has over and above general or specific conventions, and with its effects for the determination of obligations *erga omnes*.

[***]

18. True equality before the law is not measured by the mere declaration of equality in the law, but must take into account the true conditions of those who are subject to the law. There is no equality when, for example, in order to enter an employment relationship, an agreement is reached by an employer, who has ample resources and knows that he is supported by the law, and the worker, who only has his hands and perceives—or knows perfectly well—that the law does not offer him the support it provides to his counterpart. There is no equality either when there is a powerful defendant, armed with the means to defend himself, and a weak litigant, who lacks instruments to prove and argue his defense, regardless of the reasons and rights that support their respective claims.

19. In such cases, the law must introduce compensation or correction factors. . . .

20. The prohibition to discriminate does not admit exceptions or areas of tolerance that would shelter violations; discrimination is always rejected. In this respect, it is does not matter that the prohibition relates to rights that are considered fundamental, such as those that refer to life, physical integrity or personal freedom, or to rights to which some assign a different ranking or a different importance. It is discriminatory to establish different sanctions for the same offences because the authors belong to determined social, religious or political groups. It is discriminatory to deny access to education to members of an ethnic group and to provide it to members of another group; and it is discriminatory—following the same reasoning—to provide some individuals with all measures of protection that the performance of lawful work merits and deny such measures to other individuals who perform the same activity, on grounds that are unrelated to the work itself, such as those arising from their migratory status.

[***]

24. . . . Evidently, when regulating access to its territory and permanence in it, a State may establish conditions and requirements that migrants must fulfill. Non-compliance with migratory provisions would entail the relevant consequences, but should not produce effects in areas that are unrelated to the matter of the entry and residence of migrants.

25. In view of the above, it would be unacceptable, for example, to deprive an undocumented person of freedom of thought and expression, merely because he is undocumented. Likewise, it is unacceptable to punish non-compliance with migratory provisions by measures relating to other areas, disregarding the situations created in those areas and the potential effects, completely unrelated to the migratory offence. Taking any other course would, as has indeed occurred, deprive a person of the benefits of work already performed, alleging administrative errors: an expropriation, *lato sensu*, of what the worker has obtained for his work—through an agreement entered into with a third party, which has already produced certain benefits to the latter—which would become undue profit if the different forms of remuneration for the work performed are eliminated.

26. Taking into consideration the characteristics of the general obligations of States under general international law and international human rights law, specifically, with regard to these extremes of *jus cogens*, States must develop . . . specific actions of three mutually complementary types: a) they must ensure, by legislative and other measures—in other words, in every sector of State attributes and functions—the effective (and not only nominal) exercise of the human rights of workers on an equal footing and without any discrimination; b) they must eliminate provisions, whatever their scope and extent, that lead to undue inequality or discrimination; and c) lastly, they must combat public or private practices that have this same consequence. Only then, can it be said that a State complies with its obligations of *jus cogens* in this area, which, as we have said, does not depend on the State being a party to a specific international convention; and only then would the State be protected from international responsibility arising from non-compliance with international obligations.

27. **[4]** [Rights] arising from employment and thus concerning workers . . . belong to the category of "economic, social and cultural rights," which some scholars have classified as "second-generation" rights. Nevertheless, whatever their status, bearing in

mind their subject matter and also the moment in which they were included, first in constitutional and then in international texts, the truth is they have the same status as the so-called "civil and political" rights. Mutually dependent or conditioned, they are all part of the contemporary statute of the individual; they form a single extensive group, part of the same universe, which would disintegrate if any of them were excluded.

28. Among these rights, the only difference relates to their subject matter, the identity of the property they protect, and the area in which they emerge and prosper. They have the same rank and demand equal respect. They should not be confused with each other; however, it is not possible to ignore their interrelationship, owing to circumstances. For example, let us say that, although the right to work cannot be confused with the right to life, work is a condition of a decent life, and even of life itself: it is a subsistence factor. If access to work is denied, or if a worker is prevented from receiving its benefits, or if the [judicial] and administrative channels for claiming his rights are obstructed, his life could be endangered and, in any case, he would suffer an impairment of the quality of his life, which is a basic element of both economic, social and cultural rights, and civil and political rights.

[***]

33. Certain rights mentioned in the considerations of *OC-18/2003* are particularly important because they are the ones that are generally included in national and international norms, often constitute conditions or elements of other labor rights and, owing to their characteristics, determine the general framework for the provision of services and for the protection and welfare of those who provide them. The corresponding list—which is not exhaustive—includes the prohibition of obligatory or forced labor, the elimination of discriminations in the provisions of labor, the abolition of child labor, the protection of women workers and the rights corresponding to remuneration, the working day, rest and holidays, health and security in the workplace, association to form trade unions and collective negotiation.

[***]

35. The mention of these rights . . . is not intended to establish a specific ranking of the human rights of workers, as one group of rights that could constitute the "hard core" and another that might have another nature, in some way secondary or non-essential. . . .

36. Announcing rights without providing guarantees to enforce them is useless. It becomes a sterile formulation that sows expectations and produces frustrations. Therefore, guarantees must be established that permit: demanding that rights should be recognized, claiming them when they have been disregarded, re-establishing them when they have been violated, and implementing them when their exercise has encountered unjustified obstacles. This is what the principle of equal and rapid access to justice means; namely, the real possibility of access to justice through the means that domestic law provides to all persons, in order to reach a just settlement of a dispute; in other words, formal and genuine access to justice.

37. . . . Strictly speaking, due process is the means to ensure the effective exercise of human rights that is consistent with the most advanced concept of such rights: a method or factor to ensure the effectiveness of law as a whole and of subjective rights

in specific cases. Due process—a dynamic concept guided and developed under a guarantee model that serves individual and social interests and rights, and also the supreme interest of justice—is a guiding principle for the proper resolution of legal actions and a fundamental right of all persons. It is applied to settle disputes of any nature—including labor disputes—and to the claims and complaints submitted to any authority: judicial or administrative.

[***]

39. . . . Indeed, undocumented workers usually face severe problems of effective access to justice. These problems are due not only to cultural factors and lack of adequate resources or knowledge to claim protection from the authorities with [jurisdiction] to provide it, but also to the existence of norms or practices that obstruct or limit delivery of justice by the State. This happens because the request for justice can lead to reprisals against the applicants by authorities or individuals, measures of coercion or detention, threats of deportation, imprisonment or other measures that, unfortunately, are frequently experienced by undocumented migrants. Thus, the exercise of a fundamental human right—access to justice—culminates in the denial of many rights. It should be indicated that even where coercive measures or sanctions are implemented based on migratory provisions—such as deportation or expulsion—the person concerned retains all the rights that correspond to him for work performed, because their source is unrelated to the migratory problem and stems from the work performed.

[***]

43. **[5]** It would be unrealistic to believe that the opinion of a [judicial] body—even though it is supported by the convictions and decisions of States representing hundreds of millions of individuals in this hemisphere—and the trend towards progress with justice that inspires many men and women of good will, could, in the short-term, reverse obsolete tendencies that are rooted in deep prejudices and sizeable interests. However, when combined, these forces can play their role in man's effort to move mountains . . . .

Concurring Opinion of Judge Hernán SALGADO PESANTES

. . . I would like to take up [some issues] in support of the opinions expressed . . . .

[***]

3. **[1]** In recognition of the diversity of human beings, it is acknowledged that equality accepts and promotes certain distinctions, provided they tend to increase rather than prevent the enjoyment and exercise of all rights, including equality itself. Consequently, such distinctions do not affect the right to non-discrimination; nor do they restrict the concept of equality.

[***]

5. **[2]** The concept of distinction refers to a treatment that is different from the one generally applied; in other words, a specific situation is singularized for certain reasons. To ensure that distinction does not become discrimination, the following requirements, established by human rights case law and theory, must be fulfilled.

6. It should pursue a legitimate goal and it should be objective, in the sense that there is a substantial and not merely formal difference. . . .

7. In addition, the difference must be [significant], have sufficient importance to justify a different treatment, and be necessary and not merely convenient or useful. For example, the difference between a man and a woman is not sufficient to impose a different treatment in the workplace, but the fact of pregnancy and maternity is.

8. There must be proportionality between the factual and juridical difference, between the chosen means and the ends; disproportion between the content of the different treatment and the proposed goal leads to discrimination. For example, [it is impermissible] to sustain a labor policy [by stripping] undocumented workers . . . of their fundamental rights.

9. Together with proportionality, appropriateness and [adequacy] are usually indicated, as regards the desired juridical consequences of the differentiated treatment, taking into account the concrete and actual circumstances in which the distinction will be applied.

10. But there is a common denominator with regard to the preceding elements, which fine tunes the content and scope of the other elements, and that is reasonableness. The use of these elements allows us to identify the presence of discrimination in a "suspect category," represented in this case by the undocumented migrant workers.

11. **[3]** Undocumented migrant workers have—as has any human being—the rights to equality before the law and not to be discriminated against.

12. Equality before the law means that they must be treated in the same way as documented migrants and nationals before the law of the receiving country. The prohibition to work has to be considered in this context. The condition of undocumented worker can never become grounds for not having access to justice and due process of law, for failing to receive earned salaries, for not having social security benefits and for being the object of various forms of abuse and arbitrariness.

13. Such situations illustrate the existence of a series of discriminatory treatments that those responsible seek to found on the distinction between documented and undocumented.

[***]

17. I consider that an extremely important point in this Advisory Opinion is that of establishing clearly the effectiveness of human rights with regard to third parties, in a horizontal conception. These aspects, as is acknowledged, have been amply developed in German legal writings (*Drittwirkung*) and are contained in current constitutionalism.

18. It is not only the State that has the obligation to respect human rights, but also individuals in their relationships with other individuals. The environment of free will that prevails in private law cannot become an obstacle that dilutes the binding effectiveness *erga omnes* of human rights.

19. The possessors of human rights—in addition to the State (the public sphere)—are also third parties (the private sphere), who may violate such rights in the ambit of individual relationships. For the purposes of this Opinion, we are limiting ourselves basically to the workplace where it has been established that the rights to equality and non-discrimination are being violated.

20. Labor rights as a whole acquire real importance in relationships between individuals; consequently, they must be binding with regard to third parties. To this end, all States must adopt legislative or administrative measures to impede such violations and procedural instruments should be effective and prompt.

21. At the level of international responsibility, any violation of rights committed by individuals will be attributed to the State, if the latter has not taken effective measures to prevent such violation or tolerates it or permits the authors to remain unpunished.

22. The foregoing signifies that international human rights instruments also produce binding effects with regard to third parties. Likewise, the responsibility of the individual has a bearing on and affects that of the State.

I have participated in this Advisory Opinion, like my colleagues, aware of its importance for the countries of our hemisphere.

Concurring Opinion of Judge Alirio ABREU BURELLI

. . . I wish to submit the following considerations separately:

I

[***]

. . . States must respect and guarantee the labor rights of workers, whatever their migratory status and, at the same time, must prevent private employers from violating the rights of undocumented migrant workers and the employment relationship from violating minimum international standards. For the protection of the labor rights of undocumented migrants to be effective, such workers must be guaranteed access to justice and due process of law.

A State's observance of the principle of equality and non-discrimination and the right to due process of law cannot be subordinated to its policy goals, whatever these may be, including those of a migratory character.

[1] By voting in favor of the adoption of this Opinion, I am aware of its particular importance in endeavoring to provide legal answers, in international law, to the grave problem of the violation of the human rights of migrant workers. In general, despite their non-contentious nature, Advisory Opinions have indisputable effects on both the legislative and administrative acts of States and on the interpretation and application of laws and human rights treaties by judges, owing to their moral authority and the principle of good faith on which the international treaties that authorize them are based.

II

[T]he State that requested the Court to render an Opinion referred specifically to the fact that almost six million Mexican workers are outside national territory; and, of these, approximately two and a half million are undocumented migrant workers.

[***]

III

Limited to the strictly juridical sphere, established by regulatory, statutory and convention-related instruments that govern its proceedings, in exercise of its [jurisdiction], the Court cannot go beyond the interpretation and application of legal norms in its judgments and advisory opinions. However, it is impossible to prevent the human tragedy underlying the cases it hears from being reflected in the Court's proceedings and reports. Frequently, the statements of the victims or of their next of kin, who resort to the Court seeking justice, have moved the judges profoundly. The arbitrary death of children, of youth or, in general, of any person; enforced disappearance; torture; illegal imprisonment, and other human rights violations, submitted to the Court's consideration and decision, cannot be resolved by mere legal concepts; not even bearing in mind the Court's efforts to try and provide reparations for the damages suffered by the victims that go beyond monetary compensation. It continues to be an ideal—whose achievement depends on the development of a new collective conception of justice—that these violations should never be repeated and that, if they are, their authors should be severely punished. **[2]** [T]his ruling also contains an implicit call for social justice and human solidarity.

IV

In particular—and due to the possibility of doing so in this separate opinion—I consider that the tragedy represented in each case of forced migration, whatever its cause, cannot be bypassed for mere juridical considerations. Thus, the tragedy of all those who, against their will, abandon their country of origin, their home, their parents, their spouse, their children, their memories, in order to confront generally hostile conditions and become the target of human and labor exploitation owing to their particularly vulnerable situation, should gives us cause for reflection. In addition to trying to repair the consequences of forced migrations, through instruments of international law, the creation of courts, migratory policies and administrative or other measures, the international community should also concern itself with investigating the real causes of migration and ensure that people are not forced to emigrate. In this way, it would be discovered that, apart from inevitable natural events, on many occasions migrations are the result of the impoverishment of countries, due to erroneous economic policies, which exclude numerous sectors of the population, together with the generalized fact of corruption. Other factors include dictatorships or populist regimes; irrational extraction from poor countries of raw materials for processing abroad by transnational companies, and the exploitation of workers with the tolerance and complicity of Governments; vast social and economic imbalances and injustice; lack of national educational policies that cover the entire population, guaranteeing professional development and training for productive work; excessive publicity, which leads to consumerism and the illusion of well-being in highly developed countries; absence of genuine international cooperation in the national development plans; and macroeconomic development policies that ignore social justice.

[***]

[The] rule of law, democracy and personal freedom are consubstantial with the regime of human rights protection contained in the Convention . . . .

It is possible that the establishment of a just society begins with the strengthening of a genuine democracy that fully guarantees the dignity of the human being.

Shirley DAVIS v. Otto E. PASSMAN

442 U.S. 228 (1979)
Supreme Court of the United States
June 5, 1979

Brennan, J., delivered the opinion of the Court, in which White, Marshall, Blackmun, and Stevens, JJ., joined. Burger, C. J., filed a dissenting opinion, in which Powell and Rehnquist, JJ., joined. . . . Stewart, J., filed a dissenting opinion, in which Rehnquist, J., joined. . . . Powell, J., filed a dissenting opinion, in which Burger, C. J., and Rehnquist, J., joined. . . .

Mr. Justice BRENNAN delivered the opinion of the Court.

[I] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), held that a "cause of action for damages" arises under the Constitution when Fourth Amendment rights are violated. The issue presented for decision in this case is whether a cause of action and a damages remedy can also be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated. The Court of Appeals for the Fifth Circuit, en banc, concluded that "no civil action for damages" can be thus implied. 571 F.2d 793, 801 (1978). We granted certiorari, 439 U.S. 925 (1978), and we now reverse.

I

[F] At the time this case commenced, respondent Otto E. Passman was a United States Congressman from the Fifth Congressional District of Louisiana.[1] On February 1, 1974, Passman hired petitioner Shirley Davis as a deputy administrative assistant. Passman subsequently terminated her employment, effective July 31, 1974, writing Davis that, although she was "able, energetic and a very hard worker," he had concluded "that it was essential that the understudy to my Administrative Assistant be a man." App. 6.

[P] Davis brought suit in the United States District Court for the Western District of Louisiana, alleging that Passman's conduct discriminated against her "on the basis of sex in violation of the United States Constitution and the Fifth Amendment thereto." *Id.*, at 4. Davis sought damages in the form of backpay. *Id.*, at 5.[4] Jurisdiction for her suit was founded on 28 U.S.C. § 1331 (a), which provides in pertinent part that federal "district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 . . . and arises under the Constitution . . . of the United States. . . ."

Passman moved to dismiss Davis' action for failure to state a claim upon which relief can be granted, Fed. Rule Civ. Proc. 12(b)(6), arguing, inter alia, that "the law affords no private right of action" for her claim. App. 8. The District Court accepted this argument, ruling that Davis had "no private right of action." *Id.*, at 9. A panel of the Court of Appeals for the Fifth Circuit reversed. 544 F.2d 865 (1977). The panel

[1] Passman was defeated in the 1976 primary election, and his tenure in office ended January 3, 1977.
[4] Davis also sought equitable relief in the form of reinstatement, as well as a promotion and salary increase. Id., at 4–5. Since Passman is no longer a Congressman, however, see n. 1, *supra*, these forms of relief are no longer available.

concluded that a cause of action for damages arose directly under the Fifth Amendment. . . .

The Court of Appeals for the Fifth Circuit, sitting en banc, reversed the decision of the panel. The en banc court . . . held that "no right of action may be implied from the Due Process Clause of the fifth amendment." 571 F.2d, at 801. . . .

II

[R] In Bivens v. Six Unknown Fed. Narcotics Agents, federal agents had allegedly arrested and searched Bivens without probable cause, thereby subjecting him to great humiliation, embarrassment, and mental suffering. **[1]** *Bivens* held that the Fourth Amendment guarantee against "unreasonable searches and seizures" was a constitutional right which Bivens could enforce through a private cause of action, and that a damages remedy was an appropriate form of redress. Last Term, Butz v. Economou, 438 U.S. 478 (1978), reaffirmed this holding. . . .

Today we hold that *Bivens* and *Butz* require reversal of the holding of the en banc Court of Appeals. Our inquiry proceeds in three stages. We hold first that, pretermitting the question whether respondent's conduct is shielded by the Speech or Debate Clause, petitioner asserts a constitutionally protected right; second, that petitioner has stated a cause of action which asserts this right; and third, that relief in damages constitutes an appropriate form of remedy.

A

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." . . . The equal protection component of the Due Process Clause thus confers on petitioner a federal constitutional right to be free from gender discrimination. . . . We inquire next whether petitioner has a cause of action to assert this right.

B

[***]

Almost half a century ago, Mr. Justice Cardozo recognized that a "'cause of action' may mean one thing for one purpose and something different for another." United States v. Memphis Cotton Oil Co., 288 U.S. 62, 67 -68 (1933). The phrase apparently became a legal term of art when the New York Code of Procedure of 1848 abolished the distinction between actions at law and suits in equity and simply required a plaintiff to include in his complaint "[a] statement of the facts constituting the cause of action. . . ." 1848 N.Y. Laws, ch. 379, 120 (2). By the first third of the 20th century, however, the phrase had become so encrusted with doctrinal complexity that the authors of the Federal Rules of Civil Procedure eschewed it altogether, requiring only that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8 (a). . . . **[2]** Nevertheless, courts and commentators have continued to use the phrase "cause of action" in the traditional sense established by the Codes to refer roughly to the alleged invasion of "recognized legal rights" upon which a litigant bases his claim for relief. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 693 (1949).

[***]

[The] question is which class of litigants may enforce in court legislatively created rights or obligations. If a litigant is an appropriate party to invoke the power of the courts, it is said that he has a "cause of action" under the statute, and that this cause of action is a necessary element of his "claim." So understood, the question whether a litigant has a "cause of action" is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive. The concept of a "cause of action" is employed specifically to determine who may judicially enforce the statutory rights or obligations.[18]

[***]

Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner. For example, statutory rights and obligations are often embedded in complex regulatory schemes, so that if they are not enforced through private causes of action, they may nevertheless be enforced through alternative mechanisms, such as criminal prosecutions . . . or other public causes of actions. . . . In each case, however, the question is the nature of the legislative intent informing a specific statute. . . .

The Constitution . . . speaks instead with a majestic simplicity [and, importantly, designates] rights. And . . . the judiciary is clearly discernible as the primary means through which these rights may be enforced. . . .

[3] At least in the absence of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department," Baker v. Carr, 369 U.S. 186, 217 (1962), we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights. . . . Indeed, this Court has already settled that a cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right. . . .

[4] [The] petitioner rests her claim directly on the Due Process Clause of the Fifth Amendment. She claims that her rights under the Amendment have been violated, and that she has no effective means other than the judiciary to vindicate these rights. We conclude, therefore, that she is an appropriate party to invoke the general federal-question jurisdiction of the District Court to seek relief. She has a cause of action under the Fifth Amendment.

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[18] Thus it may be said that jurisdiction is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case . . . ; standing is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction . . . ; cause of action is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and relief is a question of the various remedies a federal court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the "preconditions" for such equitable remedies. . . .

Although petitioner has a cause of action, her complaint might nevertheless be dismissed under Rule 12(b)(6) unless it can be determined that judicial relief is available. We therefore proceed to consider whether a damages remedy is an appropriate form of relief.

C

[***]

[5] When § 717 was added to Title VII [of the Civil Rights Act of 1964] to protect federal employees from discrimination, it failed to extend this protection to congressional employees such as petitioner who are not in the competitive service. *See* 42 U.S.C. § 2000e-16 (a). There is no evidence, however, that Congress meant § 717 to foreclose alternative remedies available to those not covered by the statute. [Therefore], we do not now interpret § 717 to foreclose the judicial remedies of those expressly unprotected by the statute. On the contrary, § 717 leaves undisturbed whatever remedies petitioner might otherwise possess.

[***]

We conclude, therefore, that in this case, as in *Bivens*, if petitioner is able to prevail on the merits, she should be able to redress her injury in damages, a "remedial mechanism normally available in the federal courts." *Id.*, at 397.

III

[H] We hold today that the Court of Appeals for the Fifth Circuit, en banc, must be reversed because petitioner has a cause of action under the Fifth Amendment, and because her injury may be redressed by a damages remedy. The Court of Appeals did not consider, however, whether respondent's conduct was shielded by the Speech or Debate Clause of the Constitution. Accordingly, we do not reach this question. And, of course, we express no opinion as to the merits of petitioner's complaint.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.
SO ORDERED

Mr. Chief justice BURGER, with whom Mr. Justice POWELL and Mr. Justice REHNQUIST join, dissenting

I dissent because, for me, the case presents very grave questions of separation of powers, rather than Speech or Debate Clause issues, although the two have certain common roots. **[1]** Congress could, of course, make *Bivens*-type remedies available to its staff employees—and to other congressional employees—but it has not done so. On the contrary, Congress has historically treated its employees differently from the arrangements for other Government employees. Historically, staffs of Members have been considered so intimately a part of the policymaking and political process that they are not subject to being selected, compensated, or tenured as others who serve the Government.

[***]

[2] The intimation that if Passman were still a Member of the House, a federal court could command him, on pain of contempt, to re-employ Davis represents an

astonishing break with concepts of separate, coequal branches; I would categorically reject the notion that courts have any such power in relation to the Congress.

Mr. Justice STEWART, with whom Mr. Justice REHNQUIST joins, dissenting

Few questions concerning a plaintiff's complaint are more basic than whether it states a cause of action. The present case, however, involves a preliminary question that may be completely dispositive. . . .

[1] If . . . the respondent's alleged conduct was within the immunity of the Speech or Debate Clause, that is the end of this case, regardless of the abstract existence of a cause of action or a damages remedy. **[2]** Accordingly, it seems clear to me that the first question to be addressed in this litigation is the Speech or Debate Clause claim—a claim that is far from frivolous.

I would vacate the judgment and remand the case to the Court of Appeals with directions to decide the Speech or Debate Clause issue.

Mr. Justice POWELL, with whom the Chief Justice and Mr. Justice REHNQUIST join, dissenting.

[1] Although I join the opinion of the Chief Justice, I write separately to emphasize that no prior decision of this Court justifies today's intrusion upon the legitimate powers of Members of Congress.

[***]

Among those policies that a court certainly should consider in deciding whether to imply a constitutional right of action is that of comity toward an equal and coordinate branch of government. . . .

Whether or not the employment decisions of a Member of Congress fall within the scope of the Speech or Debate Clause of the Constitution, a question the Court does not reach today, it is clear that these decisions are bound up with the conduct of his duties. . . . **[2]** A Congressman simply cannot perform his constitutional duties effectively, or serve his constituents properly, unless he is supported by a staff in which he has total confidence.

The foregoing would seem self-evident even if Congress had not indicated an intention to reserve to its Members the right to select, employ, promote, and discharge staff personnel without judicial interference. But Congress unmistakably has made clear its view on this subject. It took pains to exempt itself from the coverage of Title VII. Unless the Court is abandoning or modifying *sub silentio* our holding in Brown v. GSA, 425 U.S. 820 (1976), that Title VII, as amended, "provides the exclusive judicial remedy for claims of discrimination in federal employment," *id.*, at 835, the exemption from this statute for congressional employees should bar all judicial relief.

[***]

I would affirm the judgment of the Court of Appeals.

SANTA CLARA PUEBLO, *et al.* v. Julia MARTÍNEZ *et al.*

436 U.S. 49 (1978)
Supreme Court of the United States
May 15, 1978

Marshall, J., delivered the Court's opinion, in which Burger, C. J., and Brennan, Stewart, Powell, and Stevens, JJ., joined, and in all but Part III of which Rehnquist, J., joined. White, J., filed a dissenting opinion. . . . Blackmun, J., took no part in the consideration or decision of the case.

Mr. Justice MARSHALL delivered the opinion of the Court.

[I, H] This case requires us to decide whether a federal court may pass on the validity of an Indian tribe's ordinance denying membership to the children of certain female tribal members.

Petitioner Santa Clara Pueblo is an Indian tribe that has been in existence for over 600 years. Respondents, a female member of the tribe and her daughter, brought suit in federal court against the tribe and its Governor, petitioner Lucario Padilla, seeking declaratory and injunctive relief against enforcement of a tribal ordinance denying membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe. Respondents claimed that this rule discriminates on the basis of both sex and ancestry in violation of Title I of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§1301-1303, which provides in relevant part that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws." §1302(8).

Title I of the ICRA does not expressly authorize the bringing of civil actions for declaratory or injunctive relief to enforce its substantive provisions. The threshold issue in this case is thus whether the Act may be interpreted to impliedly authorize such actions, against a tribe or its officers, in the federal courts. For the reasons set forth below, we hold that the Act cannot be so read.

I

[F] Respondent Julia Martínez is a full-blooded member of the Santa Clara Pueblo, and resides on the Santa Clara Reservation in Northern New Mexico. In 1941 she married a Navajo Indian with whom she has since had several children, including respondent Audrey Martínez. Two years before this marriage, the Pueblo passed the membership ordinance here at issue, which bars admission of the Martínez children to the tribe because their father is not a Santa Claran. Although the children were raised on the reservation and continue to reside there now that they are adults, as a result of their exclusion from membership they may not vote in tribal elections or hold secular office in the tribe; moreover, they have no right to remain on the reservation in the event of their mother's death, or to inherit their mother's home or her possessory interests in the communal lands.

[P] After unsuccessful efforts to persuade the tribe to change the membership rule, respondents filed this lawsuit in the United States District Court for the District of New Mexico, on behalf of themselves and others similarly situated. Petitioners moved to dismiss the complaint on the ground that the court lacked jurisdiction to decide intratribal controversies affecting matters of tribal self-government and sovereignty. The District Court rejected petitioners' contention, finding that jurisdiction was conferred by 28 U.S.C. §1343(4) and 25 U.S.C. §1302 (8). The court apparently concluded, first, that the substantive provisions of Title I impliedly authorized civil

actions for declaratory and injunctive relief, and second, that the tribe was not immune from such suit. Accordingly, the motion to dismiss was denied. 402 F. Supp. 5 (1975).

Following a full trial, the District Court found for petitioners on the merits. . . .

On respondents' appeal, the Court of Appeals for the Tenth Circuit upheld the District Court's determination that 28 U.S.C. §1343(4) provides a jurisdictional basis for actions under Title I of the ICRA. 540 F.2d 1039, 1042 (1976). . . . The Court of Appeals disagreed, however, with the District Court's ruling on the merits. . . . Because of the ordinance's recent vintage, and because in the court's view the rule did not rationally identify those persons who were emotionally and culturally Santa Clarans, the court held that the tribe's interest in the ordinance was not substantial enough to justify its discriminatory effect. . . .

We granted certiorari, 431 U.S. 913 (1977), and we now reverse.

II

[R] Indian tribes . . . have power to make their own substantive law in internal matters, . . . and to enforce that law in their own forums.

[***]

Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. . . . Title I of the ICRA, 25 U.S.C. §§1301-1303, represents an exercise of that authority. In §25 U.S.C. 1302, Congress [imposed] certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment. In 25 U.S.C. §1303, the only remedial provision expressly supplied by Congress, the "privilege of the writ of *habeas corpus*" is made "available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

[***]

III

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. . . . This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. . . .

[1] . . . Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. Moreover, since the respondent in a *habeas corpus* action is the individual custodian of the prisoner, . . . the provisions of 1303 can hardly be read as a general waiver of the tribe's sovereign immunity. In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.

IV

As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit. . . . We must therefore determine whether the cause of action for declaratory and injunctive relief asserted here by respondents, though not expressly authorized by the statute, is nonetheless implicit in its terms.

In addressing this inquiry, we must bear in mind that providing a federal forum for issues arising under §1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself. . . . Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief in 1303, a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent. . . .

With these considerations [as] a backdrop . . . , we turn now to those factors of more general relevance in determining whether a cause of action is implicit in a statute not expressly providing one. . . . We note at the outset that a central purpose of the ICRA and in particular of Title I was to "secur[e] for the American Indian the broad constitutional rights afforded to other Americans," and thereby to "protect individual Indians from arbitrary and unjust actions of tribal governments." S. Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967). There is thus no doubt that respondents, American Indians living on the Santa Clara Reservation, are among the class for whose especial benefit this legislation was enacted. . . . Moreover, we have frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms. . . . These precedents, however, are simply not dispositive here. Not only are we unpersuaded that a judicially sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of the ICRA, but to the contrary, the structure of the statutory scheme and the legislative history of Title I suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one. . . .

A

Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members *vis-a-vis* the tribe, Congress also intended to promote the well-established federal "policy of furthering Indian self-government." Morton v. Mancari, 417 U.S. 535, 551 (1974). . . . This commitment to the goal of tribal self-determination is demonstrated by the provisions of Title I itself. Section 1302, rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed, selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments. . . . Thus, for example, the statute does not prohibit the establishment of religion, nor does it require jury trials in civil cases, or appointment of counsel for indigents in criminal cases. . . .

The other Titles of the ICRA also manifest a congressional purpose to protect tribal sovereignty from undue interference. For instance, Title III, 25 U.S.C. 1321-1326, hailed by some of the ICRA's supporters as the most important part of the Act, 15 provides that States may not assume civil or criminal jurisdiction over "Indian country" without the prior consent of the tribe, thereby abrogating prior law to the contrary. Other Titles of the ICRA provide for strengthening certain tribal courts through training of Indian judges, and for minimizing interference by the Federal Bureau of Indian Affairs in tribal litigation.

[2] Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that,

while serving one legislative purpose, will disserve the other. Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with 1302, plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums . . . but it would also impose serious financial burdens. . . .

Moreover, contrary to the reasoning of the court below, implication of a federal remedy in addition to *habeas corpus* is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government. Tribal forums are available to vindicate rights created by the ICRA, and §1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. *See, e. g.*, Fisher v. District Court, 424 U.S. 382 (1976); Williams v. Lee, 358 U.S. 217 (1959). . . . Nonjudicial tribal institutions have also been recognized as competent law-applying bodies. *See* United States v. Mazurie, 419 U.S. 544 (1975). Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief.

B

Our reluctance is strongly reinforced by the specific legislative history underlying 25 U.S.C. §1303. This history, extending over more than three years, 23 indicates that Congress' provision for habeas corpus relief, and nothing more, reflected a considered accommodation of the competing goals of "preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people." Summary Report 11.

In settling on *habeas corpus* as the exclusive means for federal-court review of tribal criminal proceedings, Congress opted for a less intrusive review mechanism than had been initially proposed. Originally, the legislation would have authorized de novo review in federal court of all convictions obtained in tribal courts. At hearings held on the proposed legislation in 1965, however, it became clear that even those in agreement with the general thrust of the review provision—to provide some form of judicial review of criminal proceedings in tribal courts—believed that *de novo* review would impose unmanageable financial burdens on tribal governments and needlessly displace tribal courts. . . . Moreover, tribal representatives argued that *de novo* review would "deprive the tribal court of all jurisdiction in the event of an appeal, thus having a harmful effect upon law enforcement within the reservation," and urged instead that "decisions of tribal courts . . . be reviewed in the U.S. district courts upon petition for a writ of *habeas corpus*." *Id.*, at 79. After considering numerous alternatives for review of tribal convictions, Congress apparently decided that review by way of *habeas corpus* would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments.

[3] Similarly, and of more direct import to the issue in this case, Congress considered and rejected proposals for federal review of alleged violations of the Act arising in a civil context. As initially introduced, the Act would have required the Attorney General to "receive and investigate" complaints relating to deprivations of an Indian's statutory or constitutional rights, and to bring "such criminal or other action as he

deems appropriate to vindicate and secure such right to such Indian." Notwithstanding the screening effect this proposal would have had on frivolous or vexatious lawsuits, it was bitterly opposed by several tribes.

[***]

Given this history, it is highly unlikely that Congress would have intended a private cause of action for injunctive and declaratory relief to be available in the federal courts to secure enforcement of 1302. Although the only Committee Report on the ICRA in its final form, S. Rep. No. 841, 90th Cong., 1st Sess. (1967), sheds little additional light on this question, it would hardly support a contrary conclusion. Indeed, its description of the purpose of Title I, as well as the floor debates on the bill, indicates that the ICRA was generally understood to authorize federal judicial review of tribal actions only through the *habeas corpus* provisions of 1303. These factors, together with Congress' rejection of proposals that clearly would have authorized causes of action other than *habeas corpus*, persuade us that Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in §1303.

V

. . . Although Congress explored the extent to which tribes were adhering to constitutional norms in both civil and criminal contexts, its legislative investigation revealed that the most serious abuses of tribal power had occurred in the administration of criminal justice. . . . In light of this finding, and given Congress' desire not to intrude needlessly on tribal self-government, it is not surprising that Congress chose at this stage to provide for federal review only in *habeas corpus* proceedings.

By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under §1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts. [The] tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments. . . . As is suggested by the District Court's opinion in this case, . . . efforts by the federal judiciary to apply the statutory prohibitions of §1302 in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity.

As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. . . . Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that §1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.

The judgment of the Court of Appeals is, accordingly,

REVERSED.

Mr. Justice BLACKMUN took no part in the consideration or decision of this case.

Mr. Justice REHNQUIST joins Parts I, II, IV, and V of this opinion.

Mr. Justice WHITE, dissenting

The . . . Court today, by denying a federal forum to Indians who allege that their rights under the ICRA have been denied by their tribes, substantially undermines the goal of the ICRA. . . . Because I believe that implicit within Title I's declaration of constitutional rights is the authorization for an individual Indian to bring a civil action in federal court against tribal officials for declaratory and injunctive relief to enforce those provisions. I dissent.

[***]

[1] The ICRA itself gives no indication that the constitutional rights it extends to American Indians are to be enforced only by means of federal *habeas corpus* actions. **[2]** On the contrary, since several of the specified rights are most frequently invoked in noncustodial situations, the natural assumption is that some remedy other than *habeas corpus* must be contemplated. . . . While I believe that the uniqueness of the Indian culture must be taken into consideration in applying the constitutional rights granted in §1302, I do not think that it requires insulation of official tribal actions from federal-court scrutiny. Nor do I find any indication that Congress so intended.

[***]

[3] The degree of intrusion permitted by a private cause of action to enforce the civil provisions of §1302 would be no greater than that permitted in a *habeas corpus* proceeding. The federal district court's duty would be limited to determining whether the challenged tribal action violated one of the enumerated rights. If found to be in violation, the action would be invalidated; if not, it would be allowed to stand. In no event would the court be authorized, as in a de novo review proceeding, to substitute its judgment concerning the wisdom of the action taken for that of the tribal authorities.

Nor am I persuaded that Congress, by rejecting various proposals for administrative review of alleged violations of Indian rights, indicated its rejection of federal judicial review of such violations. . . .

[***]

In sum, then, I find no positive indication in the legislative history that Congress opposed a private cause of action to enforce the rights extended to Indians under 1302. The absence of any express approval of such a cause of action, of course, does not prohibit its inference. . . .

The most important consideration, of course, is whether a private cause of action would be consistent with the underlying purposes of the Act. . . . Not only is a private cause of action consistent with that purpose, it is necessary for its achievement. The legislative history indicates that Congress was concerned, not only about the Indian's lack of substantive rights, but also about the lack of remedies to enforce whatever rights the Indian might have. . . .

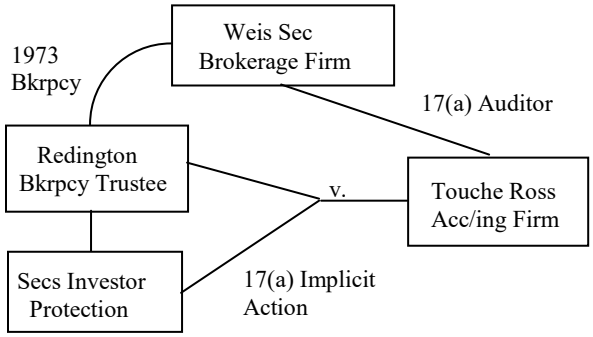
[***]

[4] Given Congress' concern about the deprivations of Indian rights by tribal authorities, I cannot believe, as does the majority, that it desired the enforcement of these rights to be left up to the very tribal authorities alleged to have violated them. In the case of the Santa Clara Pueblo, for example, both legislative and judicial powers are vested in the same body, the Pueblo Council. . . . To suggest that this tribal body is the "appropriate" forum for the adjudication of alleged violations of the ICRA is to ignore both reality and Congress' desire to provide a means of redress to Indians aggrieved by their tribal leaders.

Although the Senate Report's statement of the purpose of the ICRA refers only to the granting of constitutional rights to the Indians, I agree with the majority that the legislative history demonstrates that Congress was also concerned with furthering Indian self-government. I do not agree, however, that this concern on the part of Congress precludes our recognition of a federal cause of action to enforce the terms of the Act. The major intrusion upon the tribe's right to govern itself occurred when Congress enacted the ICRA and mandated that the tribe "in exercising powers of self-government" observe the rights enumerated in §1302. The extension of constitutional rights to individual citizens is intended to intrude upon the authority of government. And once it has been decided that an individual does possess certain rights *vis-a-vis* his government, it necessarily follows that he has some way to enforce those rights. Although creating a federal cause of action may "constitut[e] an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself," *ante*, at 59, in my mind it is a further step that must be taken; otherwise, the change in the law may be meaningless.

[***]

Because I believe that respondents stated a cause of action over which the federal courts have jurisdiction, I would proceed to the merits of their claim. Accordingly, I dissent from the opinion of the Court.



1. 17(a) Crim Prosecution v. Weis Secs Officers
2. SIPC paid $14m on customer claims.
3. Millions in claims remained.
4. Redington seeks $51m.
5. SIPC wants $14m.

TOUCHE ROSS & Co. v. REDINGTON, Trustee et al.

442 U.S. 560 (1979)
Supreme Court of the United States
June 18, 1979

Rehnquist, J., delivered the [Court's] opinion . . . , in which Burger, C. J., and Brennan, Stewart, White, Blackmun, and Stevens, JJ., joined. Brennan, J., filed a concurring opinion. . . . Marshall, J., filed a dissenting opinion . . . . Powell, J., took no part

in the consideration or decision of the case.

Mr. Justice REHNQUIST delivered the opinion of the Court.

[I] Once again, we are called upon to decide whether a private remedy is implicit in a statute not expressly providing one. During this Term alone, we have been asked to undertake this task no fewer than five times in cases in which we have granted certiorari. Here we decide whether customers of securities brokerage firms that are required to file certain financial reports with regulatory authorities by § 17(a) of the Securities Exchange Act of 1934 (1934 Act), 48 Stat. 897, as amended, 15 U.S.C. § 78q(a), have an implied cause of action for damages under § 17(a) against accountants who audit such reports, based on misstatements contained in the reports.

I

[F] Petitioner Touche Ross & Co. is a firm of certified public accountants. Weis Securities, Inc. (Weis), a securities brokerage firm registered as a broker-dealer with the Securities and Exchange Commission (Commission) and a member of the New York Stock Exchange (Exchange), retained Touche Ross to serve as Weis' independent certified public accountant from 1969 to 1973. In this capacity, Touche Ross conducted audits of Weis' books and records and prepared for filing with the Commission the annual reports of financial condition required by § 17(a) of the 1934 Act, 15 U.S.C. § 78q(a), and the rules and regulations adopted thereunder. 17 CFR § 240.17a-5 (1972). Touche Ross also prepared for Weis responses to financial questionnaires required by the Exchange of its member firms.

This case arises out of the insolvency and liquidation of Weis. In 1973, the Commission and the Exchange learned of Weis' precarious financial condition and of possible violations of the 1934 Act by Weis and its officers. In May 1973, the Commission sought and was granted an injunction barring Weis and five of its officers from conducting business in violation of the 1934 Act. At the same time, the Securities Investor Protection Corporation (SIPC), pursuant to statutory authority, applied in the United States District Court for the Southern District of New York for a decree adjudging that Weis' customers were in need of the protection afforded by the Securities Investor Protection Act of 1970 (SIPA), 84 Stat. 1636, 15 U.S.C. § 78aaa et seq.[5] The District Court granted the requested decree and appointed respondent Redington (Trustee) to act as trustee in the liquidation of the Weis business under SIPA.

During the liquidation, Weis' cash and securities on hand appeared to be insufficient to make whole those customers who had left assets or deposits with Weis. Accordingly, pursuant to SIPA, SIPC advanced the Trustee $14 million to satisfy, up to specified statutory limits, the claims of the approximately 34,000 Weis customers and certain other creditors of Weis. Despite the advance of $14 million by SIPC, there apparently remain several million dollars of unsatisfied customer claims.

[P] In 1976, SIPC and the Trustee filed this action for damages against Touche Ross in the District Court for the Southern District of New York. The "common allegations" of the complaint, which at this stage of the case we must accept as true, aver

[5] SIPC is a nonprofit organization of securities dealers established by Congress in 1970 in the Securities Investor Protection Act. 15 U.S.C. § 78ccc. SIPC maintains a fund, supported by assessments of its members, which is used to compensate, up to specified limits, customers of brokerage firms who incur losses as a result of broker insolvencies. §§ 78ddd, 78fff (f). . . .

that certain of Weis' officers conspired to conceal substantial operating losses during its 1972 fiscal year by falsifying financial reports required to be filed with regulatory authorities pursuant to § 17(a) of the 1934 Act. . . . SIPC and the Trustee seek to impose liability upon Touche Ross by reason of its allegedly improper audit and certification of the 1972 Weis financial statements and preparation of answers to the Exchange financial questionnaire. . . . The complaint alleges that because of its improper conduct, Touche Ross breached duties that it owed SIPC, the Trustee, and others under the common law, § 17(a) and the regulations thereunder, and that Touche Ross' alleged dereliction prevented Weis' true financial condition from becoming known until it was too late to take remedial action to forestall liquidation or to lessen the adverse financial consequences of such a liquidation to the Weis customers. . . . The Trustee seeks to recover $51 million on behalf of Weis in its own right and on behalf of the customers of Weis whose property the Trustee was unable to return. SIPC claims $14 million, either as subrogee of Weis' customers whose claims it has paid under SIPA or in its own right. The federal claims are based on § 17(a) of the 1934 Act; the complaint also alleges several state common-law causes of action based on accountants' negligence, breach of contract, and breach of warranty.

The District Court dismissed the complaint, holding that no claim for relief was stated because no private cause of action could be implied from § 17(a). 428 F.Supp. 483 (SDNY 1977). A divided panel of the Second Circuit reversed. 592 F.2d 617 (1978). The court first found that § 17(a) imposes a duty on accountants. 592 F.2d, at 621. . . . We granted certiorari, 439 U.S. 979 (1978), and we now reverse.

II

[R] The question of the existence of a statutory cause of action is, of course, one of statutory construction. Cannon v. University of Chicago, 441 U.S. 677, 688 (1979). . . . SIPC's argument in favor of implication of a private right of action based on tort principles, therefore, is entirely misplaced. . . **[1]** As we recently have emphasized, "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." Cannon v. University of Chicago, *supra*, at 688. Instead, our task is limited solely to determining whether Congress intended to create the private right of action asserted by SIPC and the Trustee. And as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself.

[***]

[2] In terms, § 17(a) simply requires broker-dealers and others to keep such records and file such reports as the Commission may prescribe. It does not, by its terms, purport to create a private cause of action in favor of anyone. It is true that in the past our cases have held that in certain circumstances a private right of action may be implied in a statute not expressly providing one. But in those cases finding such implied private remedies, the statute in question at least prohibited certain conduct or created federal rights in favor of private parties. . . . By contrast, § 17(a) neither confers rights on private parties nor proscribes any conduct as unlawful.

The intent of § 17(a) is evident from its face. Section 17(a) is like provisions in countless other statutes that simply require certain regulated businesses to keep records and file periodic reports to enable the relevant governmental authorities to per-

form their regulatory functions. The reports and records provide the regulatory authorities with the necessary information to oversee compliance with and enforce the various statutes and regulations with which they are concerned. . . . **[3]** The information contained in the § 17(a) reports is intended to provide the Commission, the Exchange, and other authorities with a sufficiently early warning to enable them to take appropriate action to protect investors before the financial collapse of the particular broker-dealer involved. But § 17(a) does not by any stretch of its language purport to confer private damages rights or, indeed, any remedy in the event the regulatory authorities are unsuccessful in achieving their objectives and the broker becomes insolvent before corrective steps can be taken. By its terms, § 17(a) is forward-looking, not retrospective; it seeks to forestall insolvency, not to provide recompense after it has occurred. In short, there is no basis in the language of § 17(a) for inferring that a civil cause of action for damages lay in favor of anyone. . . .

[4] As the Court of Appeals recognized, the legislative history of the 1934 Act is entirely silent on the question whether a private right of action for damages should or should not be available under § 17(a) in the circumstances of this case. 592 F.2d, at 622. SIPC and the Trustee nevertheless argue that because Congress did not express an intent to deny a private cause of action under § 17(a), this Court should infer one. But implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64 (1978). And where, as here, the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the legislative history that § 17(a) may give rise to suits for damages reinforces our decision not to find such a right of action implicit within the section. . . .

Further justification for our decision not to imply the private remedy that SIPC and the Trustee seek to establish may be found in the statutory scheme of which § 17(a) is a part. **[5]** First, § 17(a) is flanked by provisions of the 1934 Act that explicitly grant private causes of action. § 16(b), 15 U.S.C. § 78p(b); § 18(a), 15 U.S.C. § 78r(a). Section 9(e) of the 1934 Act also expressly provides a private right of action. 15 U.S.C. § 78i(e). *See also* § 20, 15 U.S.C. § 8t. Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly. . . .

Second, § 18(a) creates a private cause of action against persons, such as accountants, who "make or cause to be made" materially misleading statements in any reports or other documents filed with the Commission, although the cause of action is limited to persons who, in reliance on the statements, purchased or sold a security whose price was affected by the statements. . . . 15 U.S.C. § 78r(a). . . . Since SIPC and the Trustee do not allege that the Weis customers purchased or sold securities in reliance on the § 17(a) reports at issue, they cannot sue Touche Ross under § 18(a). . . . Instead, their claim is that the Weis customers did not get the enforcement action they would have received if the § 17(a) reports had been accurate. . . . SIPC and the Trustee argue that § 18(a) cannot provide the exclusive remedy for misstatements made in § 17(a) reports because the cause of action created by § 18(a) is expressly limited to purchasers and sellers. They assert that Congress could not have intended in § 18(a) to deprive customers, such as those whom they seek to represent, of a cause of action for misstatements contained in § 17(a) reports.

There is evidence to support the view that § 18(a) was intended to provide the

exclusive remedy for misstatements contained in any reports filed with the Commission, including those filed pursuant to § 17(a). Certainly, SIPC and the Trustee have pointed to no evidence of a legislative intent to except § 17(a) reports from § 18(a)'s purview. . . . But we need not decide whether Congress expressly intended § 18(a) to provide the exclusive remedy for misstatements contained in § 17(a) reports. **[6]** For where the principal express civil remedy for misstatements in reports created by Congress contemporaneously with the passage of § 17(a) is by its terms limited to purchasers and sellers of securities, we are extremely reluctant to imply a cause of action in § 17(a) that is significantly broader than the remedy that Congress chose to provide. . . .

SIPC and the Trustee . . . contend that implication of a private remedy is essential to the goals of § 17(a) and that enforcement of § 17(a) is properly a matter of federal, not state, concern. . . . **[7]** We need not reach the merits of the arguments concerning the "necessity" of implying a private remedy and the proper forum for enforcement of the rights asserted by SIPC and the Trustee, for we believe such inquiries have little relevance to the decision of this case. . . . The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. . . . Here, the statute by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful. And the parties as well as the Court of Appeals agree that the legislative history of the 1934 Act simply does not speak to the issue of private remedies under § 17(a). At least in such a case as this, the inquiry ends there: The question whether Congress, either expressly or by implication, intended to create a private right of action, has been definitely answered in the negative.

Finally, SIPA and the Trustee . . . emphasize . . . that . . . § 27 of the Act . . . , inter alia, grants to federal district courts the exclusive jurisdiction of violations of the Act and suits to enforce any liability or duty created by the Act or the rules and regulations thereunder. . . . They argue that Touche Ross has breached its duties under § 17(a) and the rules adopted thereunder and that in view of § 27 and of the remedial purposes of the 1934 Act, federal courts should provide a damages remedy for the breach. . . .

[8] The reliance of SIPC and the Trustee on § 27 is misplaced. Section 27 grants jurisdiction to the federal courts and provides for venue and service of process. It creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the 1934 Act which they seek to enforce, not in the jurisdictional provision. . . .

The invocation of the "remedial purposes" of the 1934 Act is similarly unavailing. . . . Certainly, the mere fact that § 17(a) was designed to provide protection for brokers' customers does not require the implication of a private damages action in their behalf. . . . The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.

III

[9] SIPC and the Trustee contend that the result we reach sanctions injustice. But even if that were the case, the argument is made in the wrong forum, for we are not at liberty to legislate. If there is to be a federal damages remedy under these circumstances, Congress must provide it. . . . Obviously, nothing we have said prevents

Congress from creating a private right of action on behalf of brokerage firm customers for losses arising from misstatements contained in § 17(a) reports. But if Congress intends those customers to have such a federal right of action, it is well aware of how it may effectuate that intent.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice Powell took no part in the consideration or decision of this case.

Mr. Justice BRENNAN, concurring

I join the Court's opinion. The Court of Appeals implied a cause of action for damages under § 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a), in favor of respondents, who purport to represent customers of a bankrupt brokerage firm, against petitioner accounting firm, which allegedly injured those customers by improperly preparing and certifying the reports on the brokerage firm required by § 17(a) and the rules promulgated thereunder. **[1]** Under the tests established in our prior cases, no cause of action should be implied for respondents under § 17(a). Although analyses of the several factors outlined in Cort v. Ash, 422 U.S. 66 (1975), may often overlap, I agree that when, as here, a statute clearly does not "create a federal right in favor of the plaintiff," *id.*, at 78, i.e., when the plaintiff is not "'one of the class for whose especial benefit the statute was enacted,'" *ibid.*, quoting Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33, 39 (1916), and when there is also in the legislative history no "indication of legislative intent, explicit or implicit, . . . to create such a remedy," 422 U.S., at 78, the remaining two Cort factors cannot by themselves be a basis for implying a right of action.

Mr. Justice MARSHALL, dissenting

In determining whether to imply a private cause of action for damages under a statute that does not expressly authorize such a remedy, this Court has considered four factors:

> First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,'—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? Cort v. Ash, 422 U.S. 66, 78 (1975) (citations omitted).

Applying these factors, I believe respondents are entitled to bring an action against accountants who have allegedly breached duties imposed under § 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a).

[1] Since respondents seek relief on behalf of brokerage firm customers, the first inquiry is whether those customers are the intended beneficiaries of the regulatory scheme. [The] SEC requires brokers to provide a battery of financial statements, and directs independent accountants to verify the brokers' reports. 17 CFR § 240.17a-5

(1978). . . . The purpose of these requirements, as the Commission has consistently emphasized, is to enable regulators to "monitor the financial health of brokerage firms and protect customers from the risks involved in leaving their cash and securities with broker-dealers." *Ante*, at 570. . . . Thus, it is clear that brokerage firm customers are the "favored wards" of § 17, 592 F.2d 617, 623 (CA2 1978), and that the initial test of Cort v. Ash is satisfied here. . . .

With respect to the second *Cort* factor, the legislative history does not explicitly address the availability of a damages remedy under § 17. The majority, however, discerns an intent to deny private remedies from two aspects of the statutory scheme. Because unrelated sections in the 1934 Act expressly grant private rights of action for violation of their terms, the Court suggests that Congress would have made such provision under § 17 had it wished to do so. But as we noted recently in Cannon v. University of Chicago, 441 U.S. 677, 711 (1979), "that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section." The Court finds a further indication of congressional intent in the interaction between §§ 17 and 18 of the 1934 Act. Section 18(a), 15 U.S.C. § 78r(a), affords an express remedy for misstatements in reports filed with the Commission, apparently including reports required by § 17, but limits relief to purchasers or sellers of securities whose price was affected by the misstatement. In light of this limitation, the majority reasons, we should not imply a remedy under § 17 which embraces a broader class of plaintiffs. However, § 18 pertains to investors who are injured in the course of securities transactions, while § 17 is concerned exclusively with brokerage firm customers who may be injured by a broker's insolvency. Given this divergence in focus, § 18 does not reflect an intent to restrict the remedies available under § 17. Indeed, since false reports regarding a broker's financial condition would not affect the price of securities held by the broker's customers, § 18 would provide these persons with no remedy at all. . . .

[2] A cause of action for damages here is also consistent with the underlying purposes of the legislative scheme. Because the SEC lacks the resources to audit all the documents that brokers file, it must rely on certification by accountants. . . . Implying a private right of action would both facilitate the SEC's enforcement efforts and provide an incentive for accountants to perform their certification functions properly.

[3] Finally, enforcement of the 1934 Act's reporting provisions is plainly not a matter of traditional state concern, but rather relates solely to the effectiveness of federal statutory requirements. And, as the Court of Appeals held, since the problems caused by broker insolvencies are national in scope, so too must be the standards governing financial disclosure. . . .

In sum, straightforward application of the four *Cort* factors compels affirmance of the judgment below. Because the Court misapplies this precedent and disregards the evident purpose of § 17, I respectfully dissent.

Rule 23 (Class Actions), Federal Rules of Civil Procedures (United States) (1938) (As Amended, 2009)

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the

class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if: (1) prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests; (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

[***]

(2) *Notice*

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members. . . .

[***]

(4) *Particular Issues.* When appropriate, an action may be maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

[***]

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). <<This is a substantial restatement of former Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable.>>

[***]

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENTS

[***]

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (a) states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder of the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. . . . Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (b)(1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a). . . .

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. . . . To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. . . .

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs.

Consequently a class action was called for with adequate representation of all members of the class. . . . For much the same reason actions by shareholders to compel the declaration of a dividend, the proper recognition and handling of redemption or preemption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. . . . The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. . . .

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. . . . The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. . . . Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. . . . Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; *see* subdivision (c)(3)(B).)

Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. <<Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.>> Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

<<Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. . . .>> Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could

be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. . . .

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. . . . <<A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways.>> In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. . . . Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. . . .

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. . . . To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is "superior" to the others in the particular circumstances.

Factors (A)-(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. . . . In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretical rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the

court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request.)

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

[***]

Whether the court should require notice to be given to members of the class of its intention to make a [certification] determination, or of the order embodying it, is left to the court's discretion. . . .

Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. <<Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.>>

<<The notice, setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort.>>

[***]

NOTES OF ADVISORY COMMITTEE ON 2003 AMENDMENTS

[***]

<<The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.>>

When the court does direct certification notice in a (b)(1) or (b)(2) class action, the discretion and flexibility established by subdivision (c)(2)(A) extend to the method of giving notice. Notice facilitates the opportunity to participate. Notice calculated to reach a significant number of class members often will protect the interests of all. Informal methods may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice. The court should consider the costs of notice in relation to the probable reach of inexpensive methods.

<<If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements must be satisfied as to the (b)(3) class.>>

The direction that class-certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure raise the barriers high.

[***]

Sylvia COOPER *et al.* v. FEDERAL RESERVE BANK OF RICHMOND

467 U.S. 867 (1984)
Supreme Court of the United States
June 25, 1984

Stevens, J., delivered the Court's opinion, in which Burger, Ch. J., and Brennan, White, Blackmun, Rehnquist, and O'Connor, JJ., joined. Marshall, J., concurred in the judgment. Powell, J., took no part in the decision of the case.

Justice STEVENS delivered the opinion of the Court.

[I] The question to be decided is whether a judgment in a class action determining that an employer did not engage in a general pattern or practice of racial discrimination against the certified class of employees precludes a class member from maintaining a subsequent civil action alleging an individual claim of racial discrimination against the employer.

I

[P] On March 22, 1977, the Equal Employment Opportunity Commission commenced a civil action against respondent, the Federal Reserve Bank of Richmond. Respondent operates a branch in Charlotte, N.C. (the Bank), where during the years 1974-1978 it employed about 350-450 employees in several departments. The EEOC complaint alleged that the Bank was violating §703(a) of Title VII of the Civil Rights Act of 1964 by engaging in "policies and practices" that included "failing and refusing to promote blacks because of race." App. 9a.

Six months after the EEOC filed its complaint, four individual employees were allowed to intervene as plaintiffs. In their "complaint in intervention," these plaintiffs alleged that the Bank's employment practices violated 42 U.S.C. §1981, as well as Title VII; that each of them was the victim of employment discrimination based on race; and that they could adequately represent a class of black employees against whom the Bank had discriminated because of their race. In due course, the District Court entered an order conditionally certifying the . . . class pursuant to Federal Rules of Civil Procedure 23(b)(2) and (3). . . .

After certifying the class, the District Court ordered that notice be published in the Charlotte newspapers and mailed to each individual member of the class. The notice described the status of the litigation, and plainly stated that members of the class "will be bound by the judgment or other determination" if they did not exclude themselves by sending a written notice to the Clerk. Among the recipients of the notice were Phyllis Baxter and five other individuals employed by the Bank. It is undisputed that these individuals—the Baxter petitioners—are members of the class represented by the intervening plaintiffs and that they made no attempt to exclude themselves

from the class.

At the trial the intervening plaintiffs, as well as the Baxter petitioners, testified. The District Court found that the Bank had engaged in a pattern and practice of discrimination from 1974 through 1978 by failing to afford black employees opportunities for advancement and assignment equal to opportunities afforded white employees in pay grades 4 and 5. Except as so specified, however, the District Court found that "there does not appear to be a pattern and practice of discrimination pervasive enough for the court to order relief." App. to Pet. for Cert. 193a-194a. With respect to the claims of the four intervening plaintiffs, the court found that the Bank had discriminated against Cooper and Russell, but not against Moore and Hannah. Finally, the court somewhat cryptically stated that although it had an opinion about "the entitlement to relief of some of the class members who testified at trial," it would defer decision of such matters to a further proceeding. *Id.*, at 194a.

Thereafter, on March 24, 1981, the Baxter petitioners moved to intervene, alleging that each had been denied a promotion for discriminatory reasons. With respect to Emma Ruffin, the court denied the motion because she was a member of the class for which relief had been ordered and therefore her rights would be protected in the Stage II proceedings to be held on the question of relief. With respect to the other five Baxter petitioners, the court also denied the motion, but for a different reason. It held that because all of them were employed in jobs above the grade 5 category, they were not entitled to any benefit from the court's ruling with respect to discrimination in grades 4 and 5. . . .

A few days later the Baxter petitioners filed a separate action against the Bank alleging that each of them had been denied a promotion because of their race in violation of 42 U.S.C. §1981. The Bank moved to dismiss the complaint on the ground that each of them was a member of the class that had been certified in the Cooper litigation, that each was employed in a grade other than 4 or 5, and that they were bound by the determination that there was no proof of any classwide discrimination above grade 5. The District Court denied the motion to dismiss, but certified its order for interlocutory appeal under 28 U.S.C. §1292(b). The Bank's interlocutory appeal from the order was then consolidated with the Bank's pending appeal in the Cooper litigation.

The United States Court of Appeals for the Fourth Circuit reversed the District Court's judgment on the merits in the Cooper litigation, concluding that (1) there was insufficient evidence to establish a pattern or practice of racial discrimination in grades 4 and 5, and (2) two of the intervening plaintiffs had not been discriminated against on account of race. EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983). The court further held that under the doctrine of res judicata, the judgment in the Cooper class action precluded the Baxter petitioners from maintaining their individual race discrimination claims against the Bank. The court thus reversed the order denying the Bank's motion to dismiss in the Baxter action, and remanded for dismissal of the Baxter complaint. We granted certiorari to review that judgment, 464 U.S. 932 (1983), and we now reverse.

II

[R] Claims of two types were adjudicated in the *Cooper* litigation. First, the individual claims of each of the four intervening plaintiffs have been finally decided in the

Bank's favor. Those individual decisions do not, of course, foreclose any other individual claims. Second, the class claim that the Bank followed "policies and practices" of discriminating against its employees has also been decided. It is that decision on which the Court of Appeals based its res judicata analysis.

There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation. . . . Basic principles of res judicata (merger and bar or claim preclusion) and collateral estoppel (issue preclusion) apply. A judgment in favor of the plaintiff class extinguishes their claim, which merges into the judgment granting relief. A judgment in favor of the defendant extinguishes the claim, barring a subsequent action on that claim. A judgment in favor of either side is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment.

III

A plaintiff bringing a civil action for a violation of §703(a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U.S.C. §2000e-2(a), has the initial burden of establishing a prima facie case that his employer discriminated against him on account of his race, color, religion, sex, or national origin. A plaintiff meets this initial burden by offering evidence adequate to create an inference that he was denied an employment opportunity on the basis of a discriminatory criterion enumerated in Title VII.

A plaintiff alleging one instance of discrimination establishes a prima facie case justifying an inference of individual racial discrimination by showing that he (1) belongs to a racial minority, (2) applied and was qualified for a vacant position the employer was attempting to fill, (3) was rejected for the position, and (4) after his rejection, the position remained open and the employer continued to seek applicants of the plaintiff's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Once these facts are established, the employer must produce "evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). At that point, the presumption of discrimination "drops from the case," *id.*, at 255, n. 10, and the district court is in a position to decide the ultimate question in such a suit: whether the particular employment decision at issue was made on the basis of race. . . . The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff regarding the particular employment decision "remains at all times with the plaintiff," *ibid.*, and in the final analysis the trier of fact "must decide which party's explanation of the employer's motivation it believes." United States Postal Service Board of Governors v. Aikens, 460 U.S., at 716.

. . . Proving isolated or sporadic discriminatory acts by the employer is insufficient to establish a prima facie case of a pattern or practice of discrimination. . . . While a finding of a pattern or practice of discrimination itself justifies an award of prospective relief to the class, additional proceedings are ordinarily required to determine the scope of individual relief for the members of the class. . . .

The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. . . .

[***]

[1] [The] existence of a valid individual claim does not necessarily warrant the conclusion that the individual plaintiff may successfully maintain a class action. It is equally clear that a class plaintiff's attempt to prove the existence of a companywide policy, or even a consistent practice within a given department, may fail even though discrimination against one or two individuals has been proved. The facts of this case illustrate the point.

The District Court found that two of the intervening plaintiffs, Cooper and Russell, had both established that they were the victims of racial discrimination but, as the Court of Appeals noted, they were employed in grades higher than grade 5 and therefore their testimony provided no support for the conclusion that there was a practice of discrimination in grades 4 and 5. Given the burden of establishing a prima facie case of a pattern or practice of discrimination, it was entirely consistent for the District Court simultaneously to conclude that Cooper and Russell had valid individual claims even though it had expressly found no proof of any classwide discrimination above grade 5. It could not be more plain that the rejection of a claim of classwide discrimination does not warrant the conclusion that no member of the class could have a valid individual claim. . . .

The analysis of the merits of the Cooper litigation by the Court of Appeals is entirely consistent with this conclusion. In essence, the Court of Appeals held that the statistical evidence, buttressed by expert testimony and anecdotal evidence by three individual employees in grades 4 and 5, was not sufficient to support the finding of a pattern of bankwide discrimination within those grades. It is true that the Court of Appeals was unpersuaded by the anecdotal evidence; it is equally clear, however, that it did not regard two or three instances of discrimination as sufficient to establish a general policy. [A] piece of fruit may well be bruised without being rotten to the core.

[2] The Court of Appeals was correct in generally concluding that the Baxter petitioners, as members of the class represented by the intervening plaintiffs in the Cooper litigation, are bound by the adverse judgment in that case. The court erred, however, in the preclusive effect it attached to that prior adjudication. That judgment (1) bars the class members from bringing another class action against the Bank alleging a pattern or practice of discrimination for the relevant time period and (2) precludes the class members in any other litigation with the Bank from relitigating the question whether the Bank engaged in a pattern and practice of discrimination against black employees during the relevant time period. The judgment is not, however, dispositive of the individual claims the Baxter petitioners have alleged in their separate action. Assuming they establish a prima facie case of discrimination under McDonnell Douglas, the Bank will be required to articulate a legitimate reason for each of the challenged decisions, and if it meets that burden, the ultimate questions regarding motivation in their individual cases will be resolved by the District Court. Moreover, the prior adjudication may well prove beneficial to the Bank in the Baxter action: the determination in the Cooper action that the Bank had not engaged in a general pattern or practice of discrimination would be relevant on the issue of pretext. . . .

The Bank argues that permitting the Baxter petitioners to bring separate actions would frustrate the purposes of Rule 23. We think the converse is true. The class-

action device was intended to establish a procedure for the adjudication of common questions of law or fact. If the Bank's theory were adopted, it would be tantamount to requiring that every member of the class be permitted to intervene to litigate the merits of his individual claim.

. . . The District Court did actually adjudicate the individual claims of Cooper and the other intervening plaintiffs, as well as the class claims, but it pointedly refused to decide the individual claims of the Baxter petitioners. Whether the issues framed by the named parties before the court should be expanded to encompass the individual claims of additional class members is a matter of judicial administration that should be decided in the first instance by the District Court. Nothing in Rule 23 requires as a matter of law that the District Court make a finding with respect to each and every matter on which there is testimony in the class action. Indeed, Rule 23 is carefully drafted to provide a mechanism for the expeditious decision of common questions. Its purposes might well be defeated by an attempt to decide a host of individual claims before any common question relating to liability has been resolved adversely to the defendant. We do not find the District Court's denial of the Baxter petitioners' motion for leave to intervene in the Cooper litigation, or its decision not to make findings regarding the Baxter petitioners' testimony in the Cooper litigation, to be inconsistent with Rule 23.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice MARSHALL concurs in the judgment.

Justice POWELL took no part in the decision of this case.

LOVELY H. *et al.* v. Verna EGGLESTON, as Administrator/Comm. New York City Human Resources Administration

235 F.R.D. 248 (2006)
United States District Court for the Southern District of New York
April 19, 2006

Laura Taylor SWAIN, J., decided and delivered the opinion of the Court.

Laura Taylor SWAIN, United States District Judge

[P] In this action Plaintiffs, who assert that they are welfare recipients with disabilities who reside in New York City, seek declaratory and injunctive relief under Title II of the Americans with Disabilities Act (the "ADA"), Section 504 of the Rehabilitation Act of 1974 ("the Rehabilitation Act"), the Due Process Clauses of the United States and New York State Constitutions, and various New York State and City civil rights and social services statutes and regulations, on behalf of themselves and a putative class of New York City welfare recipients with disabilities. Plaintiffs' claims focus on recent changes in the administration of public assistance, food stamps and Medicaid benefits for such persons. They seek an injunction prohibiting further implementation of a New York City Human Resources Administration ("HRA") program under which welfare-related services for recipients who suffer from certain mental or medical conditions (and for other recipients involved in those persons' cases) are to be provided only through three "hub" centers in New York City, rather than through the

29 New York City neighborhood offices that generally administer such services. Plaintiffs argue that this centralization aspect of the program and its involuntary nature violate federal and state laws prohibiting discrimination on the basis of disability and also violate Plaintiffs' due process rights under the Constitution of the United States. Full implementation of the program has been postponed, on consent, pending the briefing and adjudication of Plaintiffs' preliminary injunction application. Plaintiffs have also moved for class certification.

The Court has jurisdiction of the federal constitutional and statutory claims raised in this matter pursuant to 28 U.S.C. §§1331 and 1343 and, as explained in section II below, also has supplemental jurisdiction over the related state and local law claims. The Court has considered thoroughly the parties' voluminous written evidentiary and argumentative submissions, as well as the oral arguments of counsel. This opinion, which addresses the pending motions for class certification and for a preliminary injunction, constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rules of Civil Procedure 52 and 65. For the reasons that follow, Plaintiffs' motion for class certification is granted and Plaintiffs' motion for a preliminary injunction is granted to the extent it seeks to require Defendant to offer class members an opportunity to opt out of certain aspects of the contested program.

BACKGROUND

[F] The general background of this matter, and the Court's findings as to the factual issues material to its determination of the pending motions, are as follows. Defendant Verna Eggleston is sued in her official capacity as the Commissioner of HRA, which is the executive agency responsible for the operation and administration of public assistance programs for residents of New York City. Named Plaintiff Lovely H. is a woman living in Queens who suffers from anxiety and Major Depressive Disorder, and whose only sources of support are public assistance, Food Stamps and Medicaid. Named Plaintiff Gloria Q. is a woman living in Queens who suffers from Major Depressive Disorder and back pain due to degenerative joint disease and who is the recipient of cash assistance, Food Stamps and Medicaid. Named Plaintiff Michele N. is a woman living in Howard Beach (a section of Queens) who suffers from Major Depressive Disorder and anxiety and who receives public assistance, Food Stamps and Medicaid.

In early 2005, HRA began to implement a new program, called the Wellness, Comprehensive Assessment, Rehabilitation and Employment ("WeCARE") program. . . . WeCARE services are intended to provide specialized, sensitive support and extra resources . . . to clients whose employment capabilities are impaired by medical and/or mental health conditions. . . .

. . . Those determined to be eligible for WeCARE are not given the option of declining the transfer of their cases to the program (although, as discussed below, HRA has offered a telephonic information line through which people may request accommodations, such as retention of their cases at the neighborhood centers). WeCARE program enrollees are required to use one of three dedicated WeCARE "hub" facilities, rather than one of the 29 neighborhood offices that are generally available to other HRA clients, for their in-person interactions with the public assistance system, including annual recertification (i.e., proving that they remain eligible for benefits), correcting errors, resolving emergencies and reporting changes in circumstances, such as

births and illnesses. The WeCARE "hub" facilities are located in Manhattan, Brooklyn and the Bronx. All clients who reside in Staten Island, Queens or Manhattan are assigned to the Manhattan center, Bronx residents are assigned to the Bronx center, and Brooklyn residents are assigned to the Brooklyn center. HRA clients who are not in the WeCARE program (or other specialized HRA programs, such as centers for refugees, senior citizens and the homeless . . .) are assigned to the neighborhood center closest to the client's home. The special WeCARE services are not available through the neighborhood centers or otherwise to clients who are not assigned to WeCARE.

HRA notified the approximately 18,000 clients who were transferred to WeCARE at the program's inception that they could seek accommodation. . . . Clients who wished to pursue this option were directed to call an HRA telephonic information line (the "Infoline"). After a series of recorded announcements and interactive options, clients who called could reach a live HRA representative. These first-line representatives were not empowered to make assignment changes or grant accommodations. Rather, they were instructed to question the clients about their current means of transport to local centers and encourage self-travel to the WeCARE center by whatever means might be available. Clients who wished to pursue a travel-related objection to the assignment had to be persistent enough to call HRA's Office of Constituent and Community Affairs after calling the Infoline and then get through several layers of telephone representatives to reach an official, at which point they were informed that they had to provide medical documentation of the impairing condition for their request to be considered further.... HRA was apparently unable to check its own records for documentation of the client's condition. . . . Transfer of the remaining approximately 17,000 WeCARE program-eligible clients . . . has been postponed on consent, pending resolution of the instant motion practice.

The evidence presented to the Court in connection with these motions demonstrates that the hub center assignment of WeCARE participants imposes substantial additional travel burdens, and consequent barriers to receipt of crucial subsistence benefits, on such persons.

[***]

[P] Plaintiffs seek certification of a main class and a subclass, and also a preliminary injunction that will "prevent HRA from implementing future involuntary transfers and require the agency to offer an opt out to those who have already been transferred." Plaintiffs' Memorandum of Law in Support of Motions for Preliminary Injunction and Class Certification ("Pl. Mem.") at 2. For the reasons that follow, the Court grants the Plaintiffs' motion for class certification and grants Plaintiffs' motion for preliminary injunction. . . .

DISCUSSION

I. Class Certification Motion

A. Proposed Class Definitions

[R] Plaintiffs propose to define their main class as: "recipients of public assistance, Food Stamps and/or Medicaid in New York City who have a physical, mental or medical impairment within the meaning of the New York State Human Rights Law, N.Y. Exec. Law §292(21) (McKinney 2005)[,] and who have received or will receive a notice from HRA involuntarily transferring their case to one of three 'hub centers' in

Manhattan, the Bronx or Brooklyn." Pl. Mem. at 37. In addition, Plaintiffs propose certification of a subclass that would be "comprised of [such main class] members, each of whom (a) has a physical and/or mental impairment that substantially limits one or more major life activities, (b) has a record of such an impairment, or (c) is regarded as having such an impairment." *Id.* at 38.

B. Rule 23(a) and (b)(2) Analysis

For each proposed class or subclass, Plaintiffs must first demonstrate that the grouping meets the four requirements set forth in Federal Rules of Civil Procedure 23(a): (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. The party seeking class certification bears the burden of demonstrating that all of the rule 23(a) requirements have been met. When, as here, the moving party is also seeking to certify a subclass, the moving party must demonstrate that the subclass satisfies all of the Rule 23(a) requirements. *See* Fed. R. Civ. P. 23(c)(4)(B) ("when appropriate . . . a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."). . . .

Additionally, a class action may be maintained only if it qualifies under at least one of the categories provided in Rule 23(b). Plaintiffs here seek certification under Rule 23(b)(2), which permits the maintenance of a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

[***]

1. Rule 23(a) Requirements

a) Numerosity

[1] Rule 23(a)(1) requires that a proposed class be so numerous that joinder is impracticable. HRA argues that Plaintiffs have failed to carry their burden of demonstrating numerosity and points out that some of the clients assigned to WeCARE are not disabled but are, rather, assigned simply because their cases are associated with those of persons assigned to WeCARE on the basis of medical or mental health conditions (the Court will refer to such non-disabled WeCARE clients in this opinion as "associated persons"). HRA has admitted, however, that it has classified at least 20,000 clients as eligible for assignment to WeCARE on the basis of self-identification or identification by HRA as suffering from medical or mental health conditions that impair their ability to work. The numerosity requirement thus is clearly met for the main class.

The numerosity requirement is also met for the subclass. Evidence of exact class size is not required by Rule 23; a good faith estimate is sufficient. . . .

Finally, with respect to both the larger class and the subclass, many of the additional factors that the Second Circuit has identified as relevant to Rule 23(a) numerosity and joinder determinations favor certification in this case. . . .

b) Commonality

. . . Here, there are numerous common questions, including whether the Plaintiffs were misled as to their right to request reasonable accommodations, whether they were transferred or are proposed to be transferred into an unlawfully segregated program, and whether the Defendant's notification and information systems, particularly insofar as they relate to reasonable accommodations, were so deficient as to have deprived class members of federal and local law accommodation and program accessibility rights without due process of law. . . . Here, the common questions of law and fact are . . . concrete, and Plaintiffs have met their burden.

c) Typicality

. . . Here, Plaintiffs have met their burden of establishing typicality for both the larger class and the subclass, as each class member's claims arise from the same course of allegedly unlawful events. All plaintiffs here claim that their involuntary reassignment to WeCARE "hub" centers violated their rights to be free from disability-based discrimination and denied them due process of law.

d) Representativeness

[***]

. . . Here, Defendant has identified no potential conflicts among class members, and Defendant has conceded that HRA does not question Plaintiffs' counsel's ability to assist Plaintiffs' in conducting a vigorous prosecution. Plaintiffs thus have met the adequacy or representativeness requirement, and all of the other Rule 23(a) requirements as well.

2. Rule 23(b)(2) Requirements

[2] Plaintiffs proposed class definitions also meet, for both the larger class and the subclass, the requirements of Rule 23(b)(2), which allows for the maintenance of a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). "Cases of this nature, alleging systemic failure of governmental bodies to properly fulfill statutory requirements, have been held to be appropriate for class certification under Rule 23(b)(2)." Raymond v. Rowland, 220 F.R.D. 173, 181 (D. Conn. 2004).

C. Class Definition Issues

[Where,] as here, each class member has also asserted a federal claim (Plaintiffs assert that the alleged deprivations of their state and local law protections against disability discrimination constitute violations of their federal due process rights), the Court can properly exercise supplemental jurisdiction of their state and local law claims. A class definition broad enough effectively to address those claims is certainly within the ambit of Rule 23 in this federal litigation.

[***]

The Court also finds that incorporation of the ADA's definition of disability in the definition of the subclass is both workable and appropriate in this case. . . .

Finally, as Rule 23 empowers the Court to revise class definitions in the course of litigation, these definitions can be revisited if they turn out to be insufficiently precise or otherwise inappropriate. The Court will certify a main class consisting of "recipients of public assistance, food stamps and/or Medicaid who have received or will receive a notice from the New York City Human Resources Administration involuntarily transferring their case to one of three 'hub' centers in Manhattan, the Bronx or Brooklyn in connection with the WeCARE program." The Court will also certify a subclass of "main class members who (a) have a physical or mental impairment that substantially limits one or more major life activities within the meaning of the Americans with Disabilities Act of 1990, (b) have a record of such an impairment, or (c) are regarded as having such an impairment."

II. Supplemental Jurisdiction

[3] Under 28 U.S.C. §1367(a), district courts are granted the authority to exercise supplemental jurisdiction over state or local law claims in an action otherwise brought pursuant to federal question jurisdiction if those claims "are so related to [the federal] claims in the action . . . that they form part of the same case or controversy.". . .

Here, it is clear that the state and local law claims do indeed derive from a common nucleus of operative fact and thus are so related to the federal claims that they form part of the same case or controversy. The Court will exercise supplemental jurisdiction of Plaintiffs' state and local law claims.

III. Preliminary Injunction Motion

Plaintiffs seek a preliminary injunction that will "prevent HRA from implementing future involuntary transfers and require the agency to offer an opt out to those who have already been transferred." Pl. Mem. at 2.

[***]

A. Likelihood of Success on the Merits

1. State Law Segregation Claims

[***]

Here, the Plaintiffs are clearly disabled as that term is used under New York law. It is not contested here that the BPS assessment conducted by the HRA vendor uses "medically accepted techniques" to determine whether a client's medical or mental health related work limitations are sufficient to render the client eligible for WeCARE, and that only clients with such limitations and their associated persons are designated to WeCARE. This state definition of disability does not require that the limitation be substantial, only that it be demonstrable, and it is exactly because HRA determines that a client has a demonstrable limitation (or is associated with a person who has a demonstrable limitation) that it classifies a client as WeCARE-eligible. Thus, the Court holds that the Plaintiffs have demonstrated a substantial likelihood that they will succeed in establishing that they are disabled persons entitled to protection under the state anti-discrimination law.

[The] New York Social Services Law and the regulations promulgated thereunder specifically prohibit disability-based segregation and differential treatment in the provision of public assistance. See N.Y. Soc. Serv. Law §331; N.Y. Comp. Codes R. & Regs. tit. 18 §303.1 (b)(2), (3), (6). (7) (2005). **[4]** When they are involuntarily transferred to

a hub center, WeCARE-eligible recipients of public assistance, unlike non-disabled residents, are precluded from attending to recertification and other issues through the neighborhood offices. They, and their associated persons, must instead deal with the hub centers on these issues. This distinction in the provision of services turns solely on WeCARE designation which is, itself, based solely on the presence of a disability. The Court finds that Plaintiffs have demonstrated a substantial likelihood of success on the merits of their claim that this aspect of the WeCARE program violates the anti-segregation and differential treatment provisions of the Social Services Law and regulations. Given the clear indication in the specific anti-segregation provisions of the Social Services Law of the breadth of New York's anti-discrimination policies, the Court finds that Plaintiffs have also demonstrated a substantial likelihood of success on the merits of their segregation claim under the Human Rights Law.

2. Federal Segregation Claim

[5] The Court also finds that Plaintiffs have demonstrated a substantial likelihood of success on the merits of their claim that involuntary WeCARE hub transfers violate the ADA-protected rights of the subclass of members who are disabled within the meaning of that statute. . . . Segregation under the ADA is permitted only in the specific and narrow circumstance where an agency establishes that such segregation is "necessary to provide qualified individuals with disabilities with aids, benefits or services that are as effective as those provided to others." 28 C.F.R. §35.130(d). Even then, individuals with disabilities must be granted "the opportunity to participate in services, programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities." 28 C.F.R. §35.130(b)(2). The current WeCARE program clearly violates the mandate that persons with disabilities be given the opportunity to participate in mainstream service delivery mechanisms; accordingly, the Court need not reach at this point the question of whether Defendants have demonstrated the necessity of providing WeCARE-related services through separate facilities.

3. Other Claims

Because Plaintiffs have met the likelihood of success prong of the preliminary injunction standard as to their state and federal law segregation claims, the Court need not address at this time their reasonable accommodation and other federal, state and local law discrimination-related claims or their due process claims.

B. Irreparable Injury

Having found that Plaintiffs have made the requisite substantial showing of likelihood of success on the merits of their claims, the Court now examines whether or not they have satisfied the irreparable injury prong of the preliminary injunction standard. . . .

[6] As explained in the findings of fact detailed above, the evidence before the Court on this motion is sufficient to establish that travel to the WeCARE centers constitutes a hardship for class members. Not only will most class members have to travel further in order to reach the WeCARE hub center they are assigned to than they would have had to travel to reach their neighborhood job center (see Faust Decl. at 4), but the significance of even relatively small increases in travel time is magnified in many

cases by the physical and mental barriers to mobility that arise from Plaintiffs' underlying disabilities. The physical and mental trauma suffered by such Plaintiffs cannot be adequately compensated in money damages, particularly where the day-to-day mobility challenges they face are exacerbated by anxiety as to whether their safety-net welfare benefits will be terminated if they fail to make the journey. . . .

The risk of irreparable harm in the form of loss of vital subsistence benefits is high because failure to appear for recertification appointments or to respond to requests for additional information could result in discontinuation of benefits for class members. The evidence before the Court demonstrates that at least one class member's benefits have already been terminated for failure to conduct in-person transactions at the hub center. *See* Declaration of Marliese A. at P12. Access to public assistance is of crucial importance to those eligible for it. *See generally* Goldberg v. Kelly, 397 U.S. 254 (1970). . . . For these reasons, the Court finds that the additional travel burdens and obligations imposed by the involuntary WeCARE assignment system put class members at risk of irreparable harm in the absence of injunctive relief. The evidence of record also demonstrates that HRA's proffer of accommodations through its Infoline system and its stated policy of permitting certain transactions to be conducted by phone, fax or mail are insufficient to protect the class against these risks of irreparable harm. . . .

The propriety of injunctive relief in connection with the involuntary reassignment of class members to the hub centers is underscored by the nature of the violation. The anti-segregation laws upon which Plaintiffs rely reflect important public policy commitments to equality and access. The statutes and regulations embody strong statements of public policy prohibiting discrimination and differential treatment on the basis of disability. To permit the continued expansion of the current involuntary program and the continued enforcement of involuntary hub center reassignments that are already in place pending final adjudication of Plaintiffs' claim for relief would be to turn back the clock not only for the individual who is denied access to the neighborhood center that welcomes her able-bodied neighbors, but also for a society that has made tremendous efforts and strides to improve, rather than constrict, accessibility for and integration of the disabled into all aspects of mainstream life. . . .

IV. Relief

For the reasons stated above, the Court grants Plaintiffs' application for class certification and grants Plaintiffs' motion for a preliminary injunction to the extent that Defendant is hereby prohibited from reassigning class members' (and their associated persons') cases to the hub centers involuntarily. Defendant shall within sixty (60) days of today's date offer WeCARE participants whose cases have already been reassigned to a hub center the option of conducting through their nearest neighborhood center all of the interactions, and receiving through those offices all of the services, that are available to non-disabled benefit recipients through those offices.

Defendant shall consult in good faith with Plaintiffs' counsel to formulate appropriate notification and election procedures and materials to be used in providing the "opt-out" opportunities contemplated by this injunction. The parties shall file with the Court a joint statement describing the procedures and including the forms of notice proposed to be utilized no later than forty (40) days from the date of this Opinion and

Order. Any objections to the procedures or notices, and Defendant's response to such objections, shall be set forth in detail in the filing.

CONCLUSION

For the foregoing reasons, the Court hereby certifies a main class of Plaintiffs consisting of recipients of public assistance, food stamps and/or Medicaid who have received or will receive a notice from the New York City Human Resources Administration involuntarily transferring their case to one of three hub centers in Manhattan, the Bronx or Brooklyn in connection with the WeCARE program.

The Court hereby certifies a sub-class within the main class, consisting of main class members who (a) have a physical or mental impairment that substantially limits one or more major life activities within the meaning of the Americans with Disabilities Act of 1990, (b) have a record of such an impairment, or (c) are regarded as having such an impairment.

The Plaintiffs' motion for a preliminary injunction is hereby granted to the extent that Defendant is hereby prohibited from reassigning class members' (and their associated persons') cases to the hub centers involuntarily. Defendant shall within sixty (60) days of today's date offer WeCARE participants whose cases have already been reassigned to a hub center the option of conducting through their nearest neighborhood center all of the interactions, and receiving through those offices all of the services, that are available to non-disabled benefit recipients through those offices.

Defendant shall consult in good faith with Plaintiffs' counsel to formulate appropriate notification and election procedures and materials to be used in providing the "opt-out" opportunities contemplated by this injunction. The parties shall file with the Court a joint statement describing the procedures and including the forms of notice proposed to be utilized no later than forty (40) days from the date of this Opinion and Order. Any objections to the procedures or notices, and Defendant's response to such objections, shall be set forth in detail in the filing. The remaining aspects of Plaintiffs' request for injunctive relief have been withdrawn. . . .

SO ORDERED

María Eugenia MORALES ACEÑA DE SIERRA v. GUATEMALA

Case 11.625, Report No. 4/01, OEA/Ser. L/V/II.98 (2001)**
[Official Translation]
Inter-American Commission on Human Rights
Organization of American States
January 19, 2001

I. Claims Presented

1. On February 22, 1995, the Inter-American Commission on Human Rights (hereinafter "Commission") received a petition dated February 8, 1995, alleging that Articles 109, 110, 113, 114, 115, 131, 133, 255, and 317 of the Civil Code of the Republic of Guatemala (hereinafter "Civil Code"), which define the role of each spouse within the

** Commission member Marta Altolaguirre, national of Guatemala, did not participate in the discussion or vote on this Report, pursuant to Article 19(2) of the IACHR's Regulations.

institution of marriage, create distinctions between men and women [that] are discriminatory and violate Articles 1(1), 2, 17 and 24 of the American Convention on Human Rights (hereinafter "American Convention").

[***]

3. The petitioners reported that the constitutionality of these legal provisions had been challenged before the Guatemalan Court of Constitutionality in Case 84-92. In response, the Court had ruled that the distinctions were constitutional, as, inter alia, they provided [legal] certainty in the allocation of roles within marriage. The petitioners requested that the Commission find the foregoing provisions of the Civil Code incompatible *in abstracto* with the guarantees set forth in Articles 1(1), 2, 17 and 24 of the American Convention.

4. The Commission indicated to the petitioners the need to identify concrete victims, as this was a requirement under its case system. On April 23, 1997, the petitioners submitted their written presentation of María Eugenia Morales [Aceña] de Sierra as the concrete victim in the case.

II. Processing by the Commission

5. Pursuant to the filing of the petition, on March 14, 1995 the petitioners sent the Commission a copy of the [judgment] issued by the Court of Constitutionality in Case 84-92. The Commission opened Case 11.625 on May 6, 1996, and the pertinent parts of the petition were transmitted to the Republic of Guatemala (hereinafter "State" or "Guatemalan State") with a request for information in response within 90 days.

[***]

7. The response of the State, dated September 10, 1996, was received and the pertinent parts thereof were transmitted to the petitioners for their observations.

8. Pursuant to the petitioners' request, the Commission granted a hearing to address the admissibility of Case 11.625 during its 93rd regular period of sessions. At the conclusion of that hearing, held on October 10, 1996[,] at the Commission's headquarters, the parties agreed that the Commission should review the matter during its next period of sessions to assess any developments and evaluate the feasibility of resolving the case through the procedure of friendly settlement initiated.

[***]

10. On December 13, 1996, the State transmitted a report to the Commission on pending efforts in favor of reforming the Civil Code, as well as the text of the "Law to Prevent, Sanction and Punish Intrafamilial Violence," approved by the Congress by means of Decree Number 97-96, and scheduled to enter into force on December 28, 1996. . . .

11. Pursuant to the January 24, 1997 request of the petitioners, the Commission held a hearing on this case at its headquarters on March 5, 1997, during its 95th regular period of sessions. The Commission questioned the petitioners as to whether they were requesting a determination *in abstracto* or pursuing an individual claim. The petitioners indicated that, in the concrete case, María Eugenia Morales Aceña de Sierra [not only] had been directly affected by the challenged legislation [but] also represented other women victims in Guatemala. The Commission requested that they formalize the status of [Ms. Morales Aceña] as the victim in writing, in order to comply with the

[provisions] of its Regulations and proceed to process the petition within its case system.

[***]

15. Pursuant to the request of the petitioners, the Commission held an additional hearing on the admissibility of the present case on October 10, 1997, at its headquarters, during its 97th period of sessions. Pursuant to Commission inquiry, the State indicated that it remained disposed to consider the option of the friendly settlement procedure. The petitioners indicated their belief that this option had been thoroughly explored but had failed to provide any fruitful results.

16. On March 6, 1998, the Commission approved Report 28/98, declaring the present case admissible. That report was transmitted to both parties by means of notes of April 2, 1998.

[***]

IV. CONSIDERATIONS REGARDING THE MERITS

Initial Considerations

28. At the outset, it is pertinent to note that, notwithstanding the presentation of various draft reform projects before the Guatemalan congressional commissions charged with pronouncing on such initiatives, as of the date of the present report, the relevant articles of the Civil Code continue in force as the law of the Republic of Guatemala. In brief, Article 109 provides that representation of the marital union corresponds to the husband, although both spouses have equal authority within the home.[3] Article 110 stipulates that the husband owes certain duties of protection and assistance to the wife, while the latter has the special right and duty to care for minor children and the home.[4] Article 113 sets forth that the wife may exercise a profession or pursue other responsibilities outside the home only insofar as this [engagement] does not prejudice her responsibilities within it.[5] Article 114 establishes that the husband may oppose the pursuit of his wife's activities outside the home where he provides adequately for maintenance of the home and has "sufficiently justified reasons." Where necessary, a judge shall resolve disputes in this regard.[6] Article 115 states that representation of the marital union may be exercised by the wife [if] the husband fails to do so, particularly [if] he abandons the home, is imprisoned, or is otherwise absent.[7] Article 131

[3] Article 109 of the Civil Code establishes: "(Representation of the Marital Union). The husband shall represent the marital union, but both spouses shall enjoy equal authority and considerations in the home; they shall establish their place of residence by common agreement and shall arrange everything concerning the education and establishment of their children, as well as the family budget."

[4] Article 110 of the Civil Code establishes: "(Protection of the Wife). The husband must provide protection and assistance to his wife and is obliged to supply everything needed to sustain the home in accordance with his economic means. The wife has the special right and duty to attend to and look after her children while they are minors and to manage the household chores."

[5] Article 113 of the Civil Code establishes: "(Wife Employed Outside the Home). The wife may perform work, exercise a profession, business, occupation, or trade, provided that her activity does not prejudice the interests and care of the children or other responsibilities in the home." . . .

[6] Article 114 of the Civil Code establishes: "The husband may object to his wife pursuing activities outside the home, so long as he provides adequately for maintenance of the home and has sufficiently justified grounds for objection. The judge shall rule outright on the issue."

[7] Article 115 of the Civil Code establishes: "(Representation by the wife). Representation of the marital union shall be exercised by the wife should the husband fail to do so for any reason and particularly when: 1) If the husband is legally deprived of that right; 2) If the husband abandons the home of his own free will, or is declared to be absent; and 3) If the husband is sentenced to imprisonment and for the duration of such imprisonment."

states that the husband shall administer the marital property.[8] Article 133 establishes exceptions to this rule on the same basis set forth in Article 115.[9] Article 255 states that, where husband and wife exercise parental authority over minor children, the husband shall represent the latter and administer their goods.[10] Article 317 establishes that specific classes of persons may be excused from exercising certain forms of custody [and explicitly mentions] women.[11]

29. **[1]** The Commission received information about two initiatives in favor of reform of those articles during the on-site visit it carried out in Guatemala from August 6 to 11, 1998 but has yet to receive information as to corresponding action by the plenary of the Congress. Nor has it received information as to the outcome, if any, of the constitutional challenge . . . , which was presented by the Attorney General before the Court of Constitutionality in 1996, [against Articles 113 and 114]. While the State appears to link the continuation of efforts in favor of reform to its willingness to explore the option of friendly settlement, the petitioners have indicated that they consider the possibility of entering into friendly settlement negotiations to have been explored and exhausted.

[***]

The Right of María Eugenia Morales [Aceña] de Sierra
to Equal Protection of and Before the Law

31. The right to equal protection of the law set forth in Article 24 of the American Convention requires that national legislation accord its protections without discrimination. Differences in treatment in otherwise similar circumstances are not necessarily discriminatory. A distinction [that] is based on "reasonable and objective criteria" may serve a legitimate state interest in conformity with the terms of Article 24.[14] It may, in fact, be required to achieve justice or to protect persons requiring the application of special measures. A distinction based on reasonable and objective criteria (1) pursues a legitimate aim and (2) employs means [that] are proportional to the end sought.

32. . . . Discrimination against women as defined in this Convention . . . , [in the context of] the specific causes and consequences of gender discrimination, covers forms of

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[8] Article 131 of the Civil Code establishes: "Under the system of absolute joint ownership [*comunidad absoluta*] by husband and wife or community of property acquired during marriage [*comunidad de gananciales*], the husband shall administer the marital property, exercising powers that shall not exceed the limits of normal administration. Each spouse or common-law spouse shall dispose freely of goods registered under his or her name in the public registries, without prejudice to the obligation to account to the other for any disposal of common property."

[9] Article 133 of the Civil Code establishes: "(Administration by the Wife). Administration of the marital property shall be transferred to the wife in the instances set forth in Article 115, with the same powers, restrictions, and responsibilities as those established in the foregoing articles."

[10] Article 255 of the Civil Code establishes: "Where husband and wife, or common-law spouses, jointly exercise parental authority over minor children, the husband shall represent the minor or incompetent children and administer their goods."

[11] Article 317 of the Civil Code establishes: "(Exemption). The following may be excused from exercising custody and guardianship: 1) Those already exercising another custody or guardianship; 2) Persons over sixty years of age; 3) Those who have three or more children under their parental authority; 4) Women; 5) Persons of low-income for whom this responsibility would threaten their means of subsistence; 6) Persons prevented from exercising this responsibility due to chronic illness; and 7) Those who have to be absent from the country for over one year."

[14] *See generally* [Belgian Linguistics Case, 6 Eur. Ct. H.R. (ser. A) 34 (1968), ¶ 10; Broeks v. The Netherlands, Comm. No. 172/1984, U.N. 29th Sess. Supp. No. 40, at 139, U.N. Doc. A/42/40 (U.N.H.R. Committee) (1987), ¶ 13; Zwaan de Vries v. The Netherlands, Comm. No. 182/1984, Rpt. H.R. Committee, U.N. GAOR, 42nd Sess., Supp. No. 40, at 160, U.N.Doc. A/42/40 (1987), ¶ 13].

systemic disadvantage affecting women that prior standards may not have contemplated.

33. In the proceedings before the Commission, the State has not controverted that Articles 109, 110, 113, 114, 115, 131, 133, 255 and 317 of the Civil Code create distinctions between married women and married men [that] are based on sex. In fact, it has acknowledged that aspects of the challenged provisions are inconsistent with the equality and non-discrimination provisions of the Constitution, the American Convention and the Convention on the Elimination of All Forms of Discrimination against Women.

34. Notwithstanding that recognition, however, the June 24, 1993 decision of the Court of Constitutionality on the validity of the cited articles remains the authoritative application and interpretation of national law. That decision bases itself on the fact that the Constitution establishes that men and women are entitled to equality of opportunities and responsibilities, whatever their civil status, as well as to equality of rights within marriage. It notes that certain human rights treaties, including the Convention on the Elimination of All Forms of Discrimination against Women, form part of internal law. In its analysis of Article 109, the Court indicates that the legal attribution of representation of the marital unit to the husband is justified by reason of "certainty and [legal] security." This does not give rise to discrimination against the wife, the Court continues, as she is free to dispose of her own goods, and both spouses [possess] equal authority within the home. The Court validates Article 115 on the same basis. With respect to Article 131, which vests authority in the husband to administer jointly held property, the Court recalls that, pursuant to Article 109, both spouses shall decide on matters concerning the family economy, including whether property shall be held separately or jointly. In the absence of such a decision, reasons of certainty and [legal] security justify the application of Article 131. The Court finds Article 133 valid on the same basis.

35. In analyzing Article 110, which attributes responsibility for sustaining the home to the husband, and responsibility for caring for minor children and the home to the wife, the Court emphasizes the mutual support spouses must provide each other and the need to protect the marital home and any children. The division of roles is not aimed at discriminating, the Court finds, but at protecting the wife in her role as mother, and at protecting the children. The woman is not prejudiced; rather, the provisions enhance her authority. In analyzing Articles 113 and 114, which permit a woman to pursue work outside the home to the extent this does not conflict with her duties within it, the Court states that these [statutes] contain no prohibition on the rights of the woman. As no right is absolute, the Articles contain limitations aimed primarily at protecting the children of the union. Consistent with the duties of each spouse, the husband may oppose his wife's activities outside the home only if he offers adequate sustenance and has justified reasons. The [provision establishing] that a judge shall decide in the event of a disagreement protects against the possibility of arbitrary action, as it ensures that the husband's reasons refer to the legally defined role of the wife and the protection of the children.

36. The Commission observes that the guarantees of equality and non-discrimination underpinning the American Convention and American Declaration of the Rights and Duties of Man reflect essential bases for the very concept of human rights. As the

Inter-American Court has stated, these principles "are inherent in the idea of the oneness in dignity and worth of all human beings."[19] Statutory distinctions based on status criteria, such as, for example, race or sex, therefore necessarily give rise to heightened scrutiny. What the European Court and Commission have stated is also true for the Americas, that as "the advancement of the equality of the sexes is today a major goal," . . . "very weighty reasons would have to be put forward" to justify a distinction based solely on the ground of sex.[20]

37. **[2]** The gender-based distinctions under study have been upheld as a matter of domestic law essentially on the basis of the need for certainty and [legal] security, the need to protect the marital home and children, respect for traditional Guatemalan values, and in certain cases, the need to protect women in their capacity as wives and mothers. However, the Court of Constitutionality made no effort to probe the validity of these assertions or to weigh alternative positions, and the Commission is not persuaded that the distinctions cited are even consistent with the aims articulated. For example, the fact that Article 109 excludes a married woman from representing the marital union, except in extreme circumstances, neither contributes to the orderly administration of justice, nor does it favor her protection or that of the home or children. To the contrary, it deprives a married woman of the legal capacity necessary to invoke the judicial protection [that] the orderly administration of justice and the American Convention require [to] be made available to every person.

38. By requiring married women to depend on their husbands to represent the union—in this case María Eugenia Morales [Aceña] de Sierra—the terms of the Civil Code mandate a system in which the ability of approximately half the married population to act on a range of essential matters is subordinated to the will of the other half. The overarching effect of the challenged provisions is to deny married women legal autonomy. The fact that the Civil Code deprives [Ms. Morales Aceña], as a married woman, of legal capacities to which other Guatemalans are entitled leaves her rights vulnerable to violation [and] without recourse.

39. In the instant case the Commission finds that the gender-based distinctions established in the challenged articles cannot be justified, and contravene the rights of María Eugenia Morales [Aceña] de Sierra set forth in Article 24. These restrictions are of immediate effect, . . . simply by virtue of the fact that the cited provisions are in force. As a married woman, she is denied [on the basis of her sex] protections [that] married men and other Guatemalans are accorded. The provisions she challenges restrict, inter alia, her legal capacity, her access to resources, her ability to enter into certain kinds of contracts (relating, for example, to property held jointly with her husband), to administer such property, and to [secure an] administrative or judicial [remedy]. They have the further effect of reinforcing systemic disadvantages [that] impede the ability of the victim to exercise a host of other rights and freedoms.

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[19] [I/A Court H.R., Advisory Opinion OC-4/84, "Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica," (1984,] ¶ 55.

[20] *See, e.g.*, Eur. Ct. H.R., Karlheinz Schmidt v. Germany, Ser. A No. 291-B, 18 July 1994, para 24, citing, Schuler-Zgraggen v. Switzerland, Ser. A No. 263, 24 June 1993, ¶ 67, Burghartz v. Switzerland, Ser. A No. 280-B, 22 Feb. 1994, ¶ 27.

The Case of María Eugenia Morales [Aceña] de Sierra and Rights of the Family: Equality of Rights and Balancing of Responsibilities in Marriage

[***]

42. The petitioners have indicated that the cited articles of the Civil Code impede the ability of wife and husband [equally to] exercise their rights and fulfill their responsibilities in marriage. María Eugenia Morales [Aceña] de Sierra alleges that, although her family life is based on the principle of reciprocal respect, the fact that the law vests exclusive authority in her husband to represent the marital union and their minor child creates a disequilibrium in the weight of the authority exercised by each spouse within their marriage—an imbalance [that] may be perceived within the family, community and society. While the victim, as a parent, has the right and duty to protect the best interests of her minor child, the law strips her of the legal capacity she requires to do [so].

43. As discussed above, the challenged articles of the Civil Code establish distinct roles for each spouse. The husband is responsible for sustaining the home financially, and the wife is responsible for caring for the home and children (Article 110). The wife may work outside the home only to the extent this does not prejudice her legally defined role within it (Article 113), in which case her husband has the right to oppose such activities (Article 114). The husband represents the marital union (Article 109), controls jointly held property (Article 131), represents the minor children, and administers their property (Article 255). The Court of Constitutionality characterized the State's regulation of matrimony as providing certainty and [legal] security to each spouse, and defended the [allocation] of roles on the basis that the norms set forth preferences [that] are not discriminatory, but protective.

44. **[3]** The Commission finds that, far from ensuring the "equality of rights and adequate balancing of responsibilities" within marriage, the cited provisions institutionalize imbalances in the rights and duties of the spouses. While Article 110 suggests a division of labor between a husband's financial responsibilities and the wife's domestic responsibilities, it must be noted that, pursuant to Article 111, a wife with a separate source of income is required to contribute to the maintenance of the household, or to fully support it if her husband is unable to do so. The fact that the law vests a series of legal capacities exclusively in the husband establishes a situation of *de jure* dependency for the wife and creates an insurmountable disequilibrium in the spousal authority within the marriage. Moreover, the [provisions] of the Civil Code apply stereotyped notions of the roles of women and men [that] perpetuate *de facto* discrimination against women in the family sphere and [that] have the further effect of impeding the ability of men to fully develop their roles within the marriage and family. The articles at issue create imbalances in family life, inhibiting the role of men with respect to the home and children, and in that sense depriving children of the full and equal attention of both parents. "A stable family is one [that] is based on principles of equity, justice and individual fulfillment for each member."[25]

45. In the case of [Ms. Morales Aceña], the Commission concludes that the challenged articles [run counter to] the duty of the State to protect the family by [instituting] a regime [that] prevents the victim from exercising her rights and responsibilities

[25] [Comm. on the Elimination of Discrimination against Women (CEDAW), General Recom. 21, Equality in marriage and family relations, ¶ 24, U.N. Doc. HRI\GEN\1\Rev.1 at 90 (1994).]

within marriage on an equal footing with her spouse. The State has failed to take steps to ensure the equality of rights and balancing of responsibilities within marriage. Accordingly, in this case, the marital regime in effect is incompatible with the terms of Article 17(4) of the American Convention, read with reference to the requirements of Article 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women.

The Right to Privacy and the Present Case

[***]

47. A principal objective of Article 11 [of the American Convention] is to protect individuals from arbitrary action by State authorities [that] infringes [upon] the private sphere. Of course, where State regulation of matters within [this] sphere is necessary to protect the rights of others, it may not only be justified, but required. The guarantee against arbitrariness is intended to ensure that any such regulation (or other action) comports with the norms and objectives of the Convention, and is reasonable under the circumstances.

48. The petitioners claim that the cited articles of the Civil Code, particularly as they restrict María Eugenia Morales [Aceña] de Sierra's ability to exercise her profession and dispose of her property, constitute an arbitrary interference with her right to have her private life respected. In the proceedings generally, the victim has indicated that the cited provisions prevent her from exercising authority over basic aspects of her day-to-day life concerning her marriage, home, children[,] and property. While she and her husband organize their home on the basis of mutual respect, her status in the family, community and society is conditioned by the attribution of authority to her husband to represent the marital union and their minor child. While their jointly held property has been obtained through mutual sacrifice, the law prevents her from administering it. Further, while her husband has never opposed her pursuit of her profession, the law authorizes him to do so at any moment. She notes that, although there are increasing opportunities for women [more fully to] incorporate themselves into the processes of national life and development, married women such as herself are continuously impeded by the fact that the law does not recognize them as having legal status equivalent to that enjoyed by other citizens.

49. The provisions in question have been upheld as a matter of domestic law on the basis that they serve to protect the family, in particular the children. However, no link has been shown between the conditioning of the right of married women to work on spousal approval, or the subordination of a wife's control of jointly held property to that of her husband and the effective protection of the family or children. In mandating these and other forms of subordination of a wife's role, the State deprives married women of their autonomy to select and pursue options for their personal development and support. This legislation, most specifically in the way it makes a woman's right to work dependent on the consent of her husband, denies women the equal right to seek employment and benefit from the increased self-determination this affords.

50. Whether or not the husband of the victim—in this case María Eugenia Morales [Aceña] de Sierra—opposes her exercise of her profession is not decisive in this regard. The analysis turns on the fact that the legislation infringes on the victim's personal sphere in a manner [that] cannot be justified. The mere fact that the husband of [Ms. Morales Aceña] may oppose [her decision to work], while she does not have the right

[similarly to thwart him, constitutes] discrimination. This discrimination has consequences from the point of view of her position in Guatemalan society . . . and reinforces cultural habits [on] which the Commission has commented in its Report on the Status of Women in the Americas.[30] As a married woman, the law does not accord her the same rights or recognition as other citizens, and she [may] not exercise the same freedoms they may in pursuing their aspirations. This situation has a harmful effect on public opinion in Guatemala . . . and on María Eugenia Morales [Aceña] de Sierra's position and status within her family, community and society.

The Obligation of the State to Respect and Guarantee
the Rights of María Eugenia Morales [Aceña] de Sierra
Without Discrimination, and to Adopt Domestic Legal Measures

51. As is demonstrated in the foregoing analysis, the State of Guatemala has failed to fulfill its obligations under Article 1(1) of the American Convention to "respect the rights and freedoms recognized [t]herein and to ensure to all persons subject to [its] jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of, [inter alia,] sex". . . . "Any impairment of [these rights] [that] can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention."[31] Article 1 imposes both negative and positive obligations on the State in pursuing the objective of guaranteeing rights [that] are practical and effective.

52. Articles 109, 110, 113, 114, 115, 131, 133, 255 and 317 have a continuous and direct effect on the victim in this case, in contravening her right to equal protection and to be free from discrimination, in failing to provide protections to ensure that her rights and responsibilities in marriage are equal to and balanced with those of her spouse, and in failing to uphold her right to respect for her dignity and private life. A person who enjoys the equal protection of and recognition before the law is empowered to act to ensure other rights in the face of public or private acts. Conversely, gender-discrimination operates to impair or nullify the ability of women [freely and fully to] exercise their rights, and gives rise to an array of consequences. The [I]nter-American system has [acknowledged], for example, that gender violence is "a manifestation of the historically unequal power relations between women and men."[33] . . .

53. Recognizing that the defense and protection of human rights necessarily rests first and foremost with the domestic system, Article 2 of the Convention provides that States Parties shall adopt the legislative and other measures necessary to give effect to any right or freedom not already ensured as a matter of domestic law and practice. In the instant case, the State has failed to take the legislative action necessary to modify, repeal or definitively leave without effect Articles 109, 110, 113, 114, 115, 131, 133, 255 and 317, which discriminate against the victim and other married women in violation of Articles 24, 17 and 11 of the American Convention. When the articles at issue were challenged as unconstitutional, the State, acting through its Court of Con-

[30] Published in, Report of the IACHR 1997, OEA/Ser.L/V/II.98 doc. 7 rev., 13 Apr. 1998.
[31] Velásquez Rodríguez Case, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 164; Godínez Cruz Case, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5 (1989), ¶ 173.
[33] *See* Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), pmbl., art. 7e, [ratified by Guatemala on April 4, 1995].

stitutionality, failed to respond in conformity with the norms of the American Convention. Although relevant national and international authorities have identified these articles as incompatible with the State's obligations under national and international law, they remain the law of the land.

54. The obligation to respect and ensure the rights of the Convention requires the adoption of all the means necessary to assure María Eugenia Morales [Aceña] de Sierra the enjoyment of rights [that] are effective. The failure of the State to honor the obligations set forth in Articles 1 and 2 of the Convention generates liability, pursuant to the principles of international responsibility, for all acts, public and private, committed pursuant to the discrimination [perpetrated] against the victim in violation of the rights recognized in the American Convention and other applicable treaties. Pursuant to [these] same principles, the State of Guatemala is obliged to repair the consequences of the violations established, including through measures to restore the rights of [Ms. Morales Aceña] to the full extent possible, and to provide a just indemnity for the harm she has sustained. Measures of reparation are meant to provide a victim with an effective remedy, with the essential objective of providing full restitution for the injury suffered.

ACTIONS SUBSEQUENT TO REPORT No. 86/98

55. Pursuant to the terms of Article 50 of the Convention, the Commission adopted Report No. 86/98 on October 1, 1998. That Report set forth the Commission's analysis (contained in sections I-V, *supra*) and finding that the State of Guatemala was responsible for [violating] the rights of María Eugenia Morales [Aceña] de Sierra to equal protection, respect for family life, and respect for private life established in Articles 24, 17 and 11 of the American Convention on Human Rights. The Commission accordingly found the State responsible for [failing] to uphold its Article 1 obligation to respect and ensure those rights under the Convention, as well as its Article 2 obligation to adopt the legislative and other measures necessary to give effect to those rights of the victim. Further, the Commission indicated that the conduct at issue also constituted [a violation] of the obligations set forth in the Convention on the Elimination of All Forms of Discrimination against Women, most specifically, in Articles 15 and 16. Consequently, the Commission recommended (1) that the State take the legislative and other measures necessary to amend, repeal or definitively leave without effect Articles 109, 110, 113, 114, 115, 131, 133, 255 and 317 of the Civil Code so as to bring national law into conformity with the norms of the American Convention and give full effect to the rights and freedoms guaranteed to María Eugenia Morales [Aceña] de Sierra therein; and, (2) that it redress and adequately compensate [Ms. Morales Aceña] for the violations established.

56. The Report was transmitted to the State of Guatemala on November 6, 1998. Pursuant to the terms set forth, the State was given two months from the date of that transmission to comply with the recommendations issued and report to the Commission on the measures taken for that purpose. . . .

57. The State transmitted its response to Report 86/98 by note dated December 7, 1998. In that response, the State emphasized its acceptance of the need to address certain norms in the Civil Code that were out of date and discriminatory towards married women. However, it reiterated its position that the victim had not been personally prejudiced by the challenged norms, as her family life and professional career

had not been harmed. In line with its recognition of the need to [amend] the provisions as a general matter, the State informed the Commission that the Congress had on November 19, 1998 approved Decree Number 80-98, enacting [amendments] to the Civil Code. The attached text reflected [alterations] to Articles 109, 110, 115, 131 and 255, and the abrogation of Articles 114 and 133. The State further informed the Commission that the [amendments] would enter into force [following] their sanction, promulgation and publication.

[***]

59. Having analyzed the [amendments] indicated, and having noted that they addressed seven of the nine provisions challenged by the petitioner, the Commission addressed the State on January 25, 1999, to request information as to any measures taken with respect to Articles 113 and 317, which were not addressed in Decree 80-98, and to ask for additional information about the language of Article 131 as published, which appeared to be inconsistent with the explanation of the [amendment].[39] In view of the fact that the three month period provided in Article 51 was set to expire on February 6, 1999, the Commission requested a response within 7 days.

[***]

67. The State, for its part, presented arguments as to why it considered that Article 317 did not require [alteration]. Its position was that the Article permits women to request to be excused from exercising certain forms of custody; accordingly, it provides a privilege that can be invoked by choice and imposes no discrimination. The State [declared] that a [proposal] to abrogate Article 113 had been elaborated in February, but that additional time would be required to work towards its adoption. With respect to Article 131, the State indicated that there had been a mistake in the transmission of the text when published, and that this [error] would be corrected. The State [asserted] that it wished to have an additional extension of one year to accomplish the measures indicated, with the understanding that this [request would extend the deadline] referred to in Article 51 of the Convention.

[***]

77. The above proceedings having been carried out, and certain articles having been reformed pursuant to Decrees 80-98 and 27-99, the Commission wishes to [summarize briefly] the status of the legislation at issue in the present case. Articles 113, 114 and 133 have been repealed. Article 109 has been [rewritten] to provide that representation of the marital union corresponds equally to both spouses, who shall have equal authority in the home and decide jointly on household and family matters. In the case of disagreement, a family court judge will decide who prevails.[40] Article 110 maintains its original heading, "protection of the wife," and first paragraph, stipulating that the

[39] According to Article 5 of Decree 80-98, "Article 131, paragraph 2 is amended to read as follows: 'Under the system of absolute joint ownership [*comunidad absoluta*] by husband and wife or that of community of property acquired during the marriage [*comunidad de gananciales*], both spouses shall administer the marital property, either jointly or separately.'"

[40] According to Article 1 of Decree 80-98:
Article 109 is amended to read as follows:
Article 109. Marital [R]epresentation. Representation of the marital union shall correspond equally to both spouses, who shall have equal authority and considerations in the home; they shall, [by common agreement,] establish their place of residence . . . and . . . arrange everything concerning the education and establishment of their children, as well as the family budget. In the event of disagreement between the spouses, a family court judge shall decide who prevails.

husband owes certain duties of protection and assistance to the wife.[41] It has been modified with respect to its second paragraph to reflect that both spouses have the duty to care for minor children.[42] Article 115 has been modified to provide that in case of a disagreement between spouses as to representation of the marital union, a family judge will decide to whom it shall correspond on the basis of the conduct of each.[43] Article 131 has been amended to read that both spouses may administer marital property, either jointly or separately.[44] Article 255 has been modified to provide that both spouses shall represent children and administer their property, either jointly or separately.[45] Article 317, which allows certain classes of persons to be excused from exercising certain types of custody, remains in its original form.[46]

78. The Commission fully recognizes and values the [amendments] enacted by the State of Guatemala in response to the recommendations set forth in Report 86/98. As the parties have [acknowledged], these [alterations] constitute a significant advance in the protection of the fundamental rights of the victim and of women in Guatemala. The [modifications] represent a substantial measure of compliance with the Commission's recommendations, and are consistent with the State's obligations as a Party to the American Convention.

79. The Commission is not, however, in a position to conclude that the State has fully complied with the recommendations. The original heading and first paragraph of Article 110, which remain in force, refer to the duty of the husband to protect and assist his wife within the marriage, a duty that, in and of itself, is consistent with the nature of the marital relationship. For its part, Article 111 of the Code establishes the obligation of the wife to contribute equitably to maintenance of the home to the extent that she can,[47] a duty that is also consistent with the relationship between spouses.

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[41] The non-amended part states: "Article 110. (Protection of the wife). The husband must provide protection and assistance to his wife and is obliged to supply everything needed to sustain the home in accordance with his economic means."

[42] According to Article 2 of Decree 80-98, art. 110, paragraph 2 is amended to read as follows: "Both spouses shall have the obligation to attend to and care for their children while they are minors."

[43] According to Article 4 of Decree 80-98:

Article 115. In the event of disagreement between the spouses with regard to representation of the marital union, a family court judge [shall] decide to whom it [will] correspond on the basis of the conduct of each, both inside and outside the home. The judge shall also indicate how long that spouse will exercise representation and the conditions that the other spouse must fulfill to recover the chance to represent the union once again.

In any event, administration shall be exercised individually, without the need for a court order to that effect, in the following cases:

1) If one of the spouses is prohibited from exercising administration by court order;

2) Voluntary abandonment of the home or declaration of absence; and

3) Pursuant to a sentence of imprisonment, and for its full duration.

[44] According to Article 1 of Decree 27-99:

Article 131. Under the system of absolute joint ownership [*comunidad absoluta*] by husband and wife or community of property acquired during marriage [*comunidad de gananciales*], both spouses shall administer the marital property, either jointly or separately.

Each spouse or common-law spouse shall dispose freely of goods registered under his or her name in the public registries, without prejudice to the obligation to account to the other for any disposal of common property.

[45] According to Article 8 of Decree 80-98:

Article 255. For the duration of the marital union or common-law marriage, the father and mother shall jointly exercise parental authority. Both parents shall also, jointly or separately, represent and administer the property of minor or incompetent children, except in cases governed by Article 115, or in cases of separation or divorce, in which representation and administration shall be exercised by the spouse who has custody of the minor or incompetent child.

[46] *See supra* notes 3-11.

[47] CD. CIV. (Guat.) (1963), art. 111 (Obligation of the Wife to Contribute to Maintenance of the Household): "The wife shall also contribute equitably to maintenance of the household if she has property of her own or performs a job,

While neither of these duties gives rise, in itself, to a situation of incompatibility, they continue to reflect an imbalance in that the legislation recognizes that the wife is the beneficiary of the husband's duty to protect and assist her, while the law does not impose the same duty on her with regard to her husband. . . .

80. With regard to Article 317, the decisive factor is not whether it is viewed as referring to a privilege or an obligation; what is dispositive is the nature of the distinction made in the provision and the justification offered for it. Essentially, the terms of Article 317 identify categories of persons who may be excused from custody or guardianship due to limitations, for example, economic or health reasons. It is not evident, nor has the State explained, what [intrinsic] limitation justifies including "women" in these categories. According to Article 17 of the American Convention, and as expressly [enunciated] in Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, States Parties must guarantee equal rights and duties with regard to exercising custody and other forms of guardianship of children.

81. In this sense, both Article 317 and the title and first paragraph of Article 110 suggest, expressly or implicitly, that women are characterized by inherent weaknesses that limit their capacity as compared to men. This affects María Eugenia Morales [Aceña] de Sierra in her right to equal protection of the law, in accordance with Article 24 of the American Convention, and to respect for her human dignity, pursuant to Article 11 of that Convention. Additionally, as stated in paragraph 44 above, these norms apply stereotyped notions about gender roles, thereby perpetuating *de facto* discrimination against women in the family sphere. Further, with regard to the question of compliance with the recommendations, the State has provided no measures of reparation to the victim in response to the findings and recommendations of the Commission.

[***]

VI. Conclusions

83. On the basis of the foregoing analysis and conclusions, the Commission finds that the recommendations issued in Report 86/98 have been complied with [to a significant degree]. It [nonetheless] reiterates its conclusion that the State of Guatemala has not discharged its responsibility [to address violations of] the rights of María Eugenia Morales [Aceña] de Sierra to equal protection, respect for family life, and respect for private life established in Articles 24, 17, and 11 of the American Convention on Human Rights in relation to the heading and paragraph one of Article 110 and paragraph four of Article 317. The Commission accordingly finds the State [liable for failing] to uphold its Article 1 obligation to respect and ensure [these] rights under the Convention, as well as its Article 2 obligation to adopt the legislative and other measures necessary to give effect to those rights of the victim.

Recommendations

84. On the basis of the analysis and conclusions set forth in the present report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS DECIDES:

To reiterate its recommendations to the State of Guatemala that it:

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profession, trade, or business; however, if the husband is unable to work and has no property of his own, the wife shall cover all the expenses out of her income."

1) Adapt the pertinent provisions of the Civil Code to balance the legal recognition of the reciprocal duties of women and men in marriage and take the legislative and other measures necessary to amend Article 317 of the Civil Code so as to bring national law into conformity with the norms of the American Convention and give full effect to the rights and freedoms guaranteed to María Eugenia Morales [Aceña] de Sierra therein.

2) Redress and adequately compensate María Eugenia Morales [Aceña] de Sierra for the harm done by the violations established in this Report.

VIII. Publication

85. On November 7, 2000, the Commission transmitted Report No. 92/00—the text of which is reproduced above—to the State of Guatemala and to the petitioners, pursuant to Article 51(2) of the American Convention, and granted the State one month to comply with the foregoing recommendations. In accordance with the aforementioned Article 51(2), at this stage in the proceedings the Commission shall restrict itself [to] evaluating the measures taken by the Guatemalan State to comply with the recommendations and remedy the situation examined. . . .

86. . . . Pursuant to the provisions contained in the instruments governing its mandate, the IACHR will continue to evaluate the measures taken by the State of Guatemala with respect to those recommendations, until the State has fully complied with them.

Approved by the Inter-American Commission on Human Rights on January 19, 2001. Hélio Bicudo, Chairman; Claudio Grossman, First Vice-Chairman; Juan E. Méndez, Second Vice-Chairman; and Commissioners Robert K. Goldman, Peter Laurie and Julio Prado Vallejo.